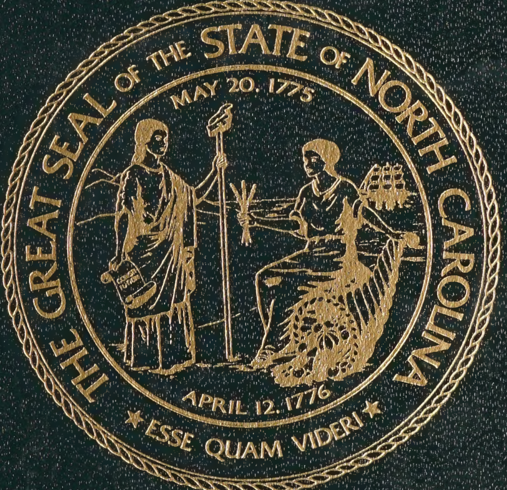
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 15

Chapters 122D Through 135

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session that are within Chapters 122D through 135, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session affecting Chapters 122D through 135 of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 21, 2007. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 2007

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2007 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER

Attorney General of North Carolina

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Chapter 122D.

North Carolina Agricultural Finance Act.

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§ 122D-1. Short title.

This chapter shall be known and may be cited as the "North Carolina Agricultural Finance Act." (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1011, repealed Chapter 122B and enacted Chapter 122D. Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 4 made this Chapter effective July 15, 1986. Where appropriate, the historical citations to sections of repealed Chapter 122B have been added to corresponding sections in Chapter 122D. These historical citations have been retained and supplemented in light of the reenactment of this chapter.

Session Laws 1989, c. 500, s. 109(e) repealed this Chapter effective July 1, 1990. However, Session Laws 1989 (Reg. Sess., 1990), c. 1074, ss. 32(a) and 32(b), effective July 1, 1990, repealed s. 109 of chapter 500, and reenacted this Chapter, with the exception of G.S. 122D-6(12), 122D-6(15), 122D-10, 122D-12, 122D-14, 122D-15, and 122D-17, which were reenacted as they existed on June 29, 1990, by Session Laws 1989 (Reg. Sess., 1990), c. 1000, s. 1, effective July 20, 1990.

§ 122D-2. Legislative findings and purposes.

(a) The General Assembly hereby finds and declares that there exists in the State of North Carolina a serious shortage of capital and credit available for investment in agriculture, for domestic and export purposes, at interest rates within the financial means of persons engaged in agricultural production and agricultural exports. This shortage of available capital and credit is severe throughout the State, has persisted for a number of years, and constitutes a grave threat to the agricultural industry and to the health, welfare, safety and prosperity of all residents of the State.

(b) The General Assembly hereby finds and declares further that private enterprise and existing federal and state governmental programs have not adequately alleviated the severe shortage of capital and credit available at affordable interest rates for investment in agriculture.

(c) The General Assembly hereby finds and declares that it is a matter of grave public necessity that the North Carolina Agricultural Finance Authority be created and empowered to alleviate the severe shortage of capital and credit available at affordable interest rates for investment in agriculture and for the export of agricultural products, commodities and services by providing such capital and credit at interest rates within the financial means of persons and businesses engaged in agriculture and agricultural exports. (1983, c. 789, s. 1;

1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-3. Definitions.

As used in this Chapter, the following terms, unless the context clearly indicates a different meaning, shall have the following meanings:

(1) "Agricultural Loan" means a loan made by a lending institution or by the Authority to any person for the purpose of financing or refinancing land acquisition or improvement; soil conservation; irrigation; construction, renovation or expansion of buildings and facilities; purchase of farm fixtures, livestock, poultry, and fish of any kind; seeds; fertilizers; pesticides; feeds; machinery; equipment; containers or supplies or any other products employed in the production, cultivation, harvesting, storage, marketing, distribution or export of agricultural products.

(2) "Agriculture" means the commercial production, storage, processing, marketing, distribution or export of any agronomic, floricultural, horticultural, viticultural, silvicultural or aquacultural crop including, but not limited to, farm products, livestock and livestock products, poultry and poultry products, milk and dairy products, fruit and other horticultural products, and seafood and aquacultural products.

(3) "Authority" means the North Carolina Agricultural Finance Authority created by this Chapter.

(4) "Bonds" or "notes" means the bonds, notes, renewal notes, refunding bonds, interim certificates, certificates of indebtedness, debentures, warrants, commercial paper, or other obligations or evidences of indebtedness authorized to be issued by the Authority pursuant to the provisions of this Chapter.

(5) "Commissioner" means the North Carolina Commissioner of Agriculture.

(6) "Department" means the North Carolina Department of Agriculture and Consumer Services.

(7) "Federal government" means the United States of America and any agency or instrumentality, corporate or otherwise, of the United States of America.

(8) "Lending institution" means any bank, bank or trust company, federal land bank, production credit association, bank for cooperatives, building and loan association, homestead, insurance company, investment banker, mortgage banker or company, pension or retirement fund, savings bank or savings and loan association, small business investment company, credit union, the federal government or any other financial institution authorized to do business in North Carolina or operating under the supervision of any federal agency or any corporation organized or operating pursuant to Section 25 of the Federal Reserve Act.

(9) "Persons" means any individual, partnership, firm, corporation, company, cooperative, association, society, trust or any other business unit or entity, including any state or federal agency.

(10) "State" means the State of North Carolina or any agency or instrumentality thereof. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1987, c. 112, s. 3; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b); 1997-261, s. 85.)

§ 122D-4. North Carolina Agricultural Finance Authority.

(a) The North Carolina Agricultural Finance Authority, a body politic and corporate, is hereby created within the Department of Agriculture and Consumer Services. The Authority shall be constituted a public agency and an instrumentality of the State for the performance of essential public functions.

(b) The Authority shall be composed of 10 members appointed to three-year terms as follows:

(1) One member appointed by the Governor to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.
(2) One member appointed by the Governor to a term that expires on 1 July of years that are evenly divisible by three.
(3) One member appointed by the Governor to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
(4) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.
(5) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate to a term that expires on 1 July of years that are evenly divisible by three.
(6) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
(7) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.
(8) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives to a term that expires on 1 July of years that are evenly divisible by three.
(9) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
(10) The Commissioner or the Commissioner's designee shall serve ex officio, with the same rights and privileges, including voting rights, as other members.

(c) A member appointed under subdivisions (1) through (9) of subsection (b) of this section may be reappointed to no more than two successive three-year terms. Upon the expiration of a three-year term, a member shall continue to serve until a successor is appointed and duly qualified as provided by G.S. 128-7.

(d) Vacancies in the offices of any appointed members of the Authority shall be filled in accordance with G.S. 120-122 for the remainder of the unexpired term. No vacant office shall be included in the determination of a quorum. No vacancy in office shall impair the rights of the members to exercise all rights and to conduct official business of the Authority.

(e) The domicile of the Authority shall be the City of Raleigh.

(f) A majority of the members shall constitute a quorum for the transaction of official business. All official actions of the Authority shall require an affirmative vote of a majority of the members present and voting at any meeting.

(g) Members of the Authority shall not receive any salary for the performance of their duties as members. Appointed members may receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(h) The Authority shall meet quarterly and may meet more frequently upon call.

(i) The Authority may delegate to one or more of its members, officers, employees or agents such powers and duties as it may deem proper. (1983, c. 789, s. 1; 1985, c. 583, s. 2; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b); 1995, c. 490, s. 4; 1997-261, s. 109; 2004-195, s. 5.1.)

Editor's Note. — Session Laws 2004-195, s. 5.2, provides: "In order to alter the schedule of staggered terms of three years for the North Carolina Agricultural Finance Authority so that the same number of terms will expire each year and to provide for an orderly transition in membership of the Authority to the terms specified in G.S. 122D-4(b), as amended by Section 5.1 of this act, the following provisions shall apply:

"(1) The Governor shall appoint a member to serve in the position established by G.S. 122D-4(b)(1) through 1 July 2006.

"(2) The Governor shall appoint a member to serve in the position established by G.S. 122D-4(b)(2) through 1 July 2007.

"(3) The Governor shall appoint a member to serve in the position established by G.S. 122D-4(b)(3) through 1 July 2008.

"(4) George Graham of Lenoir County is appointed to serve in the position established by G.S. 122D-4(b)(4) through 1 July 2006.

"(5) James R. Britt of Duplin County is appointed to serve in the position established by G.S. 122D-4(b)(5) through 1 July 2007.

"(6) Deborah Mae Johnson of Sampson County is appointed to serve in the position established by G.S. 122D-4(b)(6) through 1 July 2008.

"(7) Ira S. Cline of Catawba County is appointed to serve in the position established by G.S. 122D-4(b)(7) through 1 July 2006.

"(8) Stan Crowe of Martin County is appointed to serve in the position established by G.S. 122D-4(b)(8) to serve through 1 July 2007.

"(9) David Hall of Rowan County is appointed to serve in the position established by G.S. 122D-4(b)(9) through 1 July 2008."

Session Laws 2004-195, s. 5.3, provides: "The limitation on the number of successive three-year terms that a member of the North Carolina Agricultural Finance Authority may serve as provided in G.S. 122D-4(c), as amended by Section 5.1 of this act, shall not apply to any person who is a member of the Authority at the time this act becomes effective."

§ 122D-5. Officers and employees; administration of Chapter.

(a) The Authority shall annually elect a chairman and vice-chairman from its members.

(b) The Authority may appoint an Executive Director. The salary of the Executive Director shall be set by the General Assembly in the Current Operations Appropriations Act.

(c) The Executive Director shall administer and enforce this Chapter in accordance with rules promulgated by the Authority. The Executive Director may employ such personnel as may be necessary to administer and enforce the provisions of this Chapter, subject to the approval of the Authority. All employees other than the Executive Director shall be compensated in accordance with the salary schedules adopted pursuant to the State Personnel Act. All employees shall be under the supervision of the Executive Director.

(d) The Authority may employ legal, financial and technical experts and consultants as it deems necessary on a contractual basis. (1983, c. 789, s. 1; 1985, c. 583, s. 2; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-6. General powers of Authority.

The Authority shall have all the powers necessary to give effect to and carry out the purposes and provisions of this Chapter, including the following powers in addition to all other powers granted by other provisions of this Chapter, to:

(1) Sue and be sued in its own name and in the name of any subsidiary corporation or entity which may be created pursuant to paragraph (19) of this section;

(2) Have a seal and alter the same at its pleasure;

(3) Adopt bylaws for the internal organization and government of the Authority;

(4) Adopt, promulgate and amend rules for the administration of the Chapter;

(4a) Limit the definition of agricultural loan under G.S. 122D-3(1);

(5) Make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this Chapter with any federal or State governmental agency, public or private corporation, lending institution or other entity or person, and each and any North Carolina governmental agency is hereby authorized to enter into contracts and otherwise cooperate with the agency to facilitate the purposes of this Chapter;

(6) Accept, administer and expend donations of movable or immovable property from any source, and receive, administer and expend appropriations from the legislature and financial assistance, guarantees, insurance or subsidies from the federal or State government;

(7) Subject to the rights of holders of bonds of the Authority, to renegotiate, refinance or foreclose on any mortgage, security interest or lien; or commence any action to protect or enforce any right or benefit conferred upon the Authority by any law, mortgage, security interest, lien, contract or other agreement; and bid for and purchase property at any foreclosure or at any other sale or otherwise acquire or take possession of any property; and in any such event, the Authority may complete, administer, pay the principal of and interest on any obligation incurred in connection with such property, dispose of and otherwise deal with such property in such manner as may be necessary or desirable to protect the interest of the Authority or of holders of its bonds therein;

(8) Procure or provide for the procurement of insurance or reinsurance against any loss in connection with its property or operations, including but not limited to insurance, reinsurance or other guarantees from any federal or State governmental agency or private insurance company for the payment of any bonds issued by the Authority, or bond, notes or any other obligations or evidences of indebtedness issued or made by any subsidiary corporation or entity created pursuant to subdivision (19) of this section or by any lending institution or other entity or person, or insurance or reinsurance against loss with respect to agricultural loans, mortgages or mortgage loans, or any other type of loans, including the power to pay premiums on such insurance or reinsurance;

(9) Make, insure, coinsure, reinsure, or cause to be insured, coinsured or reinsured, agricultural loans, mortgage loans or mortgages, or any other type of loans and pay or receive premiums on such insurance, coinsurance or reinsurance, and establish reserves for losses, and participate in the insurance, coinsurance or reinsurance of agricultural loans, mortgage loans or mortgages, or any other type of loans with the federal or State government or any private insurance company;

(10) Undertake and carry out or authorize the completion of studies and analyses of agricultural conditions and needs within the State and needs relating to the promotion of agricultural exports and ways of meeting such needs, and make such studies and analyses available to

the public and to the agricultural industry, and to engage in research or disseminate information on agriculture and agricultural exports;

(11) Accept federal, State or private financial or technical assistance and comply with any conditions for such assistance, provided such conditions are not in conflict with the intent of this Chapter;

(12) Establish, pay and collect fees and charge in connection with its loans, deposits, insurance commitments and services, including but not limited to, reimbursement of costs of issuing bonds, origination and servicing fees, and insurance premiums;

(13) Make loans to or deposits with lending institutions and purchase or sell agricultural loans;

(14) Acquire or contract to acquire from any person, firm, corporation, municipality, federal or State agency, by grant, purchase or otherwise, movable or immovable property or any interest therein; own, hold, clear, improve, lease, construct or rehabilitate, and sell, invest, assign, exchange, transfer, convey, lease, mortgage or otherwise dispose of or encumber the same, subject to the rights of holders of the bonds of the Authority, at public or private sale, with or without public bidding;

(15) Borrow money, issue bonds, and provide for the rights of the lenders or holders thereof and purchase, discount, sell, negotiate and guarantee, insure, coinsure and reinsure note, drafts, checks, bills of exchange, acceptances, bankers acceptances, cable transfers, letters of credit and other evidence of indebtedness with or without credit enhancement devices;

(16) Subject to the rights of holders of the bonds of the Authority, consent to any modification with respect to the rate of interest, time, payment of any installment of principal or interest, security or any other term or condition of any loan, contract, mortgage, mortgage loan or commitment therefor or agreement of any kind to which the Authority is a party or beneficiary;

(17) Maintain an office at such place or places as the Authority shall determine;

(18) Serve as the beneficiary of any public trust;

(19) After reporting to the agriculture committees of the House of Representatives and the Senate, to create such subsidiary corporations or entities as may be necessary to borrow money, insure or reinsure agricultural loans, or issue bonds in the international financial market; and

(20) Purchase or participate in the purchase and enter into commitments by itself or together with others for the purchase of federally issued securities; provided that the proceeds of such securities will be utilized in accordance with the provisions of this Chapter. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1987, c. 112, s. 4; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1; c. 1074, s. 32(b); 1993, c. 553, ss. 37, 38.)

§ 122D-7. Purchases and sales of agricultural loans.

The Authority may purchase or contract to purchase and sell or contract to sell agricultural loans made by lending institutions. All lending institutions are hereby authorized to purchase and sell agricultural loans to the Authority in accordance with the provisions of this Chapter and the rules and regulations of the Authority. To the extent that any provisions of this section may be inconsistent with any provision of law governing lending institutions, the provisions of this section shall control. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-8. Loans to and deposits with lending institutions.

The Authority may make, or contract to make, loans to and deposits with lending institutions. All lending institutions may borrow funds and accept deposits from the Authority in accordance with the provisions of this Chapter and the rules and regulations of the Authority. The Authority shall require that all proceeds of its loans to or deposits with lending institutions, or an equivalent amount, shall be used by such lending institutions to make agricultural loans, subject to such terms and conditions as the Authority may prescribe. To the extent that any provisions of this section may be inconsistent with any provision of the law governing lending institutions, the provisions of this section shall control. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-9. Insurance of agricultural loans.

(a) The Authority may insure and reinsure agricultural loans made by lending institutions, subject to the terms, conditions, limitations, collateral and security provisions, and reserve requirements as shall be determined by the Authority in accordance with the rules adopted by the Authority.

(b) Unless otherwise determined by the Authority, insurance of agricultural loans shall be in the amount of one hundred percent (100%) of the unpaid principal and interest on each loan.

(c) An insured agricultural loan shall be in default when the holder of such loan makes application to the Authority for payment of insurance on such loan stating that such loan is in default in accordance with the terms of any agreement with respect to such insurance executed pursuant to this section.

(d) The Authority may enter into agreements with any person, lending institution or holder of an insured agricultural loan upon such terms as may be agreed upon between the Authority and such person, lending institution, or holder, to provide for the administration, applications therefor, repayment thereof, and to establish the conditions for payment of insurance by the Authority, and the servicing, suit upon, or foreclosure of insured agricultural loans.

(e) The aggregate value of all agricultural loans insured by the Authority and outstanding at any one time shall not exceed 20 times the total value of funds, investments, properties and other assets of the Authority except that this insurance may be further expanded by use of federal, state or private loan insurance, reinsurance, or guarantees of which the Authority is or shall become the beneficiary. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-10. Bonds of the Authority.

(a) The Authority may issue from time to time bonds, notes, bond anticipation notes, renewal notes, refunding bonds, interim certificates, certificates of indebtedness, debentures, warrants, commercial paper or other obligations or evidences of indebtedness, hereinafter collectively referred to as "bonds", to provide funds for and to fulfill and achieve its authorized public functions or corporate purposes, as set forth in this Chapter, including, but not limited to, the purchase of agricultural loans from lending institutions, the making of loans to or deposits with lending institutions, the payment of interest on bonds of the Authority, the establishment of reserves to secure such bonds, the establishment of reserves with respect to the insurance of agricultural loans, and all other purposes and expenditures of the Authority incident to and necessary or convenient to carry out its public functions or corporate purposes.

(b) Except as may otherwise be provided by the Authority, all bonds issued by the Authority shall be negotiable instruments and may be general obligations of the Authority, secured by the full faith and credit of the Authority and payable out of any money, assets or revenues of the Authority or from any other sources whatsoever that may be available to the Authority. Obligations issued under the provisions of this Chapter shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the revenues or assets of the Authority. Each obligation issued under this Chapter shall contain on the face thereof a statement to the effect that the Authority shall not be obligated to pay the same nor the interest thereon except from the revenues or assets pledged therefor and that neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such obligation.

(c) Bonds shall be authorized, issued and sold by a resolution or resolutions of the Authority adopted as provided in this Chapter. Such bonds may be of such series, bear such date or dates, mature at such time or times, bear interest at such rate or rates including variable, adjustable or zero interest rates, be payable at such time or times, be in such denominations, be sold at such price or prices, at public or private negotiated sale, be in such form, carry such registration and exchangeability privileges, be payable at such place or places, be subject to such terms of redemption, and be entitled to such priorities on the income, revenue and receipts of, or available to, the Authority as may be provided by the Authority in the resolution or resolutions providing for the issuance and sale of the bonds of the Authority.

(d) The bonds of the Authority shall be signed by such members or officers of the Authority, by either manual or facsimile signatures, as shall be determined by resolution or resolutions of the Authority, and shall have impressed or imprinted thereon the seal of the Authority, or a facsimile thereof. The coupons attached to coupon bonds of the Authority shall bear the facsimile signature of such member or officer of the Authority as shall be determined by resolution or resolutions of the Authority. The Authority may also provide for the authentication of the bonds, notes or coupons by a trustee or fiscal agent.

(e) Any bonds of the Authority may be validly issued, sold and delivered, notwithstanding that one or more of the members or officers of the Authority signing such bonds, or whose facsimile signature or signatures may be on the bonds or on coupons, shall have ceased to be such member or officer of the Authority at the time such bonds shall actually have been delivered.

(f) Bonds of the Authority may be sold for such price in such manner and from time to time as may be determined by the Authority to be most beneficial, and the Authority may pay all expenses, premiums, fees or commissions which it may deem necessary or advantageous in connection with the issuance and sale thereof, subject to the provisions of this Chapter.

(g) The bonds or notes may be issued in coupon or in registered form, or both, as the Agency may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes.

(h) Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds or notes which shall become mutilated or shall be destroyed or lost.

(i) Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1.)

§ 122D-11. Statutory pledge.

Any pledge made by the Authority shall be valid and binding from time to time when the pledge is made. The money, assets or revenues of the Authority so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded or filed in order to establish and perfect a lien or security interest in the property so pledged by the Authority. Nothing herein shall be construed to prohibit the Authority from selling any assets subject to any such pledge except to the extent that any such sale may be restricted by the trust agreement or resolution providing for the issuance of such obligations. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-12. Refunding bonds.

Subject to the rights of the holders of the bonds of the Authority, the Authority may issue from time to time its bonds for the purpose of refunding any bonds of the Authority then outstanding, together with the payment of any redemption premiums thereon and interest accrued or to accrue to the date of redemption of such outstanding bonds. All such refunding bonds of the Authority shall be issued, sold or exchanged, and delivered, shall be secured, and shall be subject to the provisions of this Chapter in the same manner and to the same extent as any other bonds issued by the Authority pursuant to this Chapter, unless otherwise determined by resolution of the Authority. Refunding bonds issued by the Authority as herein provided may be sold or exchanged for outstanding bonds of the Authority and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such outstanding bonds.

Pending the application of the proceeds of any such refunding obligations, with any other available funds, to the payment of the principal, accrued interest and any redemption premium on the obligations being refunded, and, if so provided or permitted in the resolution authorizing the issuance of such refunding obligations or in the trust agreement securing the same, to the payment of any interest on such refunding obligations and any expenses in connection with such refunding, such proceeds may be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America which shall mature or which shall be subject to redemption by the holders thereof, at the option of such holders, not later than the respective dates when the proceeds, together with the interest accruing thereon, will be required for the purposes intended. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1.)

§ 122D-13. Purchase of bonds by Authority.

Subject to the rights of holders of bonds, the Authority shall have the power out of any funds available therefor, to purchase bonds of the Authority, which shall thereupon be cancelled, at a price not exceeding:

(1) If the bonds are then subject to optional redemption, the optional redemption price then applicable plus accrued interest to the next interest payment date thereon; or

(2) If the bonds are not then subject to optional redemption, the optional redemption price applicable on the first date after such purchase upon which the notes or bonds become subject to optional redemption plus accrued interest to such date. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-14. Exemption from taxes.

The exercise of the powers granted by this Chapter will be in all respects for the benefit of the people of the State, for their well-being and prosperity and for the improvement of their social and economic conditions, and the Authority shall not be required to pay any tax or assessment on any property owned by the Authority under the provisions of this Chapter or upon the income therefrom.

Any obligations issued by the Authority under the provisions of this Chapter shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes, income taxes on the gain from the transfer of the obligations, and franchise taxes. The interest on the obligations is not subject to taxation as income. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1; 1995, c. 46, s. 11.)

§ 122D-15. Covenant of State.

In consideration of the acceptance of and payment for the bonds of the Authority by the holders thereof, the State does hereby pledge to and agree with the holders of any bonds of the Authority issued pursuant to the provisions of this Chapter, that the State will not impair, limit or alter the rights hereby vested in the Authority to fulfill the terms of any agreements made with the holders of the bonds of the Authority, or in any way impair the rights or remedies of such holders thereof, until such bonds, together with the interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of such holders, are fully met and discharged. The Authority is authorized to include this pledge and agreement of the State in any agreement with the holders of bonds of the Authority. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1.)

§ 122D-16. Trust funds.

(a) Notwithstanding any other provisions of law to the contrary, all moneys received pursuant to the authority of this Chapter shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. Interest earned from these moneys and interest received from loans made from these moneys may be used for any purpose set out in this Chapter and for the costs of administering this Chapter. The resolution authorizing any obligations or the trust agreement securing any obligations may provide that any of these moneys may be temporarily invested pending the disbursement of the moneys and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited, shall act as trustee of the moneys and shall hold and apply the moneys for the purposes under this Chapter, subject to any rules adopted pursuant to this Chapter and any provisions in the provision or trust agreement.

(b) All moneys of the Authority may be invested in the following:

(1) Bonds, notes or treasury bills of the United States;
(2) Non-convertible debt securities of the following issuers:
  a. The Federal Home Loan Bank Board;
  b. Fannie Mae;
  c. The Federal Farm Credit Bank; and
  d. The Student Loan Marketing Association;
(3) Any other obligations not listed above which are guaranteed as to principal and interest by the United States or any of its agencies;
(4) Certificates of deposit and other evidences of deposit at state and federal chartered banks and savings and loan associations; provided that any principal amount of such certificate in excess of the amount insured by the federal government or any agency thereof be fully collateralized;
(5) Obligations of the United States or its agencies under a repurchase agreement for a shorter time than the maturity date of the security itself if the market value of the security itself is more than the amount of funds invested;
(6) Money market funds whose portfolios consist of any of the foregoing investments;
(7) A guaranteed investment or similar contract, which provides for the investment of funds at a guaranteed rate of return, with an insurance company or depository financial institution with a claim paying rating of no less than either of the two highest grades given by a nationally recognized rating agency; and
(8) Any other investment authorized by law for the investment of funds by a unit of local government. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1987, c. 112, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b); 1997-443, s. 14.5; 2001-487, s. 14(k).)

§ 122D-17. Bonds as legal investment and security for public deposits.

Obligations issued under the provisions of this Chapter are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State is now or may hereafter be authorized by law. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1000, s. 1.)

§ 122D-18. Account and audits.

(a) Subject to the provisions of any contract with the holders of its bonds, the Authority shall establish a system of accounts.

(b) The Authority may cause an independent audit of its books and accounts to be prepared annually and the cost thereof may be paid from any available moneys of the Authority.

(c) Within six months after the end of each fiscal year, the Authority shall submit to the Governor and to the General Assembly an annual report on the operations of the Authority. Within 60 days after receipt thereof, the Authority shall submit to the Governor and to the General Assembly a copy of the report of every audit of the books and accounts of the Authority. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-19. Cooperation of State agencies.

All State officers and agencies may render such services to the Authority within their respective functions as may be requested by the Authority. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-20. Construction of Chapter.

This Chapter, being necessary for the welfare of the State and its residents, shall be liberally construed to effect the purposes thereof. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-21. Termination of the Authority.

In the event of the termination of the Authority, all of its rights, money, assets and revenues in excess of its obligations shall be deposited in the general fund. (1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-22. Severability.

The provisions of this Chapter are severable, and if any provision of this Chapter is held invalid by a court of competent jurisdiction, the invalidity shall not affect other provisions of this Chapter which can be given effect without the invalid provision. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

§ 122D-23. Immunity.

There shall be no liability on the part of and no cause of action of any nature may arise against the members of the Authority for any acts or omission to act by them in the performance of their powers and duties under this Chapter. The immunity established by this section shall not extend to willful neglect or malfeasance that would otherwise be actionable. The immunity established by this section further shall not extend to any act or omission occurring or arising out of the operation of a motor vehicle. The immunity established herein is waived to the extent of any indemnification by insurance for the liability of the members of the authority for which this act otherwise provides immunity. (1987, c. 335, s. 1; 1989, c. 500, s. 109(e); 1989 (Reg. Sess., 1990), c. 1074, s. 32(b).)

Chapter 122E.

North Carolina Housing Trust and Oil Overcharge Act.

Sec.
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§ 122E-1. Short title.

This Chapter shall be known and may be cited as the "North Carolina Housing Trust and Oil Overcharge Act." (1987, c. 841, s. 1.)

§ 122E-2. Definitions.

As used in this Chapter:

(1) The term "substandard unit" means a housing unit which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, or has an adverse effect upon the public health, safety, morals or welfare of its inhabitants.

(2) The term "Partnership" means the North Carolina Housing Partnership.

(3) The term "Agency" means the North Carolina Finance Agency.

(4) The term "Fund" means the North Carolina Housing Trust Fund.

(5) The term "Treasurer" means the North Carolina State Treasurer.

(6) The term "affordable housing unit" means a unit for which an occupant is paying no more than thirty percent (30%) of gross monthly household income for rent and utilities.

(7) The term "Stripper Well Litigation Funds" means funds received by North Carolina, and all interest and other income generated by such funds, pursuant to the Settlement Agreement that was approved by Order of the Court, dated July 7, 1986, in In re: The Department of Energy Stripper Well Exemption Litigation M.D.L. No. 378 (D. Kan.).

(8) The term "Diamond Shamrock Litigation Funds" means funds received by North Carolina, and all interest and other income generated by such funds, pursuant to the Order of the Court, dated June 6, 1986, in Diamond Shamrock Refining and Marketing Co. v. Standard Oil Co., Civil Action No. C2-84-1432 (S.D. Ohio). (1987, c. 841, s. 1.)

§ 122E-3. North Carolina Housing Trust Fund.

(a) There is established a North Carolina Housing Trust Fund, separate and distinct from the General Fund.

(b) The Fund shall consist of monies received under this act and any other sources of revenue, public or private, dedicated for inclusion in the Fund.

(c) The State Treasurer shall serve as trustee for the Fund. The Treasurer shall invest the North Carolina Housing Trust Fund revenues he receives as provided in G.S. 147-69.2(b). The Treasurer shall provide the Agency with quarterly and annual reports of Fund revenues and interest earnings. (1987, c. 841, s. 1.)

§ 122E-4. North Carolina Housing Partnership created; compensation; organization.

(a) The North Carolina Housing Partnership is hereby created within the North Carolina Housing Finance Agency to establish policy, promulgate rules and regulations, and oversee the operation of the Fund. The Partnership shall be constituted to coordinate private enterprise and investment with public efforts to address the serious shortage of decent, safe, and affordable housing for low and moderate income citizens of this State.

(b) The Partnership shall consist of 13 members as follows:

(1) The Executive Director of the North Carolina Housing Finance Agency shall serve ex officio;

(2) The Secretary of the Department of Commerce or his designee shall serve ex officio;

(3) The State Treasurer or his designee shall serve ex officio;

(4) In accordance with G.S. 120-121, five members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, provided that one member shall be a representative of the homebuilding industry, one member shall be a low income housing advocate, and one member shall be a representative of the League of Municipalities;

(5) In accordance with G.S. 120-121, five members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, provided that one member shall be a representative of the real estate lending industry; one member shall be a representative of a non-profit housing development corporation; and one member shall be a resident of low income housing.

The members of the Partnership shall elect one of their members to serve as Chairman for a term of one year. Seven members of the Partnership shall constitute a quorum. All members shall have the right to vote on all issues before the Partnership.

(c) Members of the Partnership shall serve for three year terms. Initial terms shall begin on September 1, 1987. Appointed members shall serve until their successors are appointed and qualify.

(d) Vacancies in the offices of any appointed members shall be filled in accordance with G.S. 120-122 for the remainder of the unexpired term. No vacant office shall be included in the determination of a quorum. No vacancy in office shall impair the rights of the members to exercise all rights and conduct the official business of the Partnership.

(e) Members of the Partnership shall receive as compensation for each day spent on work for the Partnership such actual expenses as may be incurred for such travel and subsistence in the performance of official duties and such per diem as is allowed by law for other such State boards and commissions. Members shall not receive a salary for the performance of their duties as members.

(f) The Partnership shall have the following powers and duties:

(1) To promulgate rules and regulations governing all policy matters relating to the implementation of all programs for uses of the Fund and the Partnership's oversight of the Agency's administration of the Fund.

(2) To promote the development of a coordinated State low income housing plan.

(3) To obtain necessary information from other State agencies concerning housing; and

(4) To allocate monies contained in the Fund.

(g) The Partnership may appoint an Executive Director. The Executive Director shall be empowered to employ such additional professional and clerical assistance as the Partnership may deem necessary to administer the provisions of this Chapter. All employees of the Partnership, other than the Executive Director, shall be compensated in accordance with the salary schedules adopted pursuant to the State Personnel Act. The Partnership and the Agency may enter into agreements for the use of Agency staff to assist the Partnership and the provision of administrative support for the Partnership by the Agency.

(h) The Partnership shall meet quarterly and can meet more regularly upon the call of the Chairman or upon written request of four members.

(i) Members of the Partnership may not receive any direct benefit from, or participate in, the programs of the Fund. Members of the Partnership may be employed by, or serve as a board member of, a nonprofit entity participating in a program of the Fund if the member discloses the employment or the membership in the minutes of the Partnership and does not vote on any matter pertaining to the entity's participation. This policy applies to:

(1) Individual members of the Partnership;
(2) Businesses, corporations, or partnerships owned in whole or in part by members of the Partnership; and
(3) The immediate family members of the members of the Partnership. (1987, c. 841, s. 1; 1989, c. 727, ss. 218(84), 223(c); c. 751, ss. 7(12), 9(c), 16; c. 754, s. 53; 1991 (Reg. Sess., 1992), c. 959, s. 31; 1995, c. 490, s. 25.)

§ 122E-5. Administration.

(a) The North Carolina Housing Finance Agency shall administer the Fund in accordance with the policies, rules and regulations promulgated by the Partnership.

(b) The Agency's responsibilities shall include:

(1) The Management of the overall program for the use of the fund;
(2) Development of program design in accordance with policies established by the Partnership;
(3) Development and management of a selection system in accordance with policies established by the Partnership;
(4) Provision of technical assistance to prospective applicants; and
(5) Monitoring of projects to ensure compliance with applicable State and federal laws and regulations and relevant court decisions.
(6) The Agency shall promulgate rules and regulations governing the administration of the Fund and its overall program for use of the Fund in accordance with the policies, rules and regulations promulgated by the Partnership.

(c) In administering the Fund, the Agency shall maintain a separate account for and shall keep separate records regarding the principal and expenditures made from the Stripper Well Litigation funds and the Diamond Shamrock Litigation funds in order to assure the proper expenditure and reporting of these funds to the respective courts and to the United States Department of Energy.

(d) The Agency shall file all required reports with the appropriate courts in the Stripper Well Litigation and in the Diamond Shamrock Litigation, and otherwise shall fully comply with all relevant court orders. The Agency also shall file the report of planned expenditures which is required under Paragraph II.B.3.f.iv of the Final Settlement Agreement in the Stripper Well Litigation prior to its first expenditure of Stripper Well Litigation Funds. (1987, c. 841, s. 1.)

§ 122E-6. Uses of funds.

Funds from the Fund shall be used to increase the supply of decent, affordable and energy-efficient housing for low, very low, and moderate income residents of the State as defined in G.S. 122E-2. Such funds shall be used to finance, in whole or in part, projects and activities eligible under this section. The Agency shall make available loans, grants, interest reduction payments, or other comparable forms of assistance to eligible applicants. Provided, however, that with regard to those funds of the Fund which are Stripper Well Litigation Funds or Diamond Shamrock Funds, grants shall be from both the principal and income generated by the principal of such Funds so that all such Funds will be expended within a reasonable period of time. Provided, further, that with regard to that portion of the Fund which is derived from the appropriation of State funds, the amount of grants to be made in any fiscal year shall be limited to the amount of income generated by the principal of that portion of the Fund.

(a) Beneficiaries.

(1) The Partnership shall ensure that the Agency's program for uses of monies from the Fund directly benefit low, very low and moderate income persons and families as set forth in subsections (2), (3), and (4) below.

(2) The Partnership shall ensure that at least thirty percent (30%) of the total funds from the Fund eligible for expenditure by the Agency in any fiscal year directly benefit persons and families whose incomes do not exceed thirty percent (30%) of the median family income for the local area, with adjustments for family size, according to the latest figures available from the U.S. Department of Housing and Urban Development.

(3) The Partnership shall be authorized to allocate up to thirty percent (30%) of the total funds from the Fund for the benefit of persons and families whose incomes do not exceed fifty percent (50%) of the median family income for the local area, with adjustments for family size, according to the latest figures available from the U.S. Department of Housing and Urban Development; provided, however, these funds may also be directed for the benefit of the persons and families defined in subsection (2).

(4) The Partnership shall ensure that no more than forty percent (40%) of the total funds from the fund eligible for expenditure by the Agency in any fiscal year directly benefit persons and families whose incomes do not exceed eighty percent (80%) of the median family income for the local area, with adjustments for family size, according to the latest figures available from the U.S. Department of Housing and Urban Development.

(b) Eligible Projects.

(1) An eligible projects consists of one or more residential buildings containing similarly constructed units, the site on which the building(s) is located and any functionally related facilities. Multiple buildings may constitute a project only if bounded together as a result of proximate location, or common ownership and financing.

(2) Projects which provide for the construction or rehabilitation of rental projects must contain contractual guarantees to ensure that at least twenty percent (20%) of the units are occupied by persons and families defined in G.S. 122E-6(a) (2) and (3) for a period of time following the award of grants or loan funds from the Fund, said period to be not less than 10 years, and shall be established by the rules and regulations promulgated by the Partnership and are affordable housing units as defined in G.S. 122E-2(9) [G.S. 122E-2(6)].

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(c) Eligible Use for State Appropriated Funds.
Eligible activities include, but are not limited to the following:

(1) Rehabilitation, including weatherization, of sub-standard housing units;
(2) Assistance for costs of necessary studies, surveys, plans and permits, engineering, legal and architectural and other technical services;
(3) New construction, including costs of land acquisition and site preparation;
(4) Assistance for the construction or rehabilitation of shelters for the homeless;
(5) Assistance in the development of manufactured housing sites which constitute eligible projects as defined in subsection (b) of this section. The Agency may contract with outside organizations to provide such assistance; and
(6) Such other programs which increase the supply of decent and affordable housing for low, very low, and moderate income persons which the Partnership shall deem appropriate to meet the purposes stated in this section.

(d) Eligible Uses for Stripper Well Litigation Funds and Diamond Shamrock Litigation Funds.

(1) Eligible uses for the Stripper Well Litigation funds shall be those uses permitted under Paragraph II.B.3.f.ii of the Settlement Agreement that was approved by Order of the Court, dated July 7, 1986, including, but not limited to, those residential energy-related uses which are identified in Exhibit J to said Settlement Agreement.
(2) Eligible uses for the Diamond Shamrock Litigation funds shall be those uses permitted under Exhibit B to the Order of the Court, dated June 6, 1986, including but no [not] limited to those residential energy-related uses which are identified in Attachment C to Exhibit B to said Order. (1987, c. 841, s. 1.)

Editor's Note. — The reference "G.S. 122E-2(6)" has been inserted in brackets in subdivision (b)(2) as the reference apparently intended.

The word "not" has been inserted in brackets in subdivision (d)(2) following the word "no", which was apparently a typographical error.

§ 122E-7. Eligible applicants.

Eligible applicants shall include units of State and local governments including municipal corporations, for profit and nonprofit housing developers. Provided, however, that the Partnership's rules and regulations shall ensure an equitable distribution of Fund funds based upon population and low and moderate income housing needs across the State. (1987, c. 841, s. 1.)

§ 122E-8. Allocation of funds.

(a) Monies within the Fund shall be allocated to eligible applicants under this Chapter by the Agency, in accordance with funding cycles established at least annually. The Partnership shall establish rules and regulations with full public input, including at least one public hearing for which adequate notice is provided in a timely manner. These rules and regulations shall establish general policies governing the eligibility of applicants, application procedures, project eligibility requirements, and the criteria and standards for awarding grants and loans. Such rules and regulations shall be adopted within 270 days from the effective date of this Chapter.

(b) The Agency shall promulgate rules and regulations governing the review of applications for assistance and the awarding of grants or loans under this

Chapter in accordance with the rules and regulations adopted pursuant to subsection (a) above. The rules and regulations shall provide that if an application is rejected, the Agency shall detail in writing the reasons for the rejection.

(c) The Agency shall give priority to applications providing for:

(1) The improvement of existing housing stock which is affordable for low and very low income families;

(2) The construction of housing units for very low income families; and

(3) The leveraging of Fund monies by combination with other private or governmental loan grant or bond financing programs.

(d) The Agency shall also give priority to applications which include provisions such as:

(1) Interest rates and loan terms more favorable than those conventionally offered;

(2) Developer contributions to project costs;

(3) Local government contributions to project costs, including infrastructure improvements, contributions of publicly owned land for housing development, and the provision of funds for such services as child care and job training;

(4) Coordination with other housing and/or infrastructure investments in the community;

(5) Provision of housing to the disabled, single parent households, or rurally isolated households; or

(6) Provision of housing to persons whose current housing fails to meet basic standards of health and safety and who have little prospect of improving the condition of their housing except by residing in an eligible project receiving assistance under this Chapter. (1987, c. 841, s. 1; 1997-506, s. 44.)

§ 122E-9. Displacement.

In establishing criteria for G.S. 122E-8(a), the Agency shall give special attention to designing protections to provide that any lawful occupants who live in a project as defined in G.S. 122E-6(b) prior to rehabilitation or demolition shall not be displaced as a result of such activity, other than temporarily, in which case suitable relocation arrangements shall be provided. The Agency shall promulgate rules concerning acquisition of property and relocation. (1987, c. 841, s. 1.)

Editor's Note. — The section above was erroneously numbered G.S. 233E-9 in the 1987 act. It has been set out above as G.S. 122E-9 at the direction of the Revisor of Statutes.

Chapter 123.

Impeachment.

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The Court.

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Article 1.

The Court.

§ 123-1. Senate is court of impeachment; quorum.

The court for the trial of impeachments shall be the Senate. A majority of the members shall be necessary to constitute a quorum. (Const., art. 4, s. 3; 1868-9, c. 168, s. 1; Code, ss. 2923, 2924; Rev., s. 4623; C.S., s. 6244.)

§ 123-2. Chief Justice presides in impeachment of Governor.

When the Governor of the State, or Lieutenant Governor, upon whom the powers and duties of the office of Governor have devolved, is impeached, the Chief Justice of the Supreme Court shall preside; and in a case requiring the Chief Justice to preside, notice shall be given him, by order of the Senate, of the time and place fixed for the consideration of the articles of impeachment, with a request to attend; and the Chief Justice shall preside over the Senate during the consideration of said articles upon the trial of the person impeached. But the Chief Justice shall not vote on any question during the trial, and shall pronounce decision only as the organ of the Senate with its assent. (Const., art. 4, s. 4; 1868-9, c. 168, s. 6; Code, s. 2927; Rev., s. 4624; C.S., s. 6245.)

§ 123-3. Power of the Senate as a court.

The Senate, as a court, shall have power to compel the attendance of parties and witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, to punish, in a summary way, contempts of its authority, orders, mandates, writs, precepts, or judgments, to adjourn from time to time, and to make all lawful rules and regulations which it may deem essential or conducive to the ends of justice. (1868-9, c. 168, s. 4; Code, s. 2926; Rev., s. 4626; C.S., s. 6246.)

§ 123-4. Power of presiding officer.

The presiding officer of the Senate shall have power:

(1) To direct all necessary preparations in the Senate chamber.

(2) To make and issue by himself or by the clerk of the Senate all orders, mandates, writs, and precepts authorized by law or by the Senate.

(3) To direct all the forms of procedure during the trial not otherwise specially provided for.

(4) To decide in the first instance, without a division, all questions of evidence and incidental questions; but the same shall, on demand of one fifth of the members present, be decided by yeas and nays. (1868-9, c. 168, s. 5; Code, s. 2927; Rev., s. 4627; C.S., s. 6247.)

§ 123-5. Causes for impeachment.

Each member of the Council of State, each justice of the General Court of Justice, and each judge of the General Court of Justice shall be liable to impeachment for the commission of any felony, or the commission of any misdemeanor involving moral turpitude, or for malfeasance in office, or for willful neglect of duty. (1868-9, c. 168, s. 16; Code, s. 2937; Rev., s. 4628; C.S., s. 6248; 1973, c. 1420.)

Legal Periodicals. — For article, "Removing Local Elected Officials from Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

A judge of probate is not subject to impeachment under this section. People ex rel. Att'y Gen. v. Heaton, 77 N.C. 18 (1877).

District Attorneys Not to Be Impeached. — The statutory listing is exclusive and does not allow for impeachment of district attorneys. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Article 2.

Procedure in Impeachment.

§ 123-6. Articles of impeachment preferred.

All impeachments must be delivered by the House of Representatives to the presiding officer of the Senate, who shall thereupon cause proclamation to be made in the following words:

> "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of North Carolina articles of impeachment against ____________ ."

After which the articles shall be exhibited, and then the presiding officer of the Senate shall inform the House of Representatives that the Senate will take proper order on the subject of impeachment, of which due notice shall be given to the House of Representatives. (1868-9, c. 168, ss. 2, 3; Code, s. 2925; Rev., s. 4630; C.S., s. 6249.)

§ 123-7. When President of Senate impeached, another officer chosen.

If the President of the Senate be impeached, notice thereof shall immediately be given to the Senate by the House of Representatives, in order that another President may be chosen. (1868-9, c. 168, s. 14; Code, s. 2935; Rev., s. 4631; C.S., s. 6250.)

§ 123-8. Notice given to the accused.

The Senate, upon the presentation of articles of impeachment and its organization as a court, shall forthwith cause the person impeached to appear and answer the articles exhibited, either in person or by attorney. He shall be entitled to a copy of the impeachment and have a reasonable time to answer the same. (1868-9, c. 168, s. 7; Code, s. 2928; Rev., s. 4632; C.S., s. 6251.)

§ 123-9. Accused entitled to counsel.

The person accused is entitled on the trial of impeachment to the aid of counsel. (1868-9, c. 168, s. 8; Code, s. 2929; Rev., s. 4629; C.S., s. 6252.)

§ 123-10. Time of hearing fixed.

When issue is joined in the trial of an impeachment the court shall fix a time and place for the trial thereof. (1868-9, c. 168, s. 9; Code, s. 2930; Rev., s. 4633; C.S., s. 6253.)

§ 123-11. Oath administered to members.

At the time and place appointed, and before the commencement of the trial, the presiding officer of the Senate shall administer to each member of the court then present, and to other members as they appear, an oath or affirmation truly and impartially to try and determine the charge in question, under the Constitution and laws, according to the evidence. No member of the court shall sit or give his vote upon the trial until he shall have taken such oath or affirmation. (1868-9, c. 168, s. 10; Code, s. 2931; Rev., s. 4625; C.S., s. 6254.)

Article 3.

Effect of Impeachment.

§ 123-12. Accused suspended during trial.

Every officer impeached shall be suspended from the exercise of his office until his acquittal. (1868-9, c. 168, s. 13; Code, s. 2934; Rev., s. 4634; C.S., s. 6255.)

§ 123-13. Manner of conviction; judgment; indictment.

No person shall be convicted on an impeachment without the concurrence of two thirds of the Senators present. Upon a conviction of the person impeached, judgment may be given that he be removed from office, or that he be disqualified to hold any office of honor, trust, or profit under this State, or both. Every person convicted on impeachment shall, nevertheless, be liable to indictment and punishment according to law. (Const., art. 4, ss. 3, 4; 1868-9, c. 168, ss. 11, 12, 15; Code, ss. 2932, 2933, 2936; Rev., s. 4635; C.S., s. 6256.)

Chapter 123A.

Industrial Development.

§§ **123A-1 through 123A-27:** Repealed by Session Laws 1983, c. 717, s. 39.

Chapter 124.

Internal Improvements.

Article 1.

General Provisions.

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124-1. Control of internal improvements.
124-2. State deemed shareholder in corporation accepting appropriation.
124-3. Report of railroad, canal, etc.; contents.
124-4. [Repealed.]
124-5. Approval of encumbrance on State's interest in corporations.
124-5.1. State use of North Carolina Railroad dividends.

Sec.
124-6. Appointment of proxies, director of railroad companies, etc.
124-7. Power of investigation of corporations.
124-8 through 124-10. [Reserved.]

Article 2.

State-Owned Railroad Company.

124-11. Definition.
124-12. Powers of a State-owned railroad company.
124-13. Effect on State-owned railroad company charter.

ARTICLE 1.

General Provisions.

§ 124-1. Control of internal improvements.

The Governor and Council of State shall have charge of all the State's interest in all railroads, canals and other works of internal improvements. The Board of Directors of a State-owned railroad company shall be responsible for managing its affairs and for reporting as set forth in G.S. 124-3. (1925, c. 157, s. 1; 2000-146, s. 2.)

Cross References. — As to the Future of the North Carolina Railroad Study Commission, see G.S. 120-245 to 120-255.

Editor's Note. — Session Laws 2000-146, s. 6, effective December 1, 2000, designated G.S. 124-1 to 124-7 as Article 1 of Chapter 124.

§ 124-2. State deemed shareholder in corporation accepting appropriation.

When an appropriation is made by the State to any work of internal improvement conducted by a corporation, the State shall be considered, if so directed in the act making the appropriation, a stockholder in such corporation, and shall have as many shares as may correspond with the amount of money appropriated; and the acceptance of such money shall be deemed to be a consent of the corporation to the terms herein expressed. (1925, c. 157, s. 2; 1985, c. 792, s. 13.21.)

§ 124-3. Report of railroad, canal, etc.; contents.

(a) The president or other chief officer of every railroad, canal, or other public work of internal improvement in which the State owns an interest, shall, report annually to the Joint Legislative Commission on Governmental Operations. This report shall include:

(1) Number of shares owned by the State.
(2) Number of shares owned otherwise.
(3) Par value of the shares.
(4) Repealed by Session Laws 2000-146, s. 3, effective July 1, 2000.
(5) Amount of bonded debt, and for what purpose contracted.
(6) Amount of other debt, and how incurred.

(7) If interest on bonded debt has been punctually paid as agreed; if not, how much in arrears.
(8) Amount of gross receipts for past year, and from what sources derived.
(9) An itemized account of expenditures for past year.
(10) A summary of all leases, sales, or acquisitions of real property to which the company has been a party since the last report.
(11) Suits at law pending against his company concerning its bonded debt, or in which title to all or any part of such road or canal is concerned.
(12) Any sales of stock owned by the State, by whose order made, and disposition of the proceeds.
(13) Annual financial statements, including notes, audited by an independent certified public accounting firm.

(b) Upon the request of the Governor or any committee of the General Assembly, a State-owned railroad company shall provide all additional information and data within its possession or ascertainable from its records. The State-owned railroad company shall not be deemed to have waived any attorney-client privilege when complying with this subsection. At the time a State-owned railroad company provides information under this section, it shall indicate whether the information is confidential. Confidential information shall be subject to subsection (c) of this section.

(c) Confidential information includes (i) information related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created, or (ii) information that is subject to confidentiality obligations of a railroad company. Confidential information shall not be subject to a request under G.S. 132-6(a). (1925, c. 157, s. 3; 1993, c. 539, s. 928; 1994, Ex. Sess., c. 24, s. 14(c); 2000-67, s. 7.2(b); 2000-146, s. 3.)

§ **124-4:** Repealed by Session Laws 2000-146, s. 4, effective December 1, 2000.

§ 124-5. Approval of encumbrance on State's interest in corporations.

(a) No corporation or company in which the State owns the majority of any class of voting stock shall sell, lease, mortgage, or otherwise encumber its franchise, right-of-way, or other property, except by and with the approval and consent of the Governor and Council of State.

(b) No State-owned railroad company shall sell, lease, mortgage, or otherwise encumber its franchise, right-of-way, or other property, except by and with the approval and consent of the Board of Directors of that corporation. The president or other chief officer of the State-owned railroad company shall report any acquisitions and dispositions in accordance with G.S. 124-3(10). (1925, c. 157, s. 5; 1981 (Reg. Sess., 1982), c. 1372, s. 5; 1983, c. 905, ss. 10, 11; 1985, c. 792, ss. 13.25, 13.26; 2000-146, s. 5.)

Editor's Note. — For provision requiring approval of the General Assembly for the sale of state stock in the North Carolina Railroad Company, see Session Laws 1951, c. 1046.

§ 124-5.1. State use of North Carolina Railroad dividends.

(a) Notwithstanding the provisions of G.S. 136-16.6, in order to increase the capital of the North Carolina Railroad Company, any dividends of the North Carolina Railroad Company received by the State shall be applied to reduce the obligations described in subsection (c) of Section 32.30 of S.L. 1997-443, as amended by subsection (d) of Section 27.11 of S.L. 1999-237. Any dividends of the North Carolina Railroad Company received by the State shall be used by the Department of Transportation for the improvement of the property of the North Carolina Railroad Company as recommended and approved by the Board of Directors of the North Carolina Railroad Company. The improvements may include the following project types:

(1) Railroad and industrial track rehabilitation.
(2) Railroad signal and grade crossing protection.
(3) Bridge improvements.
(4) Corridor protection.
(5) Industrial site acquisition.

(b) Effective January 1, 2000, interest shall not be accrued or otherwise charged on the remaining balance of the obligations described in subsection (c) of Section 32.30 of S.L. 1997-443, as amended by subsection (d) of Section 27.11 of S.L. 1999-237. Interest accrued on those obligations relating to periods prior to January 1, 2000, shall be deemed paid and contributed by the State to the capital of the North Carolina Railroad Company. (2000-67, s. 7.2(a); 2005-276, s. 28.7.)

Cross References. — For a summary of the provisions of Session Laws 1997-443, s. 32.30(a)-(i), see the Editor's note under G.S. 136-16.6.

§ 124-6. Appointment of proxies, director of railroad companies, etc.

(a) The Governor shall appoint on behalf of the State all such officers or agents as, by any act, incorporating a company for the purpose of internal improvement, are allowed to represent the stock or other interests which the State may have in such company; and such person or persons shall cast the vote to which the State may be entitled in all the meetings of the stockholders of such company under the direction of said Governor; and the said Governor may, if in his opinion the public interest so requires, remove or suspend such persons, officers, agents, proxies, or directors in his discretion.

(b) Notwithstanding subsection (a) of this section, for any railroad company organized as a corporation in which the State is the owner of all the voting stock and which has trackage in more than two counties, seven of the members of the Board of Directors shall be appointed by the Governor, three of the members of the Board of Directors shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and three of the members of the Board of Directors shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. The Board of Directors shall consist of 13 members. Of the initial members appointed by the Governor, three shall be appointed for terms of four years and four shall be appointed for terms of two years. Of the initial members recommended to the General Assembly by the Speaker of the House of Representatives, two shall be appointed for terms of four years and one shall be appointed for a term of two years. Of the initial members recommended to the General Assembly by the President Pro Tempore of the Senate, two shall be appointed for terms of four years and one shall be appointed for a term of two years. Thereafter all Board members shall serve four-year terms. The Board shall elect the chairman from among its membership. (1925, c. 157, s. 6; 1997-443, s. 32.30(k); 1999-431, s. 3.3(a).)

Editor's Note. — Session Laws 1999-431, s. 3.3(a), rewrote subsection (b) as set out above, and s. 3.3(b) provided that this section, as amended by s. 3.3(a), would become effective when the railroad company described in subsection (b), changed its articles of incorporation to increase the size of the board. The Revisor of Statutes has been informed that this contingency has been met.

Session Laws 1999-431, s. 4, provides: "Unless otherwise provided for in this act, appointments are for terms to begin when this bill becomes law."

§ 124-7. Power of investigation of corporations.

The Governor and Council of State shall have the power to investigate the affairs of any corporation or association described in G.S. 124-3 and may require the Attorney General or the Utilities Commission to assist in making such investigation under the rules and regulations prescribed in Chapter 62. (1925, c. 157, s. 7; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

§§ 124-8 through 124-10: Reserved for future codification purposes.

ARTICLE 2.

State-Owned Railroad Company.

§ 124-11. Definition.

As used in this Chapter, the term "State-Owned Railroad Company" shall mean a railroad company in which the State owns all of the voting stock. (2000-146, s.7)

Cross References. — As to the Future of the North Carolina Railroad Study Commission, see G.S. 120-245 to 120-255.

§ 124-12. Powers of a State-owned railroad company.

A State-owned railroad company shall have, in addition to the powers of any railroad corporation, the power to:

(1) Lease, license, or improve property. — A State-owned railroad company may lease, license, or improve its right-of-way and property, whether held by easement, presumptive grant, express grant, or otherwise, for the purpose of preserving and protecting its railroad corridor and franchise.

(2) Condemnation in fee simple. — A State-owned railroad company may exercise the power of eminent domain to acquire property in fee simple for the purposes specified in G.S. 40A-3(a)(4). The procedures of Article 2 of Chapter 40A of the General Statutes shall apply to the exercise of the power of eminent domain under this subdivision. (2000-146, s. 7.)

§ 124-13. Effect on State-owned railroad company charter.

Nothing in this Chapter repeals or modifies any State-owned railroad company charter or limits the rights of the shareholders of the company as provided in Chapter 55 of the General Statutes. (2000-146, s. 7.)

Chapter 125.

Libraries.

Article 1.

State Library Agency.

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Article 1A.

State Depository Library System.

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ARTICLE 1.

State Library Agency.

§ 125-1. State library agency.

The library agency of the State of North Carolina shall be the Department of Cultural Resources. (1955, c. 505, s. 3; 1973, c. 476, s. 84.)

Cross References. — As to the State Library Commission, see G.S. 143B-90, 143B-91.

State Government Reorganization. — The State Library was transferred to the Department of Art, Culture and History by former G.S. 143A-195, enacted by Session Laws 1971, c. 864. See now G.S. 143B-51.

§ 125-2. Powers and duties of Department of Cultural Resources.

The Department of Cultural Resources shall have the following powers and duties:

(1) To adopt a seal for use in official business.

(2) To make to the Governor a biennial report of its activities and needs, including recommendations for improving its services to the State, to be transmitted by the Governor to the General Assembly.

(3) To accept gifts, bequests and endowments for the purposes which fall within the general legal powers and duties of the Department of Cultural Resources. Unless otherwise specified by the donor or legator, the Department of Cultural Resources may either expend both the principal and interest of any gift or bequest or may invest such sums in whole or in part, by and with the consent of the State Treasurer, in securities in which sinking funds may be invested under the provisions of G.S. 142-34.

(4) To purchase and maintain collections of books, periodicals, newspapers, maps, films, audiovisual and other materials; to subscribe to computerized databases; to provide other resources, services and programs; and to serve as an information distribution center for State government and the people of the State as a means for the promotion of knowledge, education, commerce and business in the State. The scope of the library's collections, resources and services should be determined by the Secretary of Cultural Resources upon consideration of the recommendations of the State Library Commission; and in making these decisions, the Secretary shall take into account the collections, resources and services of other libraries throughout the State and the availability of such collections, resources and services to the general public. All materials owned by the State Library shall be available for free circulation to libraries and to all citizens of the State under rules and regulations fixed by the librarian, except that the librarian may restrict the circulation of books and other materials which, because they are rare or are used intensively in the library for reference purposes or for other good reasons, should be retained in the library at all times. The public schools shall be given equal priority in borrowing all films which are available for circulation.

(5) To give assistance, advice and counsel to other State agencies maintaining special reference collections as to the best means of establishing and administering such libraries and collections.

(5a) To provide for the establishment and maintenance of union catalogs.

(6) To fix reasonable penalties for damage to or failure to return any book, periodical or other material owned by the Department of Cultural Resources, or for violation of any rule or regulation concerning the use of books, periodicals, and other materials in the custody of the Department of Cultural Resources.

(7) Repealed by Session Laws 1987, c. 199, s. 4.

(8) To give assistance, advice and counsel to all libraries in the State, to all communities which may propose to establish libraries, and to all persons interested in public libraries, as to the best means of establishing and administering such libraries, as to the selection of books, cataloguing, maintenance and other details of library management.

(9) To provide library services to blind and physically handicapped readers of North Carolina by making available to them books and other reading materials in braille, or sound recordings or any other medium used by the blind and physically handicapped; to enter into contracts and agreements with appropriate libraries and other organizations for the purposes of serving the blind and physically handicapped; to enter into contracts with library agencies of other states for providing library service to the blind and physically handicapped of those states, provided adequate compensation is paid for such service and such contract is otherwise advantageous to this State.

(10) To plan and coordinate cooperative programs between the various types of libraries within the State of North Carolina, and to coordinate State development with regional and national cooperative library

programs; and to assist nonprofit corporations in organization and operation for the purposes of cooperative programs. (1955, c. 505, s. 3; 1961, c. 1161; 1973, c. 476, s. 84; 1977, c. 645, s. 1; 1981, c. 918, s. 4; 1983, c. 819; 1987, c. 199.)

Editor's Note. — G.S. 142-34, referred to in subdivision (3) of this section, was repealed by Session Laws 1983, c. 913, s. 30.

Legal Periodicals. — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'", see 68 N.C.L. Rev. 1035 (1990).

§§ 125-3, 125-4: Repealed by Session Laws 1973, c. 476, s. 84.

§ 125-5. Public libraries to report to Department of Cultural Resources.

Every public library in the State shall make an annual report to the Department of Cultural Resources in such form as may be prescribed by the Department. The term "public library" shall, for the purpose of this section, include subscription libraries, college and university libraries, legal association, medical association, Supreme Court, and other special libraries. (1955, c. 505, s. 3; 1973, c. 476, s. 84.)

§ 125-6. Librarian's seal.

It shall be the duty of the Secretary of State to furnish the State Librarian with a seal of office. The State Librarian is authorized to certify to the authenticity and genuineness of any document, paper, or extract from any document, paper, or book or other writing which may be on file in the Library. When a certificate is made under his hand and attested by his official seal, it shall be received as prima facie evidence of the correctness of the matter therein contained, and as such shall receive full faith and credit. (1955, c. 505, s. 3.)

§ 125-7. State policy as to public library service; annual appropriation therefor; administration of funds.

(a) It is hereby declared the policy of the State to promote the establishment and development of public library service throughout all sections of the State.

(b) For promoting, aiding, and equalizing public library service in North Carolina a sum shall annually be appropriated out of the moneys within the State treasury to be known as the Aid to Public Libraries Fund.

(c) The fund herein provided shall be administered by the Department of Cultural Resources, which shall frame bylaws, rules and regulations for the allocation and administration of such funds. The funds shall be used to improve, stimulate, increase and equalize public library service to the people of the whole State, shall be used for no other purpose, except as herein provided, and shall be allocated among the legally established municipal, county or regional libraries in the State taking into consideration local needs, area and population to be served, local interest and such other factors as may affect the State program of public library service.

(d) For the necessary expenses of administration, allocation, and supervision, a sum not to exceed seven percent (7%) of the annual appropriation may annually be used by the Department of Cultural Resources.

(e) The fund appropriated under this section shall be separate and apart from the appropriations of the Department of Cultural Resources, which appropriation shall not be affected by this section or the appropriation hereunder.

(f) Repealed by Session Laws 1973, c. 476, s. 84. (1955, c. 505, s. 3; 1973, c. 476, s. 84; 1979, c. 578.)

§ 125-8. Department of Cultural Resources authorized to accept and administer funds from federal government and other agencies.

The Department of Cultural Resources is hereby authorized and empowered to receive, accept and administer any money or moneys appropriated or granted to it, separate and apart from the appropriation by the State for the Department of Cultural Resources, for providing and equalizing public library service in North Carolina:

(1) By the federal government and,

(2) By any other agencies, private and/or otherwise.

The fund herein provided for shall be administered by the Department of Cultural Resources, which Department shall frame bylaws, rules and regulations for the allocation and administration of this fund. This fund shall be used to increase, improve, stimulate and equalize library service to people of the whole State, and shall be used for no other purpose whatsoever except as hereinafter provided, and shall be allocated among the counties of the State, taking into consideration local needs, area and population to be served, local interests as evidenced by local appropriations, and such other factors as may affect the State program of library service. Any gift or grant from the federal government or other sources shall become a part of said funds, to be used as part of the State fund, or may be invested as the Department of Cultural Resources may deem advisable, according to provisions of G.S. 125-5(5), the income to be used for the promotion of libraries as stated in this section. (1955, c. 505, s. 3; 1973, c. 476, s. 84.)

Editor's Note. — The reference near the end of this section to G.S. 125-5(5) would seem to be an error. It is possible that G.S. 125-2(3) was intended.

§ 125-9. Librarian certification.

The Secretary of Cultural Resources shall issue librarian certificates to public librarians under such reasonable rules and regulations as the Public Librarian Certification Commission may adopt. A complete record of the transaction of the Department in the issuance of librarian certificates shall be kept at all times in the office of the North Carolina State Library. (1955, c. 505, s. 3; 1973, c. 476, s. 53.)

Cross References. — As to the Public Librarian Certification Commission, see G.S. 143B-67 through 143B-70.

State Government Reorganization. — The Library Certification Board was transferred to the Department of Art, Culture and History by former G.S. 143A-201, enacted by Session Laws 1971, c. 864. See now G.S. 143B-51.

§ 125-10. Temporary certificates for public librarians.

Upon the submission of satisfactory evidence that no qualified librarian is available for appointment as chief librarian, and upon written application by the Department of Cultural Resources for issuance of a temporary certificate to an unqualified person who is available for the position, a temporary certificate, valid for one year only, may be issued to such persons by the Public Librarian Certification Commission. (1955, c. 505, s. 3; 1973, c. 476, ss. 53, 84.)

§ 125-11. Failure to return books.

Any person who shall fail to return any book, periodical, or other material withdrawn by him from the Library shall be guilty of a Class 3 misdemeanor if he shall fail to return the borrowed material within 30 days after receiving a notice from the State Librarian that the material is overdue. The provisions of this section shall not be in effect unless a copy of this section is attached to the overdue notice by the State Librarian. (1955, c. 505, s. 3; 1993, c. 539, s. 929; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 125-11.1 through 125-11.4: Reserved for future codification purposes.

Article 1A.

State Depository Library System.

§ 125-11.5. Purpose.

The purpose of this Article is to establish a depository system for the distribution of State publications to designated libraries throughout the State in order to facilitate public access to publications issued by State agencies. (1987, c. 771, s. 2.)

§ 125-11.6. Definitions.

As used in this Article:

(1) "Depository library" means a library designated to receive and maintain State publications and make them available to the public.

(2) "Document" means any printed document including any report, directory, statistical compendium, bibliography, map, regulation, newsletter, pamphlet, brochure, periodical, bulletin, compilation, or register, regardless of whether the printed document is in paper, film, tape, disk, or any other format.

(3) "State agency" means every State department, institution, board, and commission.

(4) "State publication" means any document prepared by a State agency or private organization, consultant, or research firm, under contract with or under the supervision of a State agency: Provided, however, the term "State publication" does not include administrative documents used only within the issuing agency, documents produced for instructional purposes that are not intended for sale or publication, appellate division reports and advance sheets distributed by the Administrative Office of the Courts, the S.B.I. Investigative "Bulletin", documents that will be reproduced in the Senate or House of Representatives Journals, or documents that are confidential pursuant to Article 17 of Chapter 120 of the General Statutes. (1987, c. 771, s. 2.)

§ 125-11.7. State Library designated the official depository for all State publications.

The State Library shall be the official, complete, and permanent depository for all State publications, and shall receive five copies of all State publications in addition to the copies required for the depository system: Provided, however, the State Library shall receive only five copies of any State publication offered for sale by a State agency at a price at least high enough to recover production costs: Provided, further, the State Library, notwithstanding the definition of "State publication" contained in this Article, shall have authority to exclude from required deposit in the State Library any items or materials which it finds are not appropriate for deposit. (1987, c. 771, s. 2.)

§ 125-11.8. State Publications Clearinghouse created.

(a) A State Publications Clearinghouse is created within the Department of Cultural Resources, the Division of State Library.

(b) The Clearinghouse shall:

(1) Advise State agencies annually of the number of copies of State publications needed for distribution.

(2) Advise State agencies annually that they are required to submit only five copies of any State publication offered for sale at a price at least high enough to recover production costs.

(3) Receive from State agencies promptly after publication the number of copies of State publications specified, and distribute these to the depository libraries.

(4) Prepare on microfiche one or more copies of each State publication that is printed on paper for reference and interlibrary loan purposes.

(5) Publish a checklist of State publications and distribute the checklist without charge to all requesting North Carolina libraries.

(6) Forward two copies of all State publications that are printed on paper to the Library of Congress. (1987, c. 771, s. 2.)

§ 125-11.9. Powers and duties of the State Library.

The State Library:

(1) Shall carry out the provisions of this Article.

(2) Develop and maintain standards for depository libraries. The standards shall include the ability to receive, process, organize, retain, and make available State publications and the ability to provide reference assistance and interlibrary loan service for depository publications.

(3) Shall designate depository libraries, taking into account regional distribution and number of persons served, such that State publications will be conveniently accessible to residents in all areas of the State. The State Library may designate at least one library in each congressional district.

(4) May designate as selective depository libraries those institutions that wish to receive less than the full deposit. Selective depository libraries shall meet the same standards for reference and interlibrary loan service as full depository libraries.

(5) May enter into depository contracts with public libraries and community, technical, special, college and university libraries that meet the standards for depository eligibility adopted by the Clearinghouse.

(6) Shall determine how many copies of State publications each State agency must submit for the State depository system. The State Library may permit a State agency to submit fewer copies of a document if the State Library determines that fewer copies are adequate in light of the cost of the document and the projected public interest in the document.

(7) Shall adopt rules to administer the depository program. These rules may include the State Library's priorities and resulting schedules for

collecting, maintaining, and making available State publications in various formats. (1987, c. 771, s. 2; 1991, c. 636, s. 14.)

§ 125-11.10. Duties of State agencies.

(a) State agencies shall send the requested number of copies of each of their publications to the Clearinghouse within 10 days of issuance.

(b) The head of each State agency shall designate a publications officer who shall be responsible for supplying the requested number of copies of each State publication of that agency to the Clearinghouse. Each agency shall notify the Clearinghouse of the identity of its publications officer before October 1, 1987, and within 30 days of any change of publications officer. The publications officer shall supply the Clearinghouse semiannually a complete list of the agency's State publications issued within the previous six months and any other information regarding the publications of the agency requested by the Clearinghouse.

(c) State agencies may request permission from the State Library to submit fewer than the requested number of copies of a document. The request shall include information on the cost of the document and the projected public interest in the document. (1987, c. 771, s. 2.)

§ 125-11.11. Advisory Committee.

The Secretary of Cultural Resources may appoint an advisory committee of State officials and depository librarians to review and advise on the operation of the depository system. (1987, c. 771, s. 2.)

§ 125-11.12: Repealed by Session Laws 1993, c. 447, s. 1.

§ 125-11.13. Alkaline paper required for government publications.

(a) State publications that are of historical or enduring value and importance to the citizens of North Carolina shall be printed on alkaline (acid-free) paper. These publications shall be designated on an annual basis by the State Librarian and the University Librarian at the University of North Carolina at Chapel Hill and shall include publications of an historical, biographical, legal, or statistical nature relating to the State of North Carolina, past, present, or future. These publications shall identify thereon, adjacent to the name of the agency responsible for publication, a statement that the publication is printed on permanent paper.

(b) By November 1 of each year, the State Librarian and the University Librarian at the University of North Carolina at Chapel Hill shall designate the titles for publication on alkaline paper and shall notify each State agency that is responsible for the publication of a designated title. An agency so notified shall begin printing the designated title on alkaline paper within one year after receipt of the notification or at the awarding of the contract for the publication, whichever event occurs first. The Coordinator of the North Carolina State Publications Clearinghouse shall monitor compliance with this requirement and shall transmit a copy of the compliance report to the State Librarian and to the University Librarian at the University of North Carolina at Chapel Hill by October 1 of each year.

(c) The State Librarian and the University Librarian at the University of North Carolina at Chapel Hill shall report by November 1 of each year to the Joint Legislative Commission on Governmental Operations regarding the titles designated for printing on alkaline paper and shall include in the report the compliance report received from the Coordinator of the North Carolina State Publications Clearinghouse. (1991, c. 224, s. 1.)

ARTICLE 2.

Interstate Library Compact.

§ 125-12. Compact enacted into law; form.

The Interstate Library Compact is hereby enacted into law and entered into by this State with all states legally joining therein in the form substantially as follows:

INTERSTATE LIBRARY COMPACT.

ARTICLE I. POLICY AND PURPOSE.

Because the desire for the services provided by libraries transcends governmental boundaries and can most effectively be satisfied by giving such services to communities and people regardless of jurisdictional lines, it is the policy of the states party to this Compact to cooperate and share their responsibilities; to authorize cooperation and sharing with respect to those types of library facilities and services which can be more economically or efficiently developed and maintained on a cooperative basis, and to authorize cooperation and sharing among localities, states and others in providing joint or cooperative library services in areas where the distribution of population or of existing and potential library resources make the provision of library service on an interstate basis the most effective way of providing adequate and efficient service.

ARTICLE II. DEFINITIONS.

As used in this Compact: (a) "Public library agency" means any unit or agency of local or state government operating or having power to operate a library.

(b) "Private library agency" means any nongovernmental entity which operates or assumes a legal obligation to operate a library.

(c) "Library agreement" means a contract establishing an interstate library district pursuant to this Compact or providing for the joint or cooperative furnishing of library services.

ARTICLE III. INTERSTATE LIBRARY DISTRICTS.

(a) Any one or more public library agencies in a party state in cooperation with any public library agency or agencies in one or more other party states may establish and maintain an interstate library district. Subject to the provisions of this Compact and any other laws of the party states which pursuant hereto remain applicable, such district may establish, maintain and operate some or all of the library facilities and services for the area concerned in accordance with the terms of a library agreement therefor. Any private library agency or agencies within an interstate library district may cooperate therewith, assume duties, responsibilities and obligations thereto, and receive benefits therefrom as provided in any library agreement to which such agency or agencies become party.

(b) Within an interstate library district, and as provided by a library agreement, the performance of library functions may be undertaken on a joint or cooperative basis or may be undertaken by means of one or more arrangements between or among public or private library agencies for the extension of library privileges to the use of facilities or services operated or rendered by one or more of the individual library agencies.

(c) If a library agreement provides for joint establishment, maintenance or operation of library facilities or services by an interstate library district, such district shall have power to do any one or more of the following in accordance with such library agreement:

(1) Undertake, administer and participate in programs or arrangements for securing, lending or servicing of books and other publications, any other materials suitable to be kept or made available by libraries, library equipment or for the dissemination of information about libraries, the value and significance of particular items therein, and the use thereof.

(2) Accept for any of its purposes under this Compact any and all donations, and grants of money, equipment, supplies, materials, and services, (conditional or otherwise), from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and receive, utilize and dispose of the same.

(3) Operate mobile library units or equipment for the purpose of rendering bookmobile service within the district.

(4) Employ professional, technical, clerical and other personnel, and fix terms of employment, compensation and other appropriate benefits; and where desirable, provide for the in-service training of such personnel.

(5) Sue and be sued in any court of competent jurisdiction.

(6) Acquire, hold, and dispose of any real or personal property or any interest or interests therein as may be appropriate to the rendering of library service.

(7) Construct, maintain and operate a library, including any appropriate branches thereof.

(8) Do such other things as may be incidental to or appropriate for the carrying out of any of the foregoing powers.

Article IV. Interstate Library Districts, Governing Board.

(a) An interstate library district which establishes, maintains or operates any facilities or services in its own right shall have a governing board which shall direct the affairs of the district and act for it in all matters relating to its business. Each participating public library agency in the district shall be represented on the governing board which shall be organized and conduct its business in accordance with provision therefor in the library agreement. But in no event shall a governing board meet less often than twice a year.

(b) Any private library agency or agencies party to a library agreement establishing an interstate library district may be represented on or advise with the governing board of the district in such manner as the library agreement may provide.

Article V. State Library Agency Cooperation.

Any two or more state library agencies of two or more of the party states may undertake and conduct joint or cooperative library programs, render joint or cooperative library services, and enter into and perform arrangements for the cooperative or joint acquisition, use, housing and disposition of items or collections of materials which, by reason of expense, rarity, specialized nature, or infrequency of demand therefor would be appropriate for central collection and shared use. Any such programs, services or arrangements may include provision for the exercise on a cooperative or joint basis of any power exercisable by an interstate library district and an agreement embodying any such program, service or arrangement shall contain provisions covering the subjects detailed in Article VI of this Compact for interstate library agreements.

Article VI. Library Agreements.

(a) In order to provide for any joint or cooperative undertaking pursuant to this Compact, public and private library agencies may enter into library agreements. Any agreement executed pursuant to the provisions of this Compact shall, as among the parties to the agreement:

(1) Detail the specific nature of the services, programs, facilities, arrangements or properties to which it is applicable.
(2) Provide for the allocation of costs and other financial responsibilities.
(3) Specify the respective rights, duties, obligations and liabilities of the parties.
(4) Set forth the terms and conditions for duration, renewal, termination, abrogation, disposal of joint or common property, if any, and all other matters which may be appropriate to the proper effectuation and performance of the agreement.

(b) No public or private library agency shall undertake to exercise itself, or jointly with any other library agency, by means of a library agreement any power prohibited to such agency by the constitution or statutes of its state.

(c) No library agreement shall become effective until filed with the Compact Administrator of each state involved, and approved in accordance with Article VII of this Compact.

Article VII. Approval of Library Agreements.

(a) Every library agreement made pursuant to this Compact shall, prior to and as a condition precedent to its entry into force, be submitted to the attorney general of each state in which a public library agency party thereto is situated, who shall determine whether the agreement is in proper form and compatible with the laws of his state. The attorneys general shall approve any agreement submitted to them unless they shall find that it does not meet the conditions set forth herein and shall detail in writing addressed to the governing bodies of the public library agencies concerned the specific respects in which the proposed agreement fails to meet the requirements of law. Failure to disapprove an agreement submitted hereunder within 90 days of its submission shall constitute approval thereof.

(b) In the event that a library agreement made pursuant to this Compact shall deal in whole or in part with the provision of services or facilities with regard to which an officer or agency of the state government has constitutional or statutory powers of control, the agreement shall, as a condition precedent to its entry into force, be submitted to the state officer or agency having such power of control and shall be approved or disapproved by him or it as to all matters within his or its jurisdiction in the same manner and subject to the same requirements governing the action of the attorneys general pursuant to subsection (a) of this Article. This requirement of submission and approval shall be in addition to and not in substitution for the requirement of submission to and approval by the attorneys general.

Article VIII. Other Laws Applicable.

Nothing in this Compact or in any library agreement shall be construed to supersede, alter or otherwise impair any obligation imposed on any library by otherwise applicable law, nor to authorize the transfer or disposition of any property held in trust by a library agency in a manner contrary to the terms of such trust.

Article IX. Appropriations and Aid.

(a) Any public library agency party to a library agreement may appropriate funds to the interstate library district established thereby in the same manner and to the same extent as to a library wholly maintained by it and, subject to the laws of the state in which such public library agency is situated, may pledge its credit in support of an interstate library district established by the agreement.

(b) Subject to the provisions of the library agreement pursuant to which it functions and the laws of the states in which such district is situated, an interstate library district may claim and receive any state and federal aid which may be available to library agencies.

Article X. Compact Administrator.

Each state shall designate a Compact Administrator with whom copies of all library agreements to which his state or any public library agency thereof is party shall be filed. The Administrator shall have such other powers as may be conferred upon him by the laws of his state and may consult and cooperate with the compact administrators of other party states and take such steps as may effectuate the purposes of this Compact. If the laws of a party state so provide, such state may designate one or more deputy Compact administrators in addition to its Compact Administrator.

Article XI. Entry into Force and Withdrawal.

(a) This Compact shall enter into force and effect immediately upon its enactment into law by any two states. Thereafter, it shall enter into force and effect as to any other state upon the enactment thereof by such state.

(b) This Compact shall continue in force with respect to a party state and remain binding upon such state until six months after such state has given notice to each other party state of the repeal thereof. Such withdrawal shall not be construed to relieve any party to a library agreement entered into pursuant to this Compact from any obligation of that agreement prior to the end of its duration as provided therein.

Article XII. Construction and Severability.

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state party thereto, the Compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1967, c. 190, s. 1.)

§ 125-13. Political subdivisions to comply with laws governing capital outlay and pledging of credit.

No county, municipality, or other political subdivision of this State shall be party to a library agreement which provides for the construction or maintenance of a library pursuant to Article III, subdivision (c)(7) of the Compact, nor pledge its credit in support of such a library, or contribute to the capital financing thereof, except after compliance with any laws applicable to such counties, municipalities, or other political subdivisions relating to or governing capital outlays and the pledging of credit. (1967, c. 190, s. 2.)

§ 125-14. "State library agency" defined.

As used in the Compact, "state library agency," with reference to this State, means the Department of Cultural Resources. (1967, c. 190, s. 3; 1973, c. 476, s. 84.)

§ 125-15. State and federal aid to interstate library districts.

An interstate library district lying partly within this State may claim and be entitled to receive State aid in support of any of its functions to the same extent and in the same manner as such functions are eligible for support when carried on by entities wholly within this State. For the purposes of computing and apportioning State aid to an interstate library district, this State will consider that portion of the area which lies within this State as an independent entity for the performance of the aided function or functions and compute and apportion the aid accordingly. Subject to any applicable laws of this State, such a district also may apply for and be entitled to receive any federal aid for which it may be eligible. (1967, c. 190, s. 4.)

§ 125-16. Compact Administrator and deputies.

The State Librarian shall be the Compact Administrator pursuant to Article X of the Compact. The State Librarian may appoint one or more deputy Compact Administrators pursuant to said Article. (1967, c. 190, s. 5.)

State Government Reorganization. — The Interstate Library Compact administration was transferred to the Department of Art, Culture and History by former G.S. 143A-196, enacted by Session Laws 1971, c. 864. See now G.S. 143B-51.

§ 125-17. Withdrawal from Compact.

In the event of withdrawal from the Compact the Governor shall send and receive any notices required by Article XI(b) of the Compact. (1967, c. 190, s. 6.)

Article 3.

Library Records.

§ 125-18. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Library" means a library established by the State; a county, city, township, village, school district, or other local unit of government or authority or combination of local units of governments and authorities; community college or university; or any private library open to the public.

(2) "Library record" means a document, record, or other method of storing information retained by a library that identifies a person as having requested or obtained specific information or materials from a library. "Library record" does not include nonidentifying material that may be retained for the purpose of studying or evaluating the circulation of library materials in general. (1985, c. 486, s. 2.)

§ 125-19. Confidentiality of library user records.

(a) Disclosure. — A library shall not disclose any library record that identifies a person as having requested or obtained specific materials, information, or services, or as otherwise having used the library, except as provided for in subsection (b).

(b) Exceptions. — Library records may be disclosed in the following instances:

(1) When necessary for the reasonable operation of the library;

(2) Upon written consent of the user; or

(3) Pursuant to subpoena, court order, or where otherwise required by law. (1985, c. 486, s. 2.)

Chapter 126.

State Personnel System.

Article 1.

State Personnel System Established.

Sec.
126-1. Purpose of Chapter; application to local employees.
126-1.1. Career State employee defined.
126-1A. [Repealed.]
126-2. State Personnel Commission.
126-3. Office of State Personnel established and responsibilities outlined; administration and supervision; appointment, compensation and tenure of Director.
126-4. Powers and duties of State Personnel Commission.
126-4.1. Commission panels may recommend final agency decisions.
126-5. Employees subject to Chapter; exemptions.
126-6, 126-6.1. [Repealed.]
126-6.2. Reports.

Article 2.

Salaries, Promotions, and Leave of State Employees.

126-7. Compensation of State employees.
126-7.1. Posting requirement; State employees receive priority consideration; reduction-in-force rights; Work First hiring.
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126-8.4. (See note on condition precedent) No sick leave taken for absences by State employees resulting from adverse reactions to vaccination.
126-8.5. Discontinued service retirement allowance and severance wages for certain State employees.

Article 3.

Local Discretion as to Local Government Employees.

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Article 1.

State Personnel System Established.

§ 126-1. Purpose of Chapter; application to local employees.

It is the intent and purpose of this Chapter to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry. It is also the intent of this Chapter that this system of personnel administration shall apply to local employees paid entirely or in part from federal funds, except to the extent that local governing boards are authorized by this Chapter to establish local rules, local pay plans, and local personnel systems. It is also the intent of this Chapter to make provisions for a decentralized system of personnel administration, where appropriate, and without additional cost to the State, with the State Personnel Commission as the policy and rule-making body. The Office of State Personnel shall make recommendations for policies and rules to the Commission based on research and study in the field of personnel management, develop and administer statewide standards and criteria for good personnel management, provide training and technical assistance to all agencies, departments, and institutions, provide oversight, which includes conducting audits to monitor compliance with established State Personnel Commission policies and rules, administer a system for implementing necessary corrective actions when the rule, standards, or criteria are not met, and serve as the central repository for State Personnel System data. The agency, department, and institution heads shall be responsible and accountable for execution of Commission policies and rules for their employees. (1965, c. 640, s. 2; 1997-349, s. 1.)

Cross References. — As to provisions relating to establishment of policies and rules governing the study and implementation of competitive job classification and compensation plan for nurses by the Board of Directors of the University of North Carolina Hospitals at Chapel Hill, see G.S. 116-37(d).

State Government Reorganization. — The State personnel system was transferred to the Department of Administration by G.S. 143A-84 (now repealed), enacted by Session Laws 1971, c. 864.

Editor's Note. — Session Laws 2001-424, s. 13.1, provides: "The General Assembly encourages the Department of State Treasurer to include the model of the PREPARE program in its current delivery of retirement services. The PREPARE program in the Office of State Personnel is abolished."

Session Laws 2001-424, s. 21.14(b), as amended by 2001-487, s. 110, provides: "Under the direction of the Secretary of Health and Human Services, the Director of the Office of Policy and Planning shall have the authority to direct Divisions, offices, and programs within the Department to conduct periodic reviews of policies, plans, and rules and shall advise the Secretary when it is determined to be appropriate or necessary to modify, amend, and repeal departmental policies, plans, and rules. All professional and supervisory employees in policy and management positions within the Office of Policy and Planning are exempt from Chapter 126 of the General Statutes except for Articles 6, 7, and 14 of that Chapter. Exempt positions within the Office of Policy and Planning shall not count toward the exempt position totals authorized by G.S. 126-5(d)(1)."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2006-66, s. 22.15A(a) provides: "Except as provided in subsection (b) of this section and notwithstanding any other provision of law, the State Personnel Commission, the Office of State Personnel, and each State department, agency, and institution shall suspend further implementation of career banding pending subsequent action by the General Assembly after its review of the State Personnel Act, including the traditional graded classification system and career banding. It is the intent of the 2005 General Assembly to authorize a legislative study commission to review and evaluate the compensation and other personnel policies affecting employees and employing agencies of State government."

Session Laws 2006-66, s. 22.15A(b), as amended by Session Laws 2006-221, s. 21A(a), provides: "Career-banded classifications approved by the State Personnel Commission on or before June 15, 2006, and for which the agency had begun implementation by that date, may continue to be implemented without suspension as otherwise provided for in this section if:

"(1) It is fully and completely implemented no later than February 1, 2007; and

"(2) It is implemented entirely using technical resources provided by the Office of State Personnel and the affected agency or constituent institution."

Session Laws 2006-66, s. 22.15A(c) provides: "Career-banded classifications already approved by the State Personnel Commission on or before June 15, 2006, may be incorporated into the HR/Payroll (BEACON) program development and implementation provided that such inclusion will not delay completion and implementation of the program."

Session Laws 2006-221, s. 21A(b) through (e), provides: "(b) There is created the Legislative Study Commission on the State Personnel Act ('Commission'). The Commission shall consist of 18 members appointed as follows:

"(1) Six members appointed by the Governor, to include:

"a. One person who is a current State employee subject to the State Personnel Act and not currently working in human resources management.

"b. One person who is a current State employee and currently working in human resources management.

"c. One person having experience and expertise in human resources management in a large private sector organization with greater than 500 employees.

"d. One person having experience and expertise in human resources management in a large public sector organization with greater than 500 employees.

"e. Two persons representing the general public.

"(2) Six members appointed by the Speaker of the House of Representatives, to include:

"a. Four members of the House of Representatives.

"b. Two persons representing the general public.

"(3) Six members appointed by the President Pro Tempore of the Senate, to include:

"a. Four members of the Senate.

"b. Two persons representing the general public.

"(c) The Commission shall:

"(1) Review Chapter 126 of the General Statutes, the State Personnel Act, to determine whether the Act should be revised or repealed, in whole or in part.

"(2) Consider the efficacy of changes in policy related to the following: classification system, compensation philosophy, salary structure, merit-based pay, pay equity, pay delivery, and performance evaluation.

"(3) Evaluate career banding as an alternative to the traditional classification system, considering career progression salary adjustments as compared to current compensation increase philosophy, government/private industry best practices, and the real and perceived impact to State employees of moving to a career banding classification system.

"(4) Review any other matter that the Commission finds relevant to its charge.

"(d) The Commission may provide interim reports and shall provide its final report identifying its findings, recommendations, and legislative proposals by May 1, 2008. The Commission shall terminate upon filing its final report.

"(e) The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each appoint a cochair for the Commission. The Commission may contract for consultant services as provided by G.S. 120-32.02. Upon approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to assist in the work of the Commission. Clerical staff shall be furnished to the Commission through the offices of the House of Representatives and the Senate Directors of Legislative Assistants. The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission. With the permission of the Speaker of the House of Representatives and the President Pro Tempore of the Senate, the Commission may meet during the regular legislative session. Members of the Commission shall receive per diem, subsistence, and travel allowances at the rate established in G.S. 120-3.1. The appointing authority shall fill vacancies. The Commission, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses."

Session Laws, 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 provides: "If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid."

Session Laws 2007-323, s. 28.18B, provides: "Notwithstanding any other provision of law, the State Personnel Commission, the Office of State Personnel, State agencies as to their defined critical occupational groups limited to nursing, engineering, library, fiscal, and pharmacy positions, and The University of North Carolina as to its employees subject to the State Personnel Act shall begin or continue the development and implementation of career banding, effective July 1, 2007.

"The Office of State Personnel shall provide quarterly updates on career banding to the Joint Legislative Commission on Governmental Operations.

"The Office of State Personnel shall consult with the Joint Legislative Commission on Governmental Operations prior to the State Personnel Commission's review and approval of career banding for major occupational groups with significant labor market changes."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-413, ss. 1(a) and (b), provide: "(a) The President of The University of North Carolina (UNC) shall appoint a Task Force to examine the application of the State Personnel Act to the University of North Carolina with a goal of making recommendations that will:

"(1) Improve the ability of the University to attract, reward, and retain high quality employees;

"(2) Enable the University to better meet the needs of its employees; and

"(3) Improve the efficiency of UNC personnel operations.

"The Task Force membership shall include chancellors, representatives of the UNC Staff Assembly who are subject to the State Personnel Act, human resources professionals, other UNC employees exempt from the State Personnel Act, and a representative of the Office of State Personnel.

"(b) The Task Force shall report to the President of The University of North Carolina and to the UNC Board of Governors by January 15, 2008. By March 24, 2008, the UNC Board of Governors shall forward the recommendations that it approves, as presented or as modified, to the Joint Legislative Education Oversight Committee of the General Assembly for consideration of any legislative proposals during the 2008 Regular Session."

CASE NOTES

Constitutional Implications. — For case discussing the propriety under U.S. Const., Amends. I and XIV, of adverse personnel actions affecting State employees in exempt positions following the change from the Hunt administration to the Martin administration, see Stott v. Martin, 725 F. Supp. 1365 (E.D.N.C. 1989), rev'd on other grounds, 916 F.2d 134 (4th Cir. 1990).

This Chapter establishes and provides for the administration of the state personnel system. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

The legislative intent to forbid all hiring except under this Chapter is clear. Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976), aff'd, 534 F.2d 328 (4th Cir. 1976).

Chapter 126 clearly gives State Personnel Commission power to establish rules and policies governing personnel matters. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

There was just cause to demote the highway patrol employee as the employee drank three beers within a short period; proceeded to drive after drinking; exceeded the speed limit; and two alco-sensor tests registered 0.09 and 0.08 alcohol concentration readings. Davis v. N.C. Dep't of Crime Control & Pub. Safety, 151 N.C.

App. 513, 565 S.E.2d 716, 2002 N.C. App. LEXIS 777 (2002).

The superior court properly determined that it had subject matter jurisdiction where plaintiff sought injunctive relief ordering his reinstatement to the "same or similar position," a matter on which G.S. 126-34.1 does not specifically authorize appeal; the State Personnel Act does not place jurisdiction over this matter with the State Personnel Commission. Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Enforcement of Contracts Made in Violation of Rules. — The purpose of this Chapter and thus public policy would be frustrated by enforcement of contracts made in violation of the valid rules established pursuant to G.S. 126-4(3). Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976), aff'd, 534 F.2d 328 (4th Cir. 1976).

Discharge of Exempt Employees by Successor Governor. — Although the North Carolina State Personnel Act provides that no permanent employee subject thereto shall be discharged, suspended or reduced in pay or position except for just cause, the act exempts certain employees by its terms and allows the Governor to designate as exempt from the provisions of the act certain other policy-making or decision-making employees. Where plaintiffs having a position designated as policy-making or confidential by the previous Governor brought suit alleging that each was discharged from an exempt government position for the sole reason of political affiliation, there was a presumption that successor Governor's actions were proper if done for political patronage reasons that require, as a qualification for the performance of a job, a political affiliation. Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990).

Propriety of Reducing Number of Exempt Positions. — An exempt position, so designated by the Governor, creates a presumption at law that discharge or demotion was proper, and this section, by its terms, authorizes the Governor to reduce the number of exempt positions in order that the structure of the State government comply with the terms of the section and that the appropriate government employees enjoy the protection of the civil service position, a position that clearly falls without the political patronage system. Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990).

Property Interest in Employment. — An employee who is subject to the State Personnel Act and who holds a "trainee" appointment as defined by the North Carolina Administrative Code does not have a property interest in her continued employment which is protected by the due process clause of U.S. Const., Amend. XIV. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

Attorney Fee Awards. — G.S. 6-19.1 authorizes a superior court to award fees to the employee of a county Department of Social Services who has prevailed under the State Personnel Act, G.S. 126-1 et seq.; therefore, a trial court was authorized to award fees for representation of a plaintiff during the administrative proceedings contesting her termination while on medical leave, which was adjudged without cause and wrongful. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Cited in Bean v. Darr, 354 F. Supp. 1157 (M.D.N.C. 1973); Faulkner v. North Carolina Dep't of Cors., 428 F. Supp. 100 (W.D.N.C. 1977); Luck v. Employment Sec. Comm'n, 50 N.C. App. 192, 272 S.E.2d 607 (1980); North Carolina Dep't of Cor. v. Hill, 313 N.C. 481, 329 S.E.2d 377 (1985); Smith v. Bounds, 657 F. Supp. 1327 (E.D.N.C. 1986); Gray v. Laws, 915 F. Supp. 747 (E.D.N.C. 1994); Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999); Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

OPINIONS OF ATTORNEY GENERAL

Employment and termination of local health director are subject to the provisions of this chapter, and termination or discharge of a health director must comply with all statutory provisions and regulations duly adopted by the State Personnel Commission pursuant to this chapter. See opinion of Attorney General to Mr. Michael S. Kennedy, Esquire, Attorney for Cleveland County Board of Health, and Mr. Robert W. Yelton, Esquire, Attorney for Cleveland County, 55 N.C.A.G. 113 (1986).

Those occupational licensing boards subject to the Personnel Act, this Chapter, and the Budget Act, G.S. 143-1 et seq., are also subject to G.S. 135-1.1, just as are the occupational licensing boards not subject to the Personnel and Budget Acts. See opinion of Attorney General to Vicky Goudie, Executive Secretary, State Board of Cosmetology, 60 N.C.A.G. 54 (1990).

An occupational licensing board, even one such as the Cosmetic Arts Board and several others subject to the Personnel and Budget Acts, is not entitled to have any of its employees who were employed on or after July 1, 1983, covered by and participating in the Retirement System. See opinion of Attorney General to Vicky Goudie, Executive Secretary, State Board of Cosmetology, 60 N.C.A.G. 54 (1990).

§ 126-1.1. Career State employee defined.

For the purposes of this Chapter, unless the context clearly indicates otherwise, "career State employee" means a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:

(1) Is in a permanent position appointment; and

(2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act for the immediate 24 preceding months. (1995, c. 141, s. 1; 2007-372, s. 1.)

Transfers from Judicial Department to Department of Juvenile Justice - Credit for Service. — Session Laws 1999-237, s. 21.14, provides that, for the purposes of this chapter, employees in positions transferred from the Judicial Department to the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) during the 1998-99 fiscal year or as provided for in that act, who have been continuously employed by the State prior to the date of transfer, are to receive credit for those months of service, and that, upon 24 months of continuous employment in a permanent position with the State, an employee under this section is to become a career State employee.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

"The General Assembly encourages the State Board of Community Colleges to adopt rules authorizing the colleges to provide special annual leave bonuses, compensation bonuses, or other employee benefits to their employees. Included within this may be salary increases within available funds to employees not receiving special annual leave bonuses."

Session Laws 2002-159, s. 87, provides: "Any employee subject to a reduction in force action pursuant to Executive Order Number 22 whose position was ultimately funded in S.L. 2002-126 shall maintain the employee's career State employee status as provided in G.S. 126-1.1. Employees may also purchase vacation leave up to the amount that they had accrued, not to exceed 240 hours, prior to the date of their separation. Employees who had accrued in excess of 240 hours of annual leave shall have that balance reinstated. These employees shall also receive the "Special Annual Leave Bonus" as specified in Section 28.3A of S.L. 2002-126."

Effect of Amendments. — Session Laws 2007-372, s. 1, effective August 19, 2007, added "or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2)" near the end of the introductory paragraph; and inserted "a local entity as provided in G.S. 126-5(a)(2)" following "State of North Carolina" in subdivision (2).

CASE NOTES

State employee seeking review of her termination was not a state employee, as defined in G.S. 126-1.1, because she was not in a permanent position appointment or had not held a position subject to the State Personnel Act, G.S. 126-1 et seq., for the immediate 24 preceding months. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Applied in Campbell v. N.C. DOT - DMV, 155 N.C. App. 652, 575 S.E.2d 54, 2003 N.C. App. LEXIS 24 (2003), cert. denied, 357 N.C. 62, 579 S.E.2d 386 (2003); Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Cited in N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Bobbitt v. N.C. State Univ., — N.C. App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006).

§ 126-1A: Repealed by Session Laws 1995, c. 141, s. 2.

§ 126-2. State Personnel Commission.

(a) There is hereby established the State Personnel Commission (hereinafter referred to as "the Commission").

(b) The Commission shall consist of nine members, appointed as follows:

(1) Two members shall be attorneys licensed to practice law in North Carolina appointed by the General Assembly, one of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives, and one of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate.

The initial two attorney members appointed under this subdivision shall serve terms expiring June 30, 2004; the terms of subsequent appointees shall be six years.

(2) Two persons from private business or industry appointed by the Governor, both of whom shall have a working knowledge of, or practical experience in, human resources management. The initial members appointed under this subdivision shall serve terms expiring June 30, 2003; the terms of subsequent appointees shall be six years.

(3) Two State employees subject to the State Personnel Act serving in nonexempt positions, appointed by the Governor, including one of whom is a veteran of the armed forces appointed upon the nomination of the Veterans' Affairs Commission. One employee shall serve in a State government position having supervisory duties, and one employee shall serve in a nonsupervisory position. Neither employee may be a human resources professional. The Governor shall consider nominations submitted by the State Employees Association of North Carolina. The initial members appointed under this subdivision shall serve terms expiring June 30, 2001; the terms of subsequent appointees shall be six years.

(4) Two local government employees subject to the State Personnel Act appointed by the Governor upon recommendation of the North Carolina Association of County Commissioners, one a nonsupervisory local employee and one a supervisory local employee. Neither local government employee may be a human resources professional. The initial members appointed under this subdivision shall serve terms expiring June 30, 2003; the terms of subsequent appointees shall be for six years.

(5) One member of the public at large appointed by the Governor. The initial member appointed under this subdivision shall serve for a term expiring June 30, 2001; the terms of subsequent appointees shall be for six years.

(c) Members of the Commission may serve no more than two consecutive terms. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Vacancies in appointments made by the Governor occurring prior to the expiration of a term shall be filled by appointment for the unexpired term.

(d) No member of the Commission may serve on a case where there would be a conflict of interest. The appointing authority may at any time remove any Commission member for cause.

(e) Members of the Commission who are State or local government employees subject to the State Personnel Act shall be entitled to administrative leave without loss of pay for all periods of time required to conduct the business of the Commission.

(f) Six members of the Commission shall constitute a quorum.

(g) The Governor shall designate one member of the Commission as chair.

(h) The Commission shall meet quarterly, and at other times at the call of the chair. (1965, c. 640, s. 2; 1975, c. 667, ss. 2-4; 1989, c. 540; 1998-181, s. 1(a), (b); 2000-140, s. 29; 2007-287, s. 1.)

Effect of Amendments. — Session Laws 2007-287, s. 1, effective July 27, 2007, and applicable upon the next vacancy arising under G.S. 126-2(b)(3) on or after July 27, 2007, added "including one of whom is a veteran of the armed forces appointed upon the nomination of the Veterans' Affairs Commission" at the end of the first sentence in subdivision (b)(3).

CASE NOTES

Cited in Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979); Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996).

§ 126-3. Office of State Personnel established and responsibilities outlined; administration and supervision; appointment, compensation and tenure of Director.

(a) There is hereby established the Office of State Personnel (hereinafter referred to as "the Office") which shall be placed for organizational purposes within the Department of Administration. Notwithstanding the provisions of North Carolina State government reorganization as of January 1, 1975, and specifically notwithstanding the provisions of Chapter 864 of the 1971 North Carolina Session Laws [Chapter 143A], the Office of State Personnel shall exercise all of its statutory powers in this Chapter independent of control by the Secretary of Administration and shall be under the administration and supervision of a State Personnel Director (hereinafter referred to as "the Director") appointed by the Governor and subject to the supervision of the Commission for purposes of this Chapter. The salary of the Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. The Director shall serve at the pleasure of the Governor.

(b) The Office shall be responsible for the following activities, and such other activities as specified in this Chapter:

(1) Providing policy and rule development for the Commission and implementing and administering all policies, rules, and procedures established by the Commission;

(2) Providing training in personnel management to agencies, departments, and institutions including train-the-trainer programs for those agencies, departments, and institutions who request such training and where sufficient staff and expertise exist to provide the training within their respective agencies, departments, and institutions;

(3) Providing technical assistance in the management of personnel programs and activities to agencies, departments, and institutions;

(4) Negotiating decentralization agreements with all agencies, departments, and institutions where it is cost-effective to include delegation of authority for certain classification and corresponding salary administration actions and other personnel programs to be specified in the agreements;

(5) Administering such centralized programs and providing services as approved by the Commission which have not been transferred to agencies, departments, and institutions or where this authority has been rescinded for noncompliance;

(6) Providing approval authority of personnel actions involving classification and compensation where such approval authority has not been transferred by the Commission to agencies, departments, and institutions or where such authority has been rescinded for noncompliance;

(7) Maintaining a computer database of all relevant and necessary information on employees and positions within agencies, departments, and institutions in the State's personnel system;

(8) Developing criteria and standards to measure the level of compliance or noncompliance with established Commission policies, rules, procedures, criteria, and standards in agencies, departments, and institutions to which authority has been delegated for classification, salary administration and other decentralized programs, and determining through routine monitoring and periodic review process, that agencies, departments, and institutions are in compliance or noncompliance with established Commission policies, rules, procedures, criteria, and standards; and

(9) Implementing corrective actions in cases of noncompliance. (1965, c. 640, s. 2; 1975, c. 667, s. 5; 1983, c. 717, s. 40; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1997-349, s. 2.)

Cross References. — As to personal services contracts, see G.S. 143-64.70.

§ 126-4. Powers and duties of State Personnel Commission.

Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:

(1) Position classification plans which shall provide for the classification and reclassification of all positions subject to this Chapter according to the duties and responsibilities of the positions.

(2) Compensation plans which shall provide for minimum, maximum, and intermediate rates of pay for all employees subject to the provisions of this Chapter.

(3) For each class of positions, reasonable qualifications as to education, experience, specialized training, licenses, certifications, and other job-related requirements pertinent to the work to be performed.

(4) Recruitment programs designed to promote public employment, communicate current hiring activities within State government, and attract a sufficient flow of internal and external applicants; and determine the relative fitness of applicants for the respective positions.

(5) Hours and days of work, holidays, vacation, sick leave, and other matters pertaining to the conditions of employment. The legal public holidays established by the Commission as paid holidays for State employees shall include Martin Luther King, Jr.'s Birthday and Veterans Day. The Commission shall not provide for more than 11 paid holidays per year except that in those years in which Christmas Day falls on a Tuesday, Wednesday, or Thursday, the Commission shall not provide for more than 12 paid holidays.

(5a) In years in which New Year's Day falls on Saturday, the Commission may designate December 31 of the previous calendar year as the New

Year's holiday, provided that the number of holidays for the previous calendar year does not exceed 12 and the number of holidays for the current year does not exceed 10. When New Year's Day falls on either Saturday or Sunday, the constituent institutions of The University of North Carolina that adopt alternative dates to recognize the legal public holidays set forth in subdivision (5) of this section and established by the Commission may designate, in accordance with the rules of the Commission and the requirements of this subdivision, December 31 of the previous calendar year as the New Year's holiday.

(6) The appointment, promotion, transfer, demotion and suspension of employees.

(7) Cooperation with the State Board of Education, the Department of Public Instruction, the University of North Carolina, and the Community Colleges of the State and other appropriate resources in developing programs in, including but not limited to, management and supervisory skills, performance evaluation, specialized employee skills, accident prevention, equal employment opportunity awareness, and customer service; and to maintain an accredited Certified Public Manager program.

(7a) The separation of employees.

(8) A program of meritorious service awards.

(9) The investigation of complaints and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, reinstatement, and any other issue defined as a contested case issue by this Chapter in all cases as the Commission shall find justified.

(10) Programs of employee assistance, productivity incentives, equal opportunity, safety and health as required by Part 1 of Article 63 of Chapter 143 of the General Statutes, and such other programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and modern system of personnel administration. This subdivision may not be construed to authorize the establishment of an incentive pay program.

(11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

(12) Repealed by Session Laws 1987, c. 320, s. 2.

(13) Repealed by Session Laws 1987, c. 320, s. 3.

(14) The implementation of G.S. 126-5(e).

(15) Recognition of State employees, public personnel management, and management excellence.

(16) The implementation of G.S. 126-7.

(17) An alternative dispute resolution procedure.

(18) Delegation of authority for approval of personnel actions through decentralization agreements with the heads of State agencies, departments, and institutions.

a. Decentralization agreements with Executive Branch agencies shall require a person, designated in the agency, to be accountable to the State Personnel Director for the compliance of all personnel actions taken pursuant to the delegated authority of the agency. Such agreements shall specify the required rules and standards for agency personnel administration.

b. The State Personnel Director shall have the authority to take appropriate corrective actions including adjusting employee salaries and changing employee classifications that are not in compliance with policy or standards and to suspend decentralization agreements for agency noncompliance with the required personnel administration standards.

The policies and rules of the Commission shall not limit the power of any elected or appointed department head, in the department head's discretion and upon the department head's determination that it is in the best interest of the Department, to transfer, demote, or separate a State employee who is not a career State employee as defined by this Chapter. (1965, c. 640, s. 2; 1971, c. 1244, s. 14; 1975, c. 667, ss. 6, 7; 1977, c. 288, s. 1; c. 866, ss. 1, 17, 20; 1985, c. 617, ss. 2, 3; c. 791, s. 50(b); 1985 (Reg. Sess., 1986), c. 1028, s. 6; 1987, c. 25, s. 2; c. 320, ss. 1-3; 1991, c. 65, s. 1; c. 354, s. 2; c. 750, s. 1; 1991 (Reg. Sess., 1992), c. 994, s. 2; 1993, c. 388, s. 2; c. 522, s. 10; 1995, c. 141, s. 4; 1997-349, s. 3; 1998-135, s. 1.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 28.11(f), provides: "Notwithstanding G.S. 126-4(10), or any other provisions of law to the contrary, the Department shall develop an incentive pay pilot program for employees of the Project Development and Environmental Analysis branch. This program shall utilize incentive pay as a means to recognize and reward increased efficiency and productivity, and such payments shall be based on quantifiable measures. The Department shall report to the Joint Legislative Transportation Oversight Committee on the incentive pay pilot program no later than March 30, 2006. This provision does not authorize the implementation of an incentive pay program."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 56 N.C.L. Rev. 898 (1977).

For a survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

CASE NOTES

Powers. — The legislature has delegated, to the extent of the commission's statutory powers, its own legislative powers over the State's personnel system. Therefore, rules and policies made pursuant to the commission's statutory authority have the effect of law. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

Legislative Intent. — The particularized exclusion of certain Department of Correction employees from the provisions of this Chapter plainly indicates the General Assembly's intent that the act's provisions for appeals of employment grievances apply to those not so excluded. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

The General Assembly only intended to give the Commission the jurisdiction to resolve, through the appeal and contested case hearing process, those issues which are specifically defined as contested case issues in Chapter 126. Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996).

Department of Correction Employee Held Not Barred from Appeal Procedures of Chapter 150B. — A permanent employee in a non-policymaking, non-academic position in the Department of Correction was not barred from the appeal procedures of the Administrative Procedure Act, Chapter 150B, by that Act's general exclusion of his department from its provisions. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Most Qualified Applicant. — This section did not confer petitioner with specific grounds for appeal on the issue of whether the most qualified applicant was chosen. Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996).

G.S. 126-37(a) allows Commission to order reinstatement of employee and direct

other suitable relief, whenever it deems it necessary to correct the failure of a department or agency to follow policies or rules promulgated pursuant to G.S. 126-4. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

To serve purpose of Chapter 126, rules and policies made pursuant to this section must be enforced. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

Enforcement of Contracts Made in Violation of Valid Rules. — The purpose of this Chapter and thus public policy would be frustrated by enforcement of contracts made in violation of the valid rules established pursuant to subdivision (3). Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976), aff'd, 534 F.2d 328 (4th Cir. 1976).

If the State Personnel Commission or its officers had the power to enter into an enforceable contract with one not qualified under the rules contemplated by this section, this Chapter would be meaningless. Bean v. Taylor, 408 F. Supp. 614 (M.D.N.C. 1976), aff'd, 534 F.2d 328 (4th Cir. 1976).

Alteration of Approved Policies. — Since the Governor must approve policies established by the Commission under this statute, the Commission does not have the power to alter such policies by ad hoc decision in each case; the Commission must follow the policy which has been set and as it was approved by the Governor. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

Property Interest in Employment. — An employee who is subject to the State Personnel Act and who holds a "trainee" appointment as defined by the North Carolina Administrative Code does not have a property interest in her continued employment which is protected by the due process clause of U.S. Const., Amend. XIV. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

Discretion of Personnel Commission to Award Back Pay and Benefits. — Where a permanent State employee is dismissed for performance of duty reasons, without sufficient warnings as required by G.S. 126-35, upon reinstating the employee the decision whether or not to award back pay and benefits is within the sound discretion of the Personnel Commission. Jones v. Department of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).

The State Personnel Commission is granted the authority to promulgate regulations regarding the award of attorneys' fees under subdivision (11). Fearrington v. University of N.C., 126 N.C. App. 774, 487 S.E.2d 169 (1997).

Court Could Not Order Back Pay. — Where the record of petitioner's grievance proceedings did not include any back pay findings by the State Personnel Commission, given the authority of the Commission over back pay, the absence of record findings, and the superior court's lack of fact-finding authority in appeals from employee grievances, the superior court could not enter an order awarding back pay in a specific amount. Harding v. North Carolina Dep't of Cor., 334 N.C. 414, 432 S.E.2d 298 (1993), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768 (1994).

State Personnel Commission abused its discretion and lacked careful and impartial decisionmaking when it passed over personnel office employee and filled a vacant position with an applicant who did not meet state qualifications for the position and who had filed her application and had been effectively offered the job a month before it was posted. Joyce v. Winston-Salem State Univ., 91 N.C. App. 153, 370 S.E.2d 866, cert. denied, 323 N.C. 476, 373 S.E.2d 862 (1988).

Retention of Employees in Abolished Positions. — Because retention of employees in abolished positions is clearly a personnel matter affecting the separation of employees, under subdivision (7a), the State Personnel Commission has authority to issue a policy thereon and to require the Department of Justice to follow it. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

Plaintiff whose position was abolished and employment terminated did not have to show prejudice once he carried his burden of showing that the Department of Justice failed to follow the State Personnel Commission's policies. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

Burden to Show Department or Agency Followed Personnel Commission's Procedures. — Neither Chapter 126 nor the Administrative Procedure Act indicates that the burden is shifted to the department or agency to show that it followed the Personnel Commission's rules, policies, or procedures. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).

Dismissals. — Just cause for dismissal has been divided into two basic categories—unsatisfactory job performance and personal conduct (misconduct) detrimental to State service. Amanini v. N.C. Dep't of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994).

The distinction between the categories of "just cause" as set forth in the State Personnel Manual provides an applicable test for determining whether a dismissal is for a "good or adequate reason having basis in fact" under particular circumstances. Amanini v. N.C. Dep't of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994).

Attorney Fees. — Upon appeal of the Commission's decision not to award attorney's fees under subsection (11) of this section, G.S. 126-41 constrains the Superior Court to reverse or modify the Commission's order only if it is deemed unreasonable or inadequate. Morgan v. North Carolina DOT, 124 N.C. App. 180, 476 S.E.2d 431 (1996).

Since the Commission had statutory authority to award attorney's fees only in cases involving discrimination, reinstatement or back pay, the Commission properly denied an award of attorney's fees to petitioners. Morgan v. North Carolina DOT, 124 N.C. App. 180, 476 S.E.2d 431 (1996).

Applied in Grissom v. North Carolina Dep't of Revenue, 28 N.C. App. 277, 220 S.E.2d 872 (1976); Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981); Bishop v. North Carolina Dep't of Human Resources, 100 N.C. App. 175, 394 S.E.2d 702 (1990); Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000); Gordon v. N.C. Dep't of Corr., 173 N.C. App. 22, 618 S.E.2d 280, 2005 N.C. App. LEXIS 1918 (2005); Sanders v. State Pers. Comm'n, — N.C. App. —, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

Cited in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976); Williams v. Greene, 36 N.C. App. 80, 243 S.E.2d 156 (1978); Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981); Gibbs v. Department of Human Resources, 77 N.C. App. 606, 335 S.E.2d 924 (1985); Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986); Cauthen v. North Carolina Dep't of Human Resources, 112 N.C. App. 238, 435 S.E.2d 81 (1993); North Carolina Dep't of Cors. v. Harding, 120 N.C. App. 451, 462 S.E.2d 671 (1995); North Carolina Dep't of Cors. v. Myers, 120 N.C. App. 437, 462 S.E.2d 824 (1995); Walker v. North Carolina Coastal Resources Comm'n, 124 N.C. App. 1, 476 S.E.2d 138 (1996), cert. denied, 346 N.C. 185, 486 S.E.2d 220 (1997); Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997), aff'd, 349 N.C. 315, 507 S.E.2d 272 (1998); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999); Pittman v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 268, 573 S.E.2d 628, 2002 N.C. App. LEXIS 1579 (2002); McIntyre v. Forsyth County Dep't of Soc. Servs., 162 N.C. App. 94, 589 S.E.2d 745, 2004 N.C. App. LEXIS 52 (2004), cert. denied, 358 N.C. 377, 598 S.E.2d 136 (2004); Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

OPINIONS OF ATTORNEY GENERAL

The purpose of Chapter 126 and thus public policy would be frustrated by enforcement of contracts made in violation of the valid rules established pursuant to subsection (3) of this section. This frustration of public policy would require nonenforcement of any such contract. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

Employment Offer Without Final Approval Not An Enforceable Contract. — A written or verbal offer of employment by a state agency or university, with a specific salary amount and without the final approval of the State Personnel Director, does not create a legally enforceable contract. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

A written or verbal offer of employment by a state agency or university, with a specific salary amount which violates applicable personnel policies and administrative rules and without the final approval of the State Personnel Director, does not create a legally enforceable contract. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

The position, authority or apparent authority of the person making the offer of employment has no impact on whether the offer constitutes a legally enforceable contract. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

Employment Offer Rescinded for Being in Violation of Personnel Policies and Rules Creates No Agency Liability. — There is no liability of the agency if an offer of employment is made by a state agency or university, with a specific salary amount which violated applicable personnel policies and administrative rules, and later rescinded as being in violation of applicable personnel policies and rules. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

There is no liability of the Office of State Personnel if it refuses to process a hiring decision which violated State Personnel Commission policy. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

The State Personnel Commission has the statutory authority, under this section and G.S. 126-82, to promulgate a rule regarding the application of a veteran's

preference in the form of an additional ten points to be awarded where a numerically scored examination is used as part of the selection process. See opinion of Attorney General to Mr. Ronald Penny, State Personnel Director, Office of State Personnel, 1998 N.C.A.G. 10 (2/12/98).

Liability of Person Who Makes Employment Offer. — It is unlikely that any liability would attach to the person who made an employment offer that is in violation of applicable personnel policies and rules, but it might depend on the nature of the person's position and the circumstances surrounding the offer. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 57 N.C.A.G. 66 (1987).

In determining whether attorneys' fees are allowable in a proceeding brought by an employee, a former employee or an applicant for employment, the State Personnel Commission should apply statutory changes in circumstances in which attorneys' fees may be awarded according to the date the cause of action arose. See opinion of Attorney General to Mr. Harold H. Webb, Director, Office of State Personnel, 47 N.C.A.G. 39 (1977).

Specific Statutory Language Required to Exempt Agency. — Once an individual is entitled to priority employment rights within the State Personnel System, only specific statutory language will be sufficient to eliminate any agency from making a vacancy available to the individual. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 31 (1989).

Entitlement to Reemployment. — When it has been determined either judicially or by the State Personnel Commission that a person is entitled to reemployment rights and a position becomes open within State government for which that person is qualified, the person must be offered that position. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 31 (1989).

State employee subject to State Personnel Act may be denied performance pay increase solely on grounds that he is already at maximum rate of salary range for his pay grade. See opinion of Attorney General to Mr. Joseph E. Johnson, Senator, 14th Senatorial District, 60 N.C.A.G. 19 (4/24/90).

§ 126-4.1. Commission panels may recommend final agency decisions.

(a) The State Personnel Commission ("Commission") may make a final agency decision in a contested case brought under Article 3 of Chapter 150B of the General Statutes upon the recommendation of a panel of its members appointed by the Chair.

(b) For contested case purposes, the Chair of the Commission may appoint panels of four members, with three panelists constituting a quorum of the panel. The Chair shall make every effort to provide that each category of Commission membership enumerated in G.S. 126-2(b) shall be represented on the appointed panels.

(c) When a panel hears and makes a recommendation in a contested case, that recommendation shall then be referred to the full Commission. Upon referral, the full Commission may either:

(1) Accept the recommendation of the panel and incorporate the panel's recommendation as the Commission's final decision; or

(2) Reject the recommendation of the panel and make a final decision upon consideration by the full Commission. (1998-181, s. 2.)

Editor's Note. — Session Laws 1998-181, s. 8 provides that this section shall not be effective until appointments are made in accordance with G.S. 126-2(b), as amended by s. 1(a) of Session Laws 1998-181. These appointments were made.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Cited in N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

§ 126-5. Employees subject to Chapter; exemptions.

(a) The provisions of this Chapter shall apply to:

(1) All State employees not herein exempt, and

(2) All employees of the following local entities:

a. Area mental health, developmental disabilities, and substance abuse authorities.

b. Local social services departments.

c. County health departments and district health departments.

d. Local emergency management agencies that receive federal grant-in-aid funds.

An employee of a consolidated county human services agency created pursuant to G.S. 153A-77(b) is not considered an employee of an entity listed in this subdivision.

(3) County employees not included under subdivision (2) of this subsection as the several boards of county commissioners may from time to time determine.

(b) As used in this section:

(1) "Exempt position" means an exempt managerial position or an exempt policymaking position.

(2) "Exempt managerial position" means a position delegated with significant managerial or programmatic responsibility that is essential to the successful operation of a State department, agency, or division, so that the application of G.S. 126-35 to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division.

(3) "Exempt policymaking position" means a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division, so that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices. The term shall not include personnel professionals.

(4) "Personnel professional" means any employee in a State department, agency, institution, or division whose primary job duties involve administrative personnel and human resources functions for that State department, agency, institution, or division.

(c) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), and 126-7, and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

(1) A State employee who is not a career State employee as defined by this Chapter.

(2) One confidential assistant and two confidential secretaries for each elected or appointed department head and one confidential secretary for each chief deputy or chief administrative assistant.

(3) Employees in exempt policymaking positions designated pursuant to G.S. 126-5(d).

(4) The chief deputy or chief administrative assistant to the head of each State department who is designated either by statute or by the department head to act for and perform all of the duties of such department head during his absence or incapacity.

(c1) Except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

(1) Constitutional officers of the State.

(2) Officers and employees of the Judicial Department.

(3) Officers and employees of the General Assembly.

(4) Members of boards, committees, commissions, councils, and advisory councils compensated on a per diem basis.
(5) Officials or employees whose salaries are fixed by the General Assembly, or by the Governor, or by the Governor and Council of State, or by the Governor subject to the approval of the Council of State.
(6) Employees of the Office of the Governor that the Governor, at any time, in the Governor's discretion, exempts from the application of the provisions of this Chapter by means of a letter to the State Personnel Director designating these employees.
(7) Employees of the Office of the Lieutenant Governor, that the Lieutenant Governor, at any time, in the Lieutenant Governor's discretion, exempts from the application of the provisions of this Chapter by means of a letter to the State Personnel Director designating these employees.
(8) Instructional and research staff, physicians, and dentists of The University of North Carolina, including the faculty of the North Carolina School of Science and Mathematics.
(9) Employees whose salaries are fixed under the authority vested in the Board of Governors of The University of North Carolina by the provisions of G.S. 116-11(4), 116-11(5), and 116-14.
(9a) Employees of the North Carolina Cooperative Extension Service of North Carolina State University who are employed in county operations and who are not exempt pursuant to subdivision (8) or (9) of this subsection.
(10) Repealed by Session Laws 1991, c. 84, s. 1.
(11) Repealed by Session Laws 2006-66, s. 9.11(z), effective July 1, 2007.
(12), (13) Repealed by Session Laws 2001-474, s. 15, effective November 29, 2001.
(14) Employees of the North Carolina State Ports Authority.
(15) Employees of the North Carolina Global TransPark Authority.
(16) The executive director and one associate director of the North Carolina Center for Nursing established under Article 9F of Chapter 90 of the General Statutes.
(17) Repealed by Session Laws 2004-129, s. 37, effective July 1, 2004.
(18) Employees of the Tobacco Trust Fund Commission established in Article 75 of Chapter 143 of the General Statutes.
(19) Employees of the Health and Wellness Trust Fund Commission established in Article 21 of Chapter 130A of the General Statutes.
(20) Employees of the North Carolina Rural Redevelopment Authority created in Part 2D of Article 10 of Chapter 143B of the General Statutes.
(21) Employees of the Clean Water Management Trust Fund.
(22) Employees of the North Carolina Turnpike Authority.
(23) **(Effective until July 1, 2008)** The Executive Administrator and the Deputy Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan.
(23) **(Effective July 1, 2008)** The Executive Administrator and the Deputy Executive Administrator of the State Health Plan for Teachers and State Employees.
(24) **(Effective until July 1, 2008)** Employees of the Teachers' and State Employees' Comprehensive Major Medical Plan as designated by law or by the Executive Administrator of the Plan.
(24) **(Effective July 1, 2008)** Employees of the State Health Plan for Teachers and State Employees as designated by law or by the Executive Administrator of the Plan.
(25) The North Carolina State Lottery Director and employees of the North Carolina State Lottery.

(26) The Executive Director, associate and assistant directors, and instructional staff of the North Carolina Teacher Academy.

(27) The Chief Administrative Law Judge of the Office of Administrative Hearings.

(28) The Executive Director and the Assistant Director of the U.S.S. North Carolina Battleship Commission.

(c2) The provisions of this Chapter shall not apply to:

(1) Public school superintendents, principals, teachers, and other public school employees.

(2) Recodified as G.S. 126-5(c)(4) by Session Laws 1985 (Regular Session, 1986), c. 1014, s. 41.

(3) Employees of community colleges whose salaries are fixed in accordance with the provisions of G.S. 115D-5 and G.S. 115D-20, and employees of the Community Colleges System Office whose salaries are fixed by the State Board of Community Colleges in accordance with the provisions of G.S. 115D-3.

(c3) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(5) and the provisions of Article 6 of this Chapter, the provisions of this Chapter shall not apply to: Teaching and related educational classes of employees of the Department of Correction, the Department of Health and Human Services, and any other State department, agency or institution, whose salaries shall be set in the same manner as set for corresponding public school employees in accordance with Chapter 115C of the General Statutes.

(c4) Repealed by Session Laws 1993, c. 321, s. 145(b).

(c5) Notwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees.

(c6) Article 15 of this Chapter shall apply to all State employees, public school employees, and community college employees.

(c7) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), 126-7, 126-14.3, and except as to the provisions of G.S. 126-14.2, G.S. 126-34.1(a)(2), and Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to exempt managerial positions.

(c8) Except as to the provisions of Articles 5, 6, 7, and 14 of this Chapter, the provisions of this Chapter shall not apply to:

(1) Employees of the University of North Carolina Health Care System.

(2) Employees of the University of North Carolina Hospitals at Chapel Hill, as may be provided pursuant to G.S. 116-37(a)(4).

(3) Employees of the clinical patient care programs of the School of Medicine of the University of North Carolina at Chapel Hill as may be provided pursuant to G.S. 116-37(a)(4).

(4) Employees of the Medical Faculty Practice Plan, a division of the School of Medicine of East Carolina University.

(c9) Notwithstanding any other provision of this section, the provisions of Article 16 of this Chapter shall apply to all exempt and nonexempt State employees in the executive, legislative, and judicial branches unless provided otherwise by Article 16 of this Chapter. The provisions of Article 16 of this Chapter shall not apply to employees described in subdivisions (2) and (3) of subsection (a) of this section.

(c10) Notwithstanding any other provision of this section, the provisions of G.S. 126-8.5 shall apply to all exempt and nonexempt State employees in the executive, legislative, and judicial branch unless provided otherwise by G.S. 126-8.5. The provisions of G.S. 126-8.5 shall not apply to employees described in subdivisions (2) and (3) of subsection (a) of this section.

(c11) The following are exempt from: (i) the classification and compensation rules established by the State Personnel Commission pursuant to G.S. 126-4(1) through (4); (ii) G.S. 126-4(5) only as it applies to hours and days of work, vacation, and sick leave; (iii) G.S. 126-4(6) only as it applies to promotion and transfer; (iv) G.S. 126-4(10) only as it applies to the prohibition of the establishment of incentive pay programs; and (v) Article 2 of Chapter 126 of the General Statutes, except for G.S. 126-7.1:

(1) The Office of the Commissioner of Banks and its employees; and

(2) The following employees of the Department of Cultural Resources:
  a. Director and Associate Directors of the North Carolina Museum of History.
  b. Program Chiefs and Curators.
  c. Regional History Museum Administrators and Curators.
  d. North Carolina Symphony.
  e. Director, Associate Directors, and Curators of Tryon Palace.
  f. Director, Associate Directors, and Curators of Transportation Museum.
  g. Director and Associate Directors of the North Carolina Arts Council.
  h. Director, Assistant Directors, and Curators of the Division of State Historic Sites.

(d)(1) Exempt Positions in Cabinet Department. — The Governor may designate a total of 100 exempt policymaking positions throughout the following departments:
  a. Department of Administration;
  b. Department of Commerce;
  c. Department of Correction;
  d. Department of Crime Control and Public Safety;
  e. Department of Cultural Resources;
  f. Department of Health and Human Services;
  g. Department of Environment and Natural Resources;
  h. Department of Revenue;
  i. Department of Transportation; and
  j. Department of Juvenile Justice and Delinquency Prevention.

The Governor may designate exempt managerial positions in a number up to one percent (1%) of the total number of full-time positions in each cabinet department listed above in this sub-subdivision, not to exceed 30 positions in each department. Notwithstanding the provisions of this subdivision, or the other requirements of this subsection, the Governor may at any time increase by five the number of exempt policymaking positions at the Department of Health and Human Services, but at no time shall the total number of exempt policymaking positions exceed 105. The Governor shall notify the General Assembly and the State Personnel Director of the additional positions designated hereunder.

(2) Exempt Positions in Council of State Departments and Offices. — The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. The State Board of Education may designate exempt positions in the Department of Public Instruction. The number of exempt policymaking positions in each department headed by an elected department head listed above in this sub-subdivision shall be limited to 20 exempt policymaking positions or one percent (1%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 20 posi-

tions or one percent (1%) of the total number of full-time positions in the department, whichever is greater.

(2a) Designation of Additional Positions. — The Governor, elected department head, or State Board of Education may request that additional positions be designated as exempt. The request shall be made by sending a list of exempt positions that exceed the limit imposed by this subsection to the Speaker of the North Carolina House of Representatives and the President of the North Carolina Senate. A copy of the list also shall be sent to the State Personnel Director. The General Assembly may authorize all, or part of, the additional positions to be designated as exempt positions. If the General Assembly is in session when the list is submitted and does not act within 30 days after the list is submitted, the list shall be deemed approved by the General Assembly, and the positions shall be designated as exempt positions. If the General Assembly is not in session when the list is submitted, the 30-day period shall not begin to run until the next date that the General Assembly convenes or reconvenes, other than for a special session called for a specific purpose not involving the approval of the list of additional positions to be designated as exempt positions; the policymaking positions shall not be designated as exempt during the interim.

(3) Letter. — These positions shall be designated in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate by May 1 of the year in which the oath of office is administered to each Governor unless the provisions of subsection (d)(4) apply.

(4) Vacancies. — In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to that person. In the event of a vacancy in the Office of Governor, the State Board of Education shall make these designations in a letter to the State Personnel Director, the Speaker of the House of Representatives, and the President of the Senate within 120 days after the oath of office is administered to the Governor.

(5) Creation, Transfer, or Reorganization. — The Governor, elected department head, or State Board of Education may designate as exempt a position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after May 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 120 days after such position is created, transferred, or in which reorganization has occurred.

(6) Reversal. — Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the Governor, by an elected department head, or by the State Board of Education in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

(7) Hearing Officers. — Except as otherwise specifically provided by this section, no employee, by whatever title, whose primary duties include

the power to conduct hearings, take evidence, and enter a decision based on findings of fact and conclusions of law based on statutes and legal precedents shall be designated as exempt. This subdivision shall apply beginning July 1, 1985, and no list submitted after that date shall designate as exempt any employee described in this subdivision.

(e) An exempt employee may be transferred, demoted, or separated from his or her position by the department head authorized to designate the exempt position except:

(1) When an employee who has the minimum service requirements described in G.S. 126-1.1 but less than 10 years of cumulative service in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall have priority to any position that becomes available for which the employee is qualified, according to rules and regulations regulating and defining priority as promulgated by the State Personnel Commission; or

(2) When an employee who has 10 years or more cumulative service, including the immediately preceding 12 months, in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall be reassigned to a subject position within the same department or agency, or if necessary within another agency, and within a 35 mile radius of the exempt position, at the same grade and salary, including all across-the-board increases since placement in the position designated as exempt, as his most recent subject position.

(f) A department head is authorized to use existing budgeted positions within his department in order to carry out the provisions of subsection (e) of this section. If it is necessary to meet the requirements of subsection (e) of this section, a department head may use salary reserve funds authorized for his department.

(g) No employee shall be placed in an exempt position without 10 working days prior written notification that such position is so designated. A person applying for a position that is designated as exempt must be notified in writing at the time he makes the application that the position is designated as exempt.

(h) In case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B. (1965, c. 640, s. 2; 1967, c. 24, s. 20; cc. 1038, 1143; 1969, c. 982; 1971, c. 1025, s. 2; 1973, c. 476, s. 143; 1975, c. 667, ss. 8, 9; 1977, c. 866, ss. 2-5; 1979, 2nd Sess., c. 1137, s. 40; 1983, c. 717, s. 41; c. 867, s. 2; 1985, c. 589, s. 38; c. 617, s. 1; c. 757, s. 206(c); 1985 (Reg. Sess., 1986), c. 955, s. 43; c. 1014, ss. 41, 235; c. 1022, s. 9; 1987, c. 320, s. 4; c. 395, s. 1; c. 809, s. 1; c. 850, s. 19; 1987 (Reg. Sess., 1988), c. 1064, s. 3; 1989, c. 168, s. 9; c. 236, s. 3; c. 484; c. 727, s. 218(85); c. 751, s. 7(13); 1991, c. 65, s. 2; c. 84, ss. 1, 2; c. 354, s. 3; c. 749, s. 4; 1991 (Reg. Sess., 1992), c. 879, s. 5; c. 959, s. 85; 1993, c. 145, s. 1; c. 321, s. 145(b); c. 553, ss. 39, 40; 1993 (Reg. Sess., 1994), c. 777, s. 4(g); 1995, c. 141, ss. 3, 5; c. 393, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 15; 1997-443, ss. 11A.118(a), 11A.119(a), 22.2(b); 1997-520, s. 3; 1998-212, s. 11.8(b); 1999-84, s. 21; 1999-253, s. 1; 1999-434, s. 25; 2000-137, s. 4(nn); 2000-147, s. 4; 2000-148, s. 3; 2001-92, s. 2; 2001-424, s. 32.16(a); 2001-474, s. 15; 2001-487, ss. 21(d), 30(a), (b); 2002-126, s. 28.4; 2002-133, s. 4; 2004-124, s. 31.27(b); 2004-129, s. 37; 2005-276, s. 29.34(b); 2005-344, s. 9; 2006-66, ss. 9.11(y), (z), 9.17(e), 18.2(e); 2006-204, s. 2; 2006-221, s. 20; 2006-259, s. 49; 2006-264, s. 11; 2007-117, s. 3(b); 2007-195, s. 1; 2007-323, s. 28.22A(o); 2007-345, s. 12; 2007-484, s. 9(c).)

Subdivisions (c1)(23) and (c1)(24) Set Out Twice. — The first versions of subdivisions (c1)(23) and (c1)(24) set out above are effective until July 1, 2008. The second versions of subdivisions (c1)(23) and (c1)(24) set out above are effective July 1, 2008.

Alcohol Law Enforcement Agents Subject to State Personnel Act. — Session Laws 2003-284, s. 17.6, provides: "The Department of Crime Control and Public Safety shall report to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by April 1 of each year on the operations and effectiveness of the National Guard Tarheel Challenge Program. The report should evaluate the program's effectiveness as an intervention method for preventing juveniles from becoming undisciplined or delinquent. The report shall also evaluate the Program's role in improving individual skills and employment potential for participants and shall include:

"(1) The source of referrals for individuals participating in the Program;

"(2) The summary of types of actions or offenses committed by the participants of the Program;

"(3) An analysis outlining the cost of providing services for each participant, including a breakdown of all expenditures related to the administration and operation of the Program and the education and treatment of the Program participants;

"(4) The number of individuals who successfully complete the Program; and

"(5) The number of participants who commit offenses after completing the Program."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Editor's Note. — Subsection (c6), as added by Session Laws 1997-520, s. 3, was redesignated as subsection (c7) at the direction of the Revisor of Statutes.

Session Laws 2000-147, s. 8(a)-(c), provides: "(a) Interpretation of Act. — The foregoing sections of this act provide an additional and alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

"(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

"(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2000-147, s. 8(d), contains a severability clause.

Session Laws 2001-424, s. 21.14(b), as amended by 2001-487, s. 110, provides: "Under the direction of the Secretary of Health and Human Services, the Director of the Office of Policy and Planning shall have the authority to direct Divisions, offices, and programs within the Department to conduct periodic reviews of policies, plans, and rules and shall advise the Secretary when it is determined to be appropriate or necessary to modify, amend, and repeal departmental policies, plans, and rules. All professional and supervisory employees in policy and management positions within the Office of Policy and Planning are exempt from Chapter 126 of the General Statutes except for Articles 6, 7, and 14 of that Chapter. Exempt positions within the Office of Policy and Planning shall not count toward the exempt position totals authorized by G.S. 126-5(d)(1)."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Subdivision (c1)(20) was enacted as subdivision (c1)(18) by Session Laws 2000-148, s. 3, and redesignated as subdivision (c1)(20) at the direction of the Revisor of Statutes.

Section 143B-472.41A, referred to in subdivision (c1)(17), was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000. As to the Information Resource Management Commission, see now G.S. 147-33.78.

Subdivision (c1)(21), as added by Session Laws 2002-133, s. 4, was renumbered as subdivision (c1)(22) at the direction of the Revisor of Statutes.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 29.34(c), effective July 1, 2005, provides: "Notwithstanding G.S. 143-34.1, the Executive Administrator may establish and fill up to three additional managerial, professional, or policy-making positions as necessary to implement the Plan and may designate these positions as exempt from the State Personnel Act."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Subdivision (c1)(24), as added by Session Laws 2005-344, s. 9, was redesignated as subdivision (c1)(25) at the direction of the Revisor of Statutes.

Session Laws 2005-344, which enacted the North Carolina State Lottery, in s. 14, provides: "Nothing in this act shall be construed to obligate the General Assembly to appropriate funds to implement this act."

Session Laws 2006-66, s. 18.2(e), which added subdivision (c1)(26), was added by Session Laws 2006-221, s. 20, and amended by Session Laws 2006-259, s. 49, which recodified (c1)(26) as (c1)(27). The subdivision was then redesignated as (c1)(28) at the direction of the Revisor of Statutes.

Session Laws 2006-259, s. 49, provides: "If House Bill 2762, 2005 Regular Session [2006-204], becomes law, then G.S. 166-5(c1)(26), as enacted by that act, is recodified as G.S. 126-5(c1)(27) [now (c1)(28)]."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-249, s. 3, provides: "Personnel. — For the purpose of improving efficiency and cost-effectiveness of Plan operations, the Executive Administrator and Board of Trustees of the North Carolina State Health Plan may create eight new full-time positions, five of which shall be subject to the State Personnel Act under G.S. 126-5, and three of which shall be exempt from the State Personnel Act under G.S. 126-5(c). The Executive Administrator and Board of Trustees may use up to five hundred sixty-three thousand one hundred six dollars ($563,106) of available funds to support these positions."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 9.11(y) and (z), effective July 1, 2007, substituted "North Carolina, including the faculty of the North Carolina School of Science and Mathematics" for "North Carolina" at the end of subdivision (c1)(8); and repealed subdivision (c1)(11), relating to employees of the North Carolina School of Science and Mathematics.

Session Laws 2006-66, s. 9.17(e), effective January 1, 2007, except that the General Assembly and the Governor may make appointments prior to that date for terms beginning January 1, 2007, added subdivision (c1)(26).

Session Laws 2006-66, s. 18.2(e), as added by 2006-221, s. 20, effective July 1, 2006, added subdivision (c1)(27).

Session Laws 2006-204, s. 2, effective August 8, 2006, added subdivision (c1)(26) (now (c1)(28)).

Session Laws 2006-264, s. 11, effective August 27, 2006, substituted "G.S. 126-1.1" for "subsection (c)(1) above" in subdivision (e)(1).

Session Laws 2007-117, s. 3(b), effective July 1, 2007, added subsections (c9) and (c10).

Session Laws 2007-195, s. 1, effective July 8, 2007, added subdivision (c1)(9a).

Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subdivisions (c1)(23) and (c1)(24).

Session Laws 2007-484, s. 9(c), effective August 30, 2007, added subsection (c11).

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

CASE NOTES

Constitutional Implications. — For case discussing the propriety under U.S. Const., Amends. I and XIV, of adverse personnel actions affecting State employees in exempt positions following the change from the Hunt administration to the Martin administration, see Stott v. Martin, 725 F. Supp. 1365 (E.D.N.C. 1989), rev'd on other grounds, 916 F.2d 134 (4th Cir. 1990).

Legislative Intent. — The particularized exclusion of certain Department of Correction employees from the provisions of this chapter plainly indicates the General Assembly's intent that the Act's provisions for appeals of employment grievances apply to those not so excluded. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

The rationale for creating exempt positions, positions exempt from the protection afforded by the civil service statute, was to allow the Governor to employ top level State employees on an at-will basis, and to reposition these employees as he felt necessary in order to further the agenda of the administration. Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990).

Discharge of Exempt Employees by Successor Governor. — Although the North Carolina State Personnel Act provides that no permanent employee subject thereto shall be discharged, suspended or reduced in pay or position except for just cause, the act exempts certain employees by its terms and allows the Governor to designate as exempt from the provisions of the act certain other policy-making or decision-making employees. Where plaintiffs having a position designated as policy-making or confidential by the previous Governor brought suit alleging that each was discharged from an exempt government position for the sole reason of political affiliation, there was a presumption that successor Governor's actions were proper if done for political patronage reasons that require, as a qualification for the performance of a job, a political affiliation. Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990).

This section controls which employees are subject to Chapter 126. Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996).

Under G.S. 126-5(c)(1) and (c1)(8), the provisions of Chapter 126, the State Personnel Act, did not apply to state employees who were not career state employees, as defined in Chapter 126, or who were instructional and research staff, physicians, and dentists of the University of North Carolina, except for Chapter 126, Articles 6 and 7. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

G.S. 126-5 stated in particular terms which state employees were covered by Chapter 126, prohibiting employment discrimination, and G.S. 126-16 addressed the same subject matter in general terms, but G.S. 126-16 did not affirmatively grant a remedy to an employee who was not otherwise covered by Chapter 126; in short, G.S. 126-5 controlled which employees were subject to Chapter 126. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

When a state employee sought review of the termination of her employment, G.S. 126-5 foreclosed her reliance on any of the provisions of the State Personnel Act, Chapter 126, because she was exempt from the Act, was not a career state employee, and her position was classified as "instructional and research staff of the University of North Carolina." Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Scope of Chapter 126's authority was set out in G.S. 126-5, which stated, in subdivision (a)(1), that the provisions of Chapter 126 applied to all state employees not therein exempt. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Director of Highway Beautification Program Policymaking Exempt Position. — Evidence that the Director of the Highway Beautification Program had authority to impose the final decision as to a settled course of action to be followed within the Department of Transportation was sufficient to designate the position as policymaking exempt under this section. Powell v. North Carolina DOT, 347 N.C. 614, 499 S.E.2d 180 (1998).

Chief of Internal Audit Section of Department of Transportation Not Policymaking Exempt Position. — Even though the Chief of the Internal Audit Section of the Department of Transportation had final decision-making authority within that section, he had no authority to impose a final decision as a settled course of action within the Department or any division thereof and thus the position could not properly be designated as policymaking exempt under this section. North Carolina DOT v. Hodge, 347 N.C. 602, 499 S.E.2d 187 (1998).

Assistant Commissioner of Motor Vehicles Policymaking Exempt Position. — The decision and order of the State Personnel Commission, determining that the position of Assistant Commissioner of Motor Vehicles was "exempt policymaking," was not supported by substantial evidence in the record. Jordan v. DOT, 140 N.C. App. 771, 538 S.E.2d 623, 2000 N.C. App. LEXIS 1272 (2000), cert denied, 353 N.C. 376, 547 S.E.2d 412 (2001).

Not All Local Government Employees Covered. — This Chapter does not establish a public policy that all local government employees have the protection of a grievance procedure. With certain exceptions, this Chapter applies to county employees only as the "boards of county commissioners may from time to time determine." Walter v. Vance County, 90 N.C. App. 636, 369 S.E.2d 631 (1988).

The legislature did not intend for local city or county employees to be included in the class of persons protected by Chapter 126. Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996).

Former Department of Social Services Employee. — Applicability of the just cause requirement set forth in G.S. 126-5(a)(2) is determined by the permanency of employment and not by months of service; therefore, a terminated employee who worked less than 24 months before being terminated while on medical leave was entitled to file a contested case based on a lack of just cause since she had been an employee of the Department of Social Services, which was a local social services department. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

The 1977 amendment clearly evinced an intent to change an employee's rights from mere entitlement to assistance in relocation to entitlement to an offer of a job for which he is qualified once such an opening becomes available. North Carolina Dep't of Cor. v. Hill, 313 N.C. 481, 329 S.E.2d 377 (1985).

Department of Correction Employee Held Not Barred from Appeal Procedures of Chapter 150B. — A permanent employee in a non-policymaking, non-academic position in the Department of Correction was not barred from the appeal procedures of the Administrative Procedure Act, Chapter 150B, by that Act's general exclusion of his department from its provisions. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Meaning of "Department Head," in Subsection (e). — The legislative intent, as to the meaning of the term "department head" in subsection (e), is the official who has executive and managerial authority over the department in which an exempt policymaking position is designated, including cabinet department heads, and while the term clearly refers to elected department heads, it does not refer to the Governor. Carrington v. Brown, 136 N.C. App. 554, 525 S.E.2d 230, 2000 N.C. App. LEXIS 104 (2000).

Authority As "Department Head" Under Subsection (e). — Because the chairman of the Employment Security Commission (ESC) had the authority to staff and make personnel decisions in the ESC, she had the authority as a "department head", pursuant to subsection (e) of this section, to dismiss plaintiff from his exempt policymaking position within the ESC. Carrington v. Brown, 136 N.C. App. 554, 525 S.E.2d 230, 2000 N.C. App. LEXIS 104 (2000).

The term "priority" in the language of subsection (e), providing that "such employee shall have priority to any position that becomes available for which the employee is qualified", gives an affected employee the right to an automatic offer of a position which becomes available. North Carolina Dep't of Cor. v. Hill, 313 N.C. 481, 329 S.E.2d 377 (1985).

In subsection (e), the phrase "such employee shall have priority to any position that becomes available for which the employee is qualified" means that if the employee is qualified for a job in state government which is available, he must be offered this job before it can be filled by anyone else, by promotion or otherwise. North Carolina Dep't of Cor. v. Hill, 313 N.C. 481, 329 S.E.2d 377 (1985).

Property Interest in Employment. — An employee who is subject to the State Personnel Act and who holds a "trainee" appointment as defined by the North Carolina Administrative Code does not have a property interest in her continued employment which is protected by the due process clause of the Fourteenth Amendment. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

Review of Recommended Decision. — No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision in a case involving an exempt employee. Johnson v. Natural Resources & Community Dev., 98 N.C. App. 334, 391 S.W.2d 48 (1990).

Application to District Attorneys. — The protections of the Whistleblower Act apply to all state employees and authorize an action by a wrongfully discharged employee against employers who are constitutional officers, including district attorneys. Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998), cert. denied, 349 N.C. 353, 517 S.E.2d 888 (1998), aff'd, 350 N.C. 89, 511 S.E.2d 304 (1999).

Since an investigatorial assistant's public statements criticizing the district attorney's discretionary decisions and the disruption of his office's working relationship with law enforcement agencies were sufficient reasons, standing alone, to terminate the investigatorial assistant's at will employment, the district attorney's decision to terminate him rested within his lawful and discretionary scope of authority; because the investigatorial assistant's termination was not injurious to the public or against the public good, there was no evidence to establish a genuine issue of material fact to support a claim for wrongful discharge against the district attorney. Hines v. Yates, 171 N.C. App. 150, 614 S.E.2d 385, 2005 N.C. App. LEXIS 1267 (2005).

Application to UNC Instructional Staff. — The Agricultural Extension Agent who was discharged could not establish a property right in his job under this act because he was part of the instructional staff of the UNC system and therefore exempt from its protections. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

Assistant director of the North Carolina State University's Office of Disability Services for Students could not seek review of the termination of her employment through the Office of Administrative Hearings because, under G.S. 126-5(c1)(8), instructional and research staff of the University of North Carolina were specifically exempted from all provisions of the State Personnel Act, G.S. 126-1 et seq., except Chapter 126, Articles 6 and 7. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Application of Veterans Preference. — Pursuant to G.S. 126-83, employees of the System designated in subdivision (a)(2) of this section are expressly excluded from the Preference afforded by G.S. 126-80 but, if qualified under G.S. 128-15, are entitled to the veterans preference thereunder applicable to all employees of State departments, agencies and institutions. Wright v. Blue Ridge Area Auth., 134 N.C. App. 668, 518 S.E.2d 772, 1999 N.C. App. LEXIS 899 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999).

Former employee of a health organization was considered a county health department employee under G.S. 126-5, where the employee was paid through the county payroll department as a health department employee, the health department's interim director asserted that her department was responsible for supervising the employee, the employee's termination letter was issued by the county health department and signed by its interim director, and the employee was subject to the county personnel policies and classified as a probationary employee under that policy. Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 2004 U.S. Dist. LEXIS 20193 (W.D.N.C. 2004).

Employment of a trainee who was in a probationary period with the North Carolina Department of Revenue was not exempted by G.S. 126-5 from the appeals process through the North Carolina State Personnel Commission; although the trainee was not a "career" state employee, G.S. 126-36(a) allowed the Commission to review his claims derived from alleged discrimination on the basis of religion. Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

Cited in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976); Employment Sec. Comm'n v. Lachman, 52 N.C. App. 368, 278 S.E.2d 307 (1981); Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982); Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22 (1984); Mitchell v. Thornton, 94 N.C. App. 313, 380 S.E.2d 146 (1989); Durham Herald Co. v. County of Durham, 334 N.C. 677, 435 S.E.2d 317 (1993); McFadyen v. Freeman, 127 N.C. App. 202, 487 S.E.2d 782 (1997); Cunningham v. Catawba County, 128 N.C. App. 70, 493 S.E.2d 82 (1997); Heckman v. University of N.C., 19 F. Supp. 2d 468 (M.D.N.C. 1998); Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998); Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000); Hodge v. N.C. DOT , 161 N.C. App. 726, 589 S.E.2d 737, 2003 N.C. App. LEXIS 2276 (2003), cert. denied, 358 N.C. 234, 595 S.E.2d 151 (2004); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

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Employment and termination of local health director are subject to the provisions of Chapter 126, the State Personnel Act, and termination or discharge of a health director must comply with all statutory provisions and regulations duly adopted by the State Personnel Commission pursuant to Chapter 126. See opinion of Attorney General to Mr. Michael S. Kennedy, Esquire, Attorney for Cleveland County Board of Health, and Mr. Robert W. Yelton, Esquire, Attorney for Cleveland County, 55 N.C.A.G. 113 (1986).

The Departments of Human Resources [now Department of Health and Human Services] and Department of Correction determine initially whether a particular position is a teaching or related education position within the meaning of subsection (c3). If an employee disputes that decision, he has a right to appeal to the State Personnel Commission and to have the commission resolve the dispute. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 57 N.C.A.G. 13 (1987).

Salaries of Exempt Personnel. — The Secretary of the Department of Human Resources and the Secretary of the Department of Correction have authority to set the salary schedules for persons employed by their departments in teaching and related educational positions exempt from the State Personnel Act by subsection (c3) of this section. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 57 N.C.A.G. 13 (1987).

The salary schedules established by the Department of Human Resources and the Department of Correction for educational personnel exempt from the State Personnel Act must correspond to the salary schedules established by the State Board of Education for public school employees except in cases where the duties of employees do not correspond to the duties of public school employee positions. In such cases the salary schedule should conform as closely as possible to the public school salary schedules. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 57 N.C.A.G. 13 (1987).

Specific Statutory Language Required to Exempt Agency. — Once an individual is entitled to priority employment rights within the State Personnel System, only specific statutory language will be sufficient to eliminate any agency from making a vacancy available to the individual. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 31 (1989).

Entitlement to Reemployment. — When it has been determined either judicially or by the State Personnel Commission that a person is entitled to reemployment rights and a position becomes open within State government for which that person is qualified, the person must be offered that position. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 31 (1989).

Agency Not Exempted from Accepting Individuals Entitled to Priority Reemployment. — The power of the North Carolina Technological Development Authority under G.S. 143B-471.3A(2) to "employ ... staff as it deems necessary" does not exempt the agency from having to accept state employees entitled to priority reemployment rights under the State Personnel System. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 31 (1989).

Acquisition of Nonprofit Corporation by University of North Carolina Health Care System. — Employees of a nonprofit corporation would not become state employees after the acquisition of the corporation by the University of North Carolina Health Care System. See opinion of Attorney General to Representative Daniel T. Blue, Jr., 2000 N.C. AG LEXIS 23 (3/8/2000).

Employees of a nonprofit corporation would not become state employees after the acquisition of the corporation by the University of North Carolina Health Care System. See opinion of Attorney General to Ms. Susan H. Ehringhaus, Senior University Counsel, 2000 N.C. AG LEXIS 32 (2/17/2000).

§ 126-6: Repealed by Session Laws 1991, c. 65, s. 3.

§ 126-6.1: Repealed by Session Laws 1993, c. 397, s. 1.

§ 126-6.2. Reports.

(a) Beginning January 1, 1998, and quarterly thereafter, the head of each State agency, department, or institution employing State employees subject to the State Personnel Act shall report to the Office of State Personnel on the following:

(1) The costs associated with the defense or settlement of administrative grievances and lawsuits filed by current or former State employees and applicants for State employment, including the costs of settlements, attorneys' fees, litigation expenses, damages, or awards incurred by the respective State agencies, departments, and institutions. The report shall include an explanation of the fiscal impact of these costs upon the operations of the State agency, department, or institution.

(2) The modification of position descriptions resulting in changes in position qualifications to allow the use of educational, experience, or other equivalencies in the hiring or promotion of State employees where such equivalencies were not previously used in the position

descriptions. The report shall include an explanation of the reasons for the changes in the position descriptions and the bases for the use of the equivalencies.

(b) Beginning May 1, 1998, and annually thereafter, the State Personnel Commission shall report to the Joint Legislative Commission on Governmental Operations on the costs associated with the defense or settlement of lawsuits and on the use of position qualification equivalencies, as compiled in accordance with subsection (a) of this section.

(c) Beginning May 1, 1998, and then annually thereafter, the State Personnel Commission, through the Office of State Personnel, shall report to the Joint Legislative Commission on Governmental Operations on outcomes with respect to State employee hirings, promotions, disciplinary actions, and compensation, based upon demographics. (1997-520, s. 8(a)-(c).)

Editor's Note. — Session Laws 1997-520, ss. 8(a)-(c), were codified as this section at the direction of the Revisor of Statutes.

ARTICLE 2.

Salaries, Promotions, and Leave of State Employees.

§ 126-7. Compensation of State employees.

(a) It is the policy of the State to compensate its employees at a level sufficient to encourage excellence of performance and to maintain the labor market competitiveness necessary to recruit and retain a competent work force. To this end, salary increases to State employees shall be implemented through the Comprehensive Compensation System based upon the individual performance of each State employee. The Comprehensive Compensation System shall combine salary increases and awards into an interrelated system of compensation that furthers the recruitment, retention, career service, and outstanding performance of State employees.

(a1) Repealed by Session Laws 1993, c. 388, s. 1.

(a2) For the purpose of this section, unless the context indicates otherwise:

(1) "Career growth recognition award" means an annual salary increase awarded to a State employee whose final annual performance appraisal indicates job performance that meets or exceeds management's expectations and performance requirements;

(2) "Cost-of-living adjustment" means a general salary increase given to State employees in response to inflation and labor market factors;

(3) "Performance bonus" means a salary increase that is awarded in a lump sum to a State employee whose final annual performance appraisal indicates job performance that exceeds management's expectations and performance requirements.

(b) To guide the Governor and the General Assembly in making appropriations to fund the Comprehensive Compensation System, the State Personnel Commission shall conduct annual compensation surveys. The Commission shall present the results of the compensation survey to the Appropriations Committees of the House and Senate no later than two weeks after the convening of the legislature in odd years and May 1st of even years.

(b1) The Comprehensive Compensation System shall consist of the following components: (i) the career growth recognition award, (ii) the cost-of-living adjustment, and (iii) the performance bonus. The career growth recognition award shall be the primary method by which an employee progresses through his or her salary range and shall be awarded annually to employees who qualify for the award. An employee may receive, within a 12-month period, the career growth recognition award, the cost-of-living adjustment, and the performance bonus, if the employee's job performance equals or exceeds the level of performance set forth in subdivisions (4), (4a), and (4b) of subsection (c) of this section. No employee shall be eligible to receive during a 12-month period a performance bonus greater than the maximum amount or less than the minimum amount established by the Commission. Nothing in this section shall affect the system of longevity payments established by the Commission.

(c) Career growth recognition awards, cost-of-living adjustments, and performance bonuses shall be based on annual performance appraisals of all employees conducted by each department, agency, and institution. The State Personnel Commission, under the authority of G.S. 126-4(8), shall adopt policy and regulations for performance appraisal. The policy and regulations shall include the following:

(1) The performance appraisal system of each department, agency, or institution shall be designed and administered to ensure that career growth recognition awards, cost-of-living adjustments, and performance bonuses are distributed fairly.

(2) To be eligible to distribute career growth recognition awards, cost-of-living adjustments, and performance bonuses, a department, agency, or institution shall have an operative performance appraisal system which has been approved by the Commission. The performance appraisal system adopted shall use a rating scale of five levels, with level four or better qualifying for performance bonuses, level three or better qualifying for career growth recognition awards, and level two or better qualifying for cost-of-living adjustments. The performance appraisal system adopted shall adhere to modern personnel management techniques and practices in common use in the public and private sectors.

(3) The State Personnel Director shall help departments, agencies, and institutions to establish and administer their performance appraisal systems and shall provide initial and ongoing training in performance appraisal and performance system administration.

(4) An employee whose performance is rated at or above level four of the rating scale shall be eligible to receive, subject to the rules and regulations of the Commission, a performance bonus unless the employee's supervisor justifies in writing to the employee the decision not to award the performance bonus. Other than the Commission, no department, agency, or institution shall set limits so as to preclude an employee whose performance exceeds management's expectations and performance requirements from consideration for a performance bonus.

(4a) An employee whose performance is rated at or above level three of the rating scale shall receive a career growth recognition award unless the employee's supervisor justifies in writing to the employee the decision not to give the career growth recognition award. The career growth recognition award shall represent a two percent (2%) increase within the employee's assigned pay grade. In no event shall any award increase an employee's compensation above the maximum of the range. Other than the Commission, no agency, department, or institution shall set limits so as to preclude an employee whose performance meets or exceeds management's expectations and performance requirements from receiving a career growth recognition award.

(4b) An employee whose performance is rated at or above level two of the rating scale and who has not received a suspension without pay or demotion that has not been resolved shall receive a cost-of-living increase. Other than the Commission, no agency, department, or institution shall set limits or initiate written disciplinary procedures for the purpose of precluding an eligible employee from receiving a cost-of-living adjustment.

(5), (5a) Repealed by Session Laws 1993, c. 388, s. 1.

(6) The State Personnel Director may rescind any career growth recognition award or performance bonus that does not appear to meet the intent of the provisions of the performance appraisal system and require the originating department, agency, or institution to reconsider or justify the increase.

(7) An employee who disputes the fairness of his or her performance appraisal or the amount of a performance bonus awarded or who believes that he or she was unfairly denied a career growth recognition award or performance bonus shall first discuss the problem with his or her supervisor. Appeals of the supervisor's decision shall be made only to the grievance committee or internal performance review board of the department, agency, or institution which shall make a recommendation to the head of the department, agency, or institution for final decision, or when consented to by both the agency and the employee, the supervisor's decision may be appealed by following the alternative dispute resolution process adopted by the State Personnel Commission. The State Personnel Director shall help a department, agency, or institution establish an internal performance review board or, if it includes employee members, to use its existing grievance committee to hear performance pay disputes. Notwithstanding G.S. 150B-2(2) and G.S. 126-22, 126-25, and 126-34, performance pay disputes, including disputes about individual performance appraisals, shall not be considered contested case issues.

(7a) Each department, agency, and institution shall establish a performance management and pay advisory committee as part of the performance appraisal system. The purpose of the committee is to ensure that salary increases and awards are made in an equitable manner. The committee shall be responsible for reviewing:

a. Agency salary increase and award policies to determine whether this section and any guidelines promulgated by the State Personnel Commission have been adhered to;

b. Agency training and education programs to determine whether all employees receive appropriate information; and

c. Performance appraisal ratings within the department, agency, or institution to determine whether an equitable distribution has been made.

The committee must have a minimum of five members. The head of each department, agency, and institution shall appoint the members of the committee with equal representation of nonsupervisory, supervisory, and management employees. The committee shall elect its own chair.

The performance management and pay advisory committee shall meet at least two times each year. The committee shall submit a written report following each meeting to the head of the department, agency, or institution. The report shall include recommendations for changes and corrections in the administration of the performance management system. The recommendations of the committee shall be advisory only. The head of the department, agency, or institution shall respond to the committee within three months. Copies of the report shall be included in the report to the Office of State Personnel that is required of that agency, department, or institution. Summaries of the report shall be included in the annual reports that are mandated by this subsection.

(8) The State Personnel Director shall monitor the performance appraisal system and the distribution of salary increases and awards within each department, agency, and institution. Each department, agency, and institution shall submit to the Director annual reports which shall include data on the demographics of performance ratings, the frequency of evaluations, the distribution of salary increases and awards, and the implementation schedule for salary increases and awards. The Director shall analyze the data to ensure that salary increases and awards are distributed fairly within each department, agency, and institution and across all departments, agencies, and institutions of State government and shall report back to each department, agency, and institution on its appraisal and distribution performance.

(9) The State Personnel Director shall report annually on the Comprehensive Compensation System to the Commission. The report shall evaluate the performance of each department, agency, and institution in the administration of its appraisal system and the distribution of salary increases and awards within each department, agency, and institution and across State government. The report shall include recommendations for improving the performance appraisal system and alleviating inequities. Copies of the report, as adopted by the State Personnel Commission, shall be sent to the Governor, Lieutenant Governor, President Pro Tempore of the Senate, Speaker of the House of Representatives, the standing personnel committees of the House of Representatives and the Senate, and the State Auditor. The State Personnel Director shall recommend to the General Assembly for its approval sanctions to be levied against departments, agencies, and institutions that have deficient performance appraisal systems or that do not link salary increases and awards to employee job performance. These sanctions may include withholding salary increases and awards from the managers and supervisors of individual employing units of departments, agencies, and institutions in which discrepancies exist.

(10) Repealed by Session Laws 1993, c. 388, s. 1.

(d) Repealed by Session Laws 1993, c. 388, s. 1.

(e) The Governor and the General Assembly, subject to availability of funds, shall advance the State's Comprehensive Compensation System by recommending and making annual appropriations to the Comprehensive Compensation System in the following manner:

(1) The career growth recognition award component shall be funded each year at the level required for full implementation as provided by this section.

(2) To the extent that expansion funds are available, the Comprehensive Compensation System shall receive an additional appropriation to fund cost-of-living adjustments. Any remaining available funds shall next be allocated to provide for performance bonuses. The level of the performance bonus allocation shall not exceed two percent (2%) of the total employee payroll. (1965, c. 640, s. 2; 1975, c. 667, s. 2; 1977, c. 802, s. 40.5; c. 866, s. 6; 1977, 2nd Sess., c. 1213; 1989, c. 796; 1989 (Reg. Sess., 1990), c. 1025, s. 1; c. 1028; 1991, c. 689, s. 187(b)-(e); 1993, c. 388, s. 1; 1995, c. 141, s. 6; c. 509, s. 67; 1998-212, s. 28.16B(a).)

Cross References. — For provision that the provisions of this section shall not apply to members of the State Highway Patrol, see G.S. 20-187.3(a).

Editor's Note. — Session Laws 2007-453, ss. 1 through 6, provide: "1. The State Board of Education shall establish a pilot program authorizing the implementation of alternative teacher salary plans. The purpose of the pilot program is to enable local school administrative units to develop and implement new and innovative teacher salary plans that will improve student performance by financially rewarding teachers through performance pay plans, recruiting teachers to the school unit, and recruiting teachers to hard-to-fill positions in specific subject areas. The State Board of Education may select up to five local school administrative units to participate in the pilot program.

"2. Local school administrative units applying to participate in the pilot program shall submit to the State Board of Education a business plan adopted by the local board of education. The business plan shall:

"(1) Explain in detail how additional flexibility regarding the use of salary funds will be used to accomplish specific improvements in student academic performance;

"(2) Describe the alternative methods to be used, the changes to existing practices proposed for the pilot, the incentives or alternative salary structure to be deployed, the expectations for teachers and other employees who participate in the pilot, the anticipated results, and the methods by which teachers and other employees will be evaluated;

"(3) Set out the laws, rules, and policies that must be waived to implement the business plan and the expected outcomes of waiving them;

"(4) Explain how the plan will be administered in a nondiscriminatory manner to assure fair and equitable treatment of all employees and employee groups participating in the pilot;

"(5) Include specific implementation, time line, management, performance, and reporting benchmarks;

"(6) Include statements of how teachers and other stakeholders were included in the development of the plan; and

"(7) Include a statement of how all teachers who will be directly participating in the plan conducted a verifiable secret ballot vote, a statement that the results of the vote were presented to the planning team and local board of education prior to the local board's consideration of the final plan, and a statement that the majority of teachers in the schools participating in the plan and the school administration team have agreed on the design of the plan.

"3. The State Board of Education may grant waivers of laws, rules, and policies to pilot units that are necessary to implement the business plans submitted by the pilot units.

"4. The Department of Public Instruction shall notify all school districts of the availability of the pilot projects and the time lines for submission of the business plans. The Department of Public Instruction shall report to the Joint Legislative Education Oversight Committee as to the number of districts that have submitted business plans, the types of waivers being requested, and the status of the selection process.

"5. The Financial Services Section of the Department of Public Instruction shall monitor the implementation of the business plans by the pilot units and shall report its findings regularly to the State Board of Education and the Joint Legislative Education Oversight Committee.

"6. The Department of Public Instruction and the State Board of Education shall report to the Joint Legislative Education Oversight Committee by June 30, 2010, regarding the effectiveness and performance of all pilots implemented under this act. The report shall include any recommendations regarding the continuation, modification, or elimination of the pilot program."

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

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The intent behind the 1998 amendments was that affected employees would receive the 1998 COLA of 1%, based on their June 30, 1998, salary, that the COLA would become effective July 1, 1998, and that employees would receive retroactive pay to that date. See opinion of Attorney General to Mr. Ronald G. Penny State Personnel Director Office of State Personnel, 1998 N.C.A.G. 52 (12/3/98).

State employee subject to State Personnel Act may be denied performance pay increase solely on grounds that he is already at maximum rate of salary range for his pay grade. See opinion of Attorney General to Mr. Joseph E. Johnson, Senator, 14th Senatorial District, 60 N.C.A.G. 19 (1990).

§ 126-7.1. Posting requirement; State employees receive priority consideration; reduction-in-force rights; Work First hiring.

(a) All vacancies for which any State agency, department, or institution openly recruit shall be posted within at least the following:

(1) The personnel office of the agency, department, or institution having the vacancy; and

(2) The particular work unit of the agency, department, or institution having the vacancy

in a location readily accessible to employees. If the decision is made, initially or at any time while the vacancy remains open, to receive applicants from outside the recruiting agency, department, or institution, the vacancy shall be listed with the Office of State Personnel for the purpose of informing current State employees of such vacancy. The State agency, department, or institution may not receive approval from the Office of State Personnel to fill a job vacancy if the agency, department, or institution cannot prove to the satisfaction of the Office of State Personnel that it complied with these posting requirements. The agency, department, or institution which hires any person in violation of these posting requirements shall pay such person when employment is discontinued as a result of such violation for the work performed during the period of time between his initial employment and separation.

(a1) State employees to be affected by a reduction in force shall be notified of the reduction in force as soon as practicable, and in any event, no less than 30 days prior to the effective date of the reduction in force.

(a2) The State Personnel Commission shall adopt rules to provide that priority consideration for State employees separated from State employment as the result of reductions in force is to enable a State employee's return to career service at a salary grade and salary rate equal to that held in the most recent position. The State Personnel Commission shall provide that a State employee who:

(1) Accepts a position at the same salary grade shall be paid at the same salary rate as the employee's previous position.

(2) Accepts a position at a lower salary grade than the employee's previous position shall be paid at the same rate as the previous position unless the salary rate exceeds the maximum of the new salary grade. When the salary rate exceeds the maximum of the salary grade, the employee's new salary rate shall be reduced to the maximum of the new salary grade.

(b) Subsection (a) of this section does not apply to vacancies which must be filled immediately to prevent work stoppage or the protection of the public health, safety, or security.

(c) If a State employee subject to this section:

(1) Applies for another position of State employment that would constitute a promotion and;

(2) Has substantially equal qualifications as an applicant who is not a State employee

then the State employee shall receive priority consideration over the applicant who is not a State employee. This priority consideration shall not apply when the only applicants considered for the vacancy are current State employees.

(c1) If a State employee who has been separated due to reduction in force or who has been given notice of imminent separation due to reduction in force:

(1) Applies for another position of State employment equal to or lower in salary grade than the position held by the employee at the time of notification or separation; and

(2) Is determined qualified for that position

then within all State agencies, the State employee shall receive priority consideration over all other applicants but shall receive equal consideration with other applicants who are current State employees not affected by the reduction in force. This priority shall remain in effect for a period of 12 months from the date the employee receives notification of separation by reduction in force. State employees separated due to reduction in force shall receive higher priority than other applicants with employment or reemployment priorities, except that the reemployment priority created by G.S. 126-5(e)(1) shall be considered as equal. The reduction-in-force priority created by this subsection shall be administered in accordance with rules promulgated by the State Personnel Commission.

(c2) If the applicants for reemployment for a position include current State employees, a State employee with more than 10 years of service shall receive priority consideration over a State employee having less than 10 years of service in the same or related position classification. This reemployment priority shall be given by all State departments, agencies, and institutions with regard to positions subject to this Chapter.

(d) "Qualifications" within the meaning of subsection (c) of this section shall consist of:

(1) Training or education;
(2) Years of experience; and
(3) Other skills, knowledge, and abilities that bear a reasonable functional relationship to the abilities and skills required in the job vacancy applied for.

(e) Each State agency, department, and institution is encouraged to hire into State government employment qualified applicants who are current or former Work First Program participants.

(f) Each State agency, department, institution, university, community college, and local education agency shall verify, in accordance with the Basic Pilot Program administered by the United States Department of Homeland Security pursuant to 8 U.S.C. § 1101, et seq, each individual's legal status or authorization to work in the United States after hiring the individual as an employee to work in the United States. (1987, c. 689, s. 2; 1991, c. 65, s. 4; c. 474, s. 1; 1995, c. 141, s. 9; c. 507, s. 7.20(a); 1997-443, s. 12.7(d); 2006-259, s. 23.1(a).)

Editor's Note. — Session Laws 2006-259, s. 23.1(b), provides: "This section does not apply to persons under contract or subcontract. This section applies to employees hired on or after January 1, 2007, except that it applies to employees of local education agencies hired on or after March 1, 2007."

Effect of Amendments. — Session Laws 2006-259, s. 23.1(a), effective August 23, 2006, and applicable to persons under contract or subcontract and is applicable to employees hired on or after January 1, 2007, except that it applies to employees of local education agencies hired on or after March 1, 2007, added subsection (f).

CASE NOTES

Priority Consideration. — Where nurse was a state employee who applied for a supervisory nursing position of state employment, and there was substantial evidence to support the finding that petitioner's qualifications were "substantially equal" to the non-state employee applicant, the State Personnel Commission did not err in applying the state employee priority consideration provision. Dockery v. North Carolina Dep't of Human Resources, 120 N.C. App. 827, 463 S.E.2d 580 (1995).

Judgment for a former state employee was reversed as the phrase "in the same or related position classification" in G.S. 126-7.1(c2) applied to both state employees with more and less than 10 years of service; as the employee did not have more than 10 years of service in the same or related position classification, she was not entitled to priority consideration for a vacant position. Wilkins v. N.C. State Univ., 178 N.C. App. 377, 631 S.E.2d 221, 2006 N.C. App. LEXIS 1399, cert. denied, 637 S.E.2d 219 (N.C. 2006).

Phrase "in the same or related position classification" in G.S. 126-7.1(c2) applies to both state employees with more and less than 10 years of service. Wilkins v. N.C. State Univ., 178 N.C. App. 377, 631 S.E.2d 221, 2006 N.C. App. LEXIS 1399, cert. denied, 637 S.E.2d 219 (N.C. 2006).

Cited in Teague v. Western Carolina Univ., 108 N.C. App. 689, 424 S.E.2d 684 (1993).

OPINIONS OF ATTORNEY GENERAL

State's Use of Personnel Agency to Fill Positions. — This section does not prohibit the State or one of its agencies from utilizing the services of a personnel agency or search firm to find candidates for a difficult-to-recruit position after other efforts to fill the position have failed; however, the statutorily mandated promotional priority for state employees under this section restricts and limits the ability of state agencies to act in this situation. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 58 N.C.A.G. 91 (1988).

A university may restrict the applicant pool for a vacant position to employees currently employed within the individual department in which the vacancy occurs, as long as it makes it clear that it is not receiving or considering any applications from outside the department and does not, in fact, receive or consider any outside applications. See opinion of Attorney General to Mr. Ronald Penny, State Personnel Director, Office of State Personnel, 1998 N.C.A.G. 21 (5/1/98).

§ 126-7.2. Time limit for appeals of applicants and noncareer State employees.

Any applicant or employee that has not attained career status, appealing any decision or action shall file a petition for contested case hearing with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal. (1995, c. 141, s. 10.)

§ 126-8. Minimum leave granted State employees.

The amount of vacation leave granted to each full-time State employee subject to the provisions of this Chapter shall be determined in accordance with a graduated scale established by the State Personnel Commission which shall allow the equivalent rate of not less than two weeks' vacation per calendar year, prorated monthly, cumulative to at least 30 days. On December 31 of each year, any State employee who has vacation leave in excess of the allowed accumulation shall have that leave converted to sick leave. Sick leave allowed as needed to such State employees shall be at a rate not less than 10 days for each calendar year, cumulative from year to year. Notwithstanding any other provisions of this section, no full-time State employee subject to the provisions of Chapter 126, as the same appears in the Cumulative Supplement to Volume 3B of the General Statutes, on May 23, 1973, shall be allowed less than the equivalent of three weeks' vacation per calendar year, cumulative to at least 30 days. (1965, c. 640, s. 2; 1973, c. 697, ss. 1, 2; 1975, c. 667, s. 2; 1993, c. 321, s. 73(f); c. 561, s. 18(a).)

Editor's Note. — Session Laws 2002-126, s. 28.3B, provides: "A State employee is entitled to take up to 52 weeks of leave without pay during a five-year period in order to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition. For State employees subject to the State Personnel Act, this leave shall be administered under the Family and Medical Leave procedures of the State Personnel Commission. Benefits under this section for employees not subject to the State Personnel Act shall be administered under the Family and Medical Leave procedures applicable to those employees. Benefits under this section are supplemental to any benefit to which an employee may otherwise be entitled."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, is a severability clause.

§ 126-8.1. Paid leave for certain athletic competition.

(a) As used in this section, the term "United States team" includes any group leader, coach, official, trainer, or athlete who is a member of an official United States delegation in Pan American, Olympic or international athletic competition.

(b) Any State employee or public school employee paid by State funds who has been chosen to be a member of a United States team for Pan American, Olympic or international competition shall be granted paid leave, in addition to annual and sick leave that person is otherwise entitled to, for the sole purpose of training for and competing in that competition. The paid leave shall be for the period of the official training camp and competition or 30 days a year, whichever is less.

(c) **(Effective until July 1, 2007)** The Department of Administration may adopt such rules and regulations as are reasonable and necessary to carry out the provisions of this section, with the approval of the Governor. Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission.

(c) **(Effective July 1, 2007)** The Department of Administration may adopt such rules and regulations as are reasonable and necessary to carry out the provisions of this section, with the approval of the Governor. (1979, c. 708; 1983, c. 717, s. 42; 1985, (Reg. Sess., 1986), c. 955, ss. 44, 45; 2006-203, s. 69.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until July 1, 2007. The second version of subsection (c) set out above is effective July 1, 2007.

Editor's Note. — Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 69, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former last sentence of (c), which read: "Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission."

§ 126-8.2. Replacement of law-enforcement officer on final sick leave.

When a sworn law-enforcement officer employed by the State is on sick leave, and the head of the department employing the officer has obtained a certification from a physician that the officer will not recover and return to duty, a replacement for the officer may be hired even though the resulting number of employees in the department exceeds the number for which an appropriation was made in the Current Operations Appropriations Act, if sufficient funds are available from appropriations to the department for salaries to pay the salary of both the new employee and the officer on sick leave until the officer's accumulated leave is exhausted or his employment is terminated. (1983 (Reg. Sess., 1984), c. 1034, s. 105.)

§ 126-8.3. Voluntary shared leave.

The State Personnel Commission, in cooperation with the State Board of Community Colleges and the State Board of Education, shall adopt rules and policies to allow any employee at a State agency to share leave voluntarily with an immediate family member who is an employee of a State agency, community college, or public school; and with a coworker's immediate family member who is an employee of a State agency, community college, or public school. For the purposes of this section, the term "immediate family member" means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships. The term "coworker" means that the employee donating the leave is employed by the same agency, department, institution, university, local school administrative unit, or community college as the employee whose immediate family member is receiving the leave. (1999-170, s. 1; 2003-9, s. 1; 2003-284, s. 30.14A(a).)

Cross References. — As to voluntary shared leave for public school employees, see G.S. 115C-12.2. As to voluntary shared leave for community college employees, see G.S. 115D-25.3.

Editor's Note. — Session Laws 2003-9, s. 4, provides: "Prior to the adoption of any rules pursuant to this Act:

"(a) The president of any community college shall allow any employee of that community college to share leave voluntarily with an immediate family member, as defined in Section 3 of this Act, who is an employee of a community college, public school, or State agency; and

"(b) Community colleges, public schools, and State agencies shall permit eligible employees to receive leave pursuant to this Act."

§ 126-8.4. (See note on condition precedent) No sick leave taken for absences by State employees resulting from adverse reactions to vaccination.

(a) Absence from work by an employee shall not count against the employee's sick leave, and the employee's salary shall continue during the absence when the employee receives in employment vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) and the absence is due to the employee having an adverse medical reaction resulting from the vaccination. The provisions of this subsection shall apply for a maximum of 480 employment hours. The employing department, agency, institution, or entity may require the employee to obtain certification from a health care provider justifying the need for leave after the first 24 hours of leave taken pursuant to this subsection.

(b) Absence from work by an employee shall not count against the employee's sick leave, and the employee's salary shall continue during the absence when the employee is permanently or temporarily living in the home of a person who receives in employment vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) and the absence is due to (i) the employee having an adverse medical reaction resulting from exposure to the vaccinated person, or (ii) the need to care for the vaccinated person who has an adverse medical reaction resulting from the vaccination. The provisions of this subsection shall apply for a maximum of 480 employment hours. The employing department, agency, institution, or entity may require the employee to obtain certification from a health care provider justifying the need for leave after the first 24 hours of leave taken pursuant to this subsection.

(c) Notwithstanding any other provisions of this Chapter, this section applies to all State employees. (2003-169, s. 4.)

Cross References. — As to tort claims arising from certain smallpox vaccinations of State employees, see G.S. 143-300.1A.

Condition Precedent to Recovery of Compensation and Benefits for Adverse Reactions to Vaccination. — Session Laws 2003-169, s. 7, provides: "In the event that federal regulatory or statutory provisions providing compensation and benefits to persons for infection with smallpox, infection with vaccinia, or any adverse medical reaction incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) are adopted, a condition precedent to recovery under this act shall be that the person claiming compensation and benefits under this act shall first seek compensation and benefits under the federal provisions, with those provisions constituting primary coverage and the person then being entitled to compensation and benefits under this act not exceeding a total recovery under the federal provisions and this act equal to the amount available under the applicable provisions of this act." The Smallpox Emergency Personnel Protection Act of 2003, Public Law 108-20, 117 Stat. 638, authorized the Secretary of Health and Human Services to establish the Smallpox Vaccine Injury Compensation Program, which covers individuals immunized through Jan. 23, 2005 (smallpox) or vaccinia contacts who show symptoms by Feb. 22, 2005.

Editor's note. — Session Laws 2003-169, s. 9, made this section effective June 12, 2003, and applicable to claims arising from infection or adverse medical reactions related to smallpox vaccinations incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) whether the infection or adverse medical reactions occurred before, on, or after June 12, 2003.

Session Laws 2003-169, s. 8, is a severability clause.

§ 126-8.5. Discontinued service retirement allowance and severance wages for certain State employees.

(a) When the Director of the Budget determines that the closing of a State institution or a reduction in force will accomplish economies in the State Budget, he shall pay either a discontinued service retirement allowance or severance wages to any affected State employee, provided reemployment is not available. As used in this section, "economies in the State Budget" means economies resulting from elimination of a job and its responsibilities or from a lack of funds to support the job. In determining whether to pay a discontinued service retirement allowance or severance wages, the Director of the Budget shall consider the recommendation of the department head involved and any recommendation of the State Personnel Director. Severance wages shall not be paid to an employee who chooses a discontinued service retirement. Severance wages shall not be subject to employer or employee retirement contributions. Severance wages shall be paid according to the policies adopted by the State Personnel Commission.

Notwithstanding any other provisions of the State's retirement laws, any employee of the State who is a member of the Teachers' and State Employees' Retirement System or the Law-Enforcement Officers' Retirement System and who has his job involuntarily terminated as a result of economies in the State Budget may be entitled to a discontinued service retirement allowance, subject to the approval of the employing agency and the availability of agency funds. An unreduced discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 20 or more years of creditable retirement service who are at least 55 years of age; or a discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 20 or more years of creditable retirement service who are at least 50 years of age, reduced by one-fourth of one percent (¼ of 1%) for each month that retirement precedes his fifty-fifth birthday. In cases where a discontinued service retirement allowance is approved, the employing agency shall make a lump sum payment to the Administrator of the State Retirement Systems equal to the actuarial present value of the additional liabilities imposed upon the System, to be determined by the System's consulting actuary, as a result of the discontinued service retirement, plus an administrative fee to be determined by the Administrator.

The salary used to determine severance wages under this section is the last annual salary except that if the employee was promoted within the previous 12 months, the last annual salary is that annual salary prior to the promotion. If the annual salary prior to the promotion is used, it shall be adjusted to account for any across-the-board legislative salary increases. Excluded from any calculation are any benefits such as, but not limited to, overtime pay, shift pay, holiday premium, or longevity pay.

(b) Any employee separated from State government and paid severance wages under this section shall not be employed under a contractual arrangement by any State agency, other than the constituent institutions of The University of North Carolina and the constituent institutions of the North Carolina Community College System, until 12 months have elapsed since the separation. This subsection does not affect any reduction in force rights that the employee may have. (1979, c. 838, s. 22; 1983, c. 761, s. 225; c. 923, s. 217(R); 1983 (Reg. Sess., 1984), c. 1034, s. 251; 1985 (Reg. Sess., 1986), c. 981, s. 1; c. 1024, s. 20; 1987, c. 177, s. 2; 1989 (Reg. Sess., 1990), c. 1066, s. 36(a); 1998-212, s. 28.28(a); 2006-203, s. 6.)

Editor's Note. — This section was formerly codified as G.S. 143-27.2. It was recodified as G.S. 126-8.5 by Session Laws 2006-203, s. 6, effective July 1, 2007.

Session Laws 2006-203, s. 126, provides: "This act becomes effective July 1, 2007, and applies to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Editor's Note. — *The case cited below was decided under former G.S. 143-27.2.*

Voluntary Resignation. — The Legislature has not authorized the expenditure of public funds in the nature of severance pay to public employees who voluntarily resign their position. Leete v. County of Warren, 341 N.C. 116, 459 S.E.2d 232 (1995).

Cited in Leete v. County of Warren, 341 N.C. 116, 462 S.E.2d 476 (1995).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion cited below was decided under former G.S. 143-27.2*

State Budget Officer Cannot Select Discontinued Service Retirement Allowance Unless Employing Agency Head Has Approved Payment. — The State Budget Officer cannot approve discontinued service retirement allowance when the agency head of the employing agency does not recommend (and approve) such an allowance, even if state funds are available and a state employee meets the age and length of service requirements set forth in this section. See opinion of Attorney General to Mr. David T. McCoy, State Budget Officer, 2001 N.C. AG LEXIS 30 (11/7/01).

ARTICLE 3.

Local Discretion as to Local Government Employees.

§ 126-9. County or municipal employees may be made subject to rules adopted by local governing body.

(a) When a board of county commissioners adopts rules and regulations governing annual leave, sick leave, hours of work, holidays, and the administration of the pay plan for county employees generally and the county rules and regulations are filed with the State Personnel Director, the county rules will supersede the rules adopted by the State Personnel Commission as to the county employees otherwise subject to the provisions of this Chapter.

(b) No county employees otherwise subject to the provisions of this Chapter may be paid a salary less than the minimum nor more than the maximum of the applicable salary range adopted in accordance with this Chapter without approval of the State Personnel Commission. Provided, however, that subject to the approval of the State Personnel Commission, a board of county commissioners may adjust the salary ranges applicable to employees who are otherwise subject to the provisions of this Chapter, in order to cause the level of pay to conform to local financial ability and fiscal policy. The State Personnel Commission shall adopt policies and regulations to ensure that significant relationships within the schedule of salary ranges are maintained.

(c) When two or more counties are combined into a district for the performance of an activity whose employees are subject to the provisions of this Chapter, the boards of county commissioners of the counties may jointly exercise the authority hereinabove granted in subsections (a) and (b) of this section.

(d) When a municipality is performing an activity by or through employees which are subject to the provisions of this Chapter, the governing body of the municipality may exercise the authority hereinabove granted in subsections (a) and (b) of this section. (1965, c. 640, s. 2; 1975, c. 667, s. 2.)

§ 126-10. Personnel services to local governmental units.

The State Personnel Commission may make the services and facilities of the Office of State Personnel available upon request to the political subdivisions of the State. The State Personnel Commission may establish reasonable charges for the service and facilities so provided, and all funds so derived shall be deposited in the State treasury to the credit of the general fund. (1965, c. 640, s. 2; 1975, c. 667, ss. 2, 12.)

§ 126-11. Local personnel system may be established; approval and monitoring; rules and regulations.

(a) The board of county commissioners of any county may establish and maintain a personnel system for all employees of the county subject to its jurisdiction, which system and any substantial changes to the system, shall be approved by the State Personnel Commission as substantially equivalent to the standards established under this Chapter for employees of local departments of social services, local health departments, and area mental health programs, local emergency management programs. If approved by the State Personnel Commission, the employees covered by the county system shall be exempt from all provisions of this Chapter except Article 6.

(a1) With approval of each of the boards of commissioners of the county or counties which comprise the area mental health authority, the area mental health authority may establish and maintain a personnel system for all employees of the area mental health authority, which system and any substantial changes to the system, shall be equivalent to the standards established under this Chapter for employees of area mental health authorities. If approved by the State Personnel Commission, the employees covered by the area mental health authority system shall be exempt from all provisions of this Chapter except Article 6.

(b) A board of county commissioners may petition the State Personnel Commission to determine whether any portion of its total personnel system meets the requirements in (a) above. Upon such determination, county employees shall be exempt from the provisions of this Chapter relating to the approved portions of the county personnel system.

(b1) The board of an area mental health authority, with the approval of each of the boards of commissioners of the county or counties which comprise the area mental health authority, may petition the State Personnel Commission to determine whether any portion of its total personnel system meets the requirements in subsection (a1) above. Upon such determination, area mental health authority employees shall be exempt from the provisions of this Chapter relating to the approved portions of the area mental health authority personnel system except as provided in G.S. 122C-121.

(c) The Office of State Personnel shall monitor at least annually county or area mental health authority personnel systems approved under this section in order to ensure compliance.

(d) In order to define "substantially equivalent," the State Personnel Commission is authorized to promulgate rules and regulations to implement the federal merit system standards and these regulations at a minimum shall include: recruitment and selection of employees; position classification; pay administration; training; employee relations; equal employment opportunity; and records and reports. (1965, c. 640, s. 2; 1975, c. 667, s. 2; 1983, c. 674, s. 1; 1991, c. 65, s. 5; c. 564, s. 1.)

CASE NOTES

Applied in Bean v. Darr, 354 F. Supp. 1157 (M.D.N.C. 1973).

Cited in Fuqua v. Rockingham County Bd. of Social Servs., 125 N.C. App. 66, 479 S.E.2d 273 (1996).

Article 4.

Competitive Service.

§ 126-12. Governor and Council of State to determine competitive service.

The Governor, with the approval of the Council of State, shall from time to time determine for which, if any of the positions subject to the provisions of Article 1 of this Chapter, appointments and promotions shall be based on a competitive system of selection. (1965, c. 640, s. 2.)

Article 5.

Political Activity of Employees.

§ 126-13. Appropriate political activity of State employees defined.

(a) As an individual, each State employee retains all the rights and obligations of citizenship provided in the Constitution and laws of the State of North Carolina and the Constitution and laws of the United States of America; however, no State employee subject to the Personnel Act or temporary State employee shall:

(1) Take any active part in managing a campaign, or campaign for political office or otherwise engage in political activity while on duty or

within any period of time during which he is expected to perform services for which he receives compensation from the State;

(2) Otherwise use the authority of his position, or utilize State funds, supplies or vehicles to secure support for or oppose any candidate, party, or issue in an election involving candidates for office or party nominations, or affect the results thereof.

(b) No head of any State department, agency, or institution or other State employee exercising supervisory authority shall make, issue, or enforce any rule or policy the effect of which is to interfere with the right of any State employee as an individual to engage in political activity while not on duty or at times during which he is not performing services for which he receives compensation from the State. A State employee who is or may be expected to perform his duties on a twenty-four hour per day basis shall not be prevented from engaging in political activity except during regularly scheduled working hours or at other times when he is actually performing the duties of his office. The willful violation of this subdivision shall be a Class 1 misdemeanor. (1967, c. 821, s. 1; 1985, c. 469, s. 1; c. 617, s. 5; 1993, c. 539, s. 930; 1994, Ex. Sess., c. 24, s. 14(c).)

OPINIONS OF ATTORNEY GENERAL

Probation and parole officer may file notice of candidacy and campaign for election to the office of sheriff assuming that no federal funds are involved with respect to the probation and parole officer's employment and, thus, that proscriptions contained in the federal Hatch Act do not apply. See opinion of Attorney General to Sheriff Ralph L. Thomas, Carteret County, 55 N.C.A.G. 35 (1985).

§ 126-14. Promise or threat to obtain political contribution or support.

(a) It is unlawful for a State employee or a person appointed to State office, other than elective office or office on a board, commission, committee, or council whose function is advisory only, whether or not subject to the Personnel Act, to coerce:

(1) a State employee subject to the Personnel Act,
(2) a probationary State employee,
(3) a temporary State employee, or
(4) an applicant for a position subject to the Personnel Act

to support or contribute to a political candidate, political committee as defined in G.S. 163-278.6, or political party or to change the party designation of his voter registration by threatening that change in employment status or discipline or preferential personnel treatment will occur with regard to a person listed in subdivisions (1) through (4).

(b) Any person violating this section shall be guilty of a Class 2 misdemeanor.

(c) A State employee subject to the Personnel Act, probationary State employee, or temporary State employee who without probable cause falsely accuses a State employee or a person appointed to State office of violating this section shall be subject to discipline or change in employment status in accordance with the provisions of G.S. 126-35, 126-37, and 126-38 and may, as otherwise provided by law, be subject to criminal penalties for perjury or civil liability for libel, slander, or malicious prosecution. (1967, c. 821, s. 1; 1985, c. 469, s. 2; 1991, c. 505, s. 1; 1993, c. 539, s. 931; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 126-14.1. Threat to obtain political contribution or support.

(a) It is unlawful for any person to coerce:

(1) a State employee subject to the Personnel Act,
(2) a probationary State employee,
(3) a temporary State employee, or
(4) an applicant for a position subject to the Personnel Act

to support or contribute to a political candidate, political committee as defined in G.S. 163-278.6, or political party or to change the party designation of his voter registration by explicitly threatening that change in employment status or discipline or preferential personnel treatment will occur with regard to any person listed in subdivisions (1) through (3) of this subsection.

(b) Any person violating this section shall be guilty of a Class 2 misdemeanor.

(c) A State employee subject to the Personnel Act, probationary State employee, or temporary State employee, who without probable cause falsely accuses a person of violating this section shall be subject to discipline or change in employment status in accordance with the provisions of G.S. 126-35, 126-37, and 126-38 and may, as otherwise provided by law, be subject to criminal penalties for perjury or civil liability for libel, slander, or malicious prosecution. (1985, c. 469, s. 3; 1991, c. 505, s. 2; 1993, c. 539, s. 932; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 126-14.2. Political hirings limited.

(a) It is the policy of this State that State departments, agencies, and institutions select from the pool of the most qualified persons for State government employment based upon job-related qualifications of applicants for employment using fair and valid selection criteria.

(b) All State departments, agencies, and institutions shall select from the pool of the most qualified persons for State government employment without regard to political affiliation or political influence. For the purposes of this section, the "most qualified persons" shall mean each of the State employees or applicants for initial State employment who:

(1) Have timely applied for a position in State government;
(2) Have the essential qualifications for that position; and
(3) Are determined to be substantially more qualified as compared to other applicants for the position, after applying fair and valid job selection criteria, in accordance with G.S. 126-5(e), G.S. 126-7.1, Articles 6 and 13 of this Chapter, and State personnel policies approved by the State Personnel Commission.

(c) It is a violation of this section giving rise to the remedies set forth in G.S. 126-14.4 if:

(1) The complaining State employee or applicant for initial State employment timely applied for the State government position in question;
(2) The complaining State employee or applicant for initial State employment was not hired into the position;
(3) The complaining State employee or applicant for initial State employment was among the most qualified persons applying for the position as defined in this Chapter;
(4) The successful applicant for the position was not among the most qualified persons applying for the position; and
(5) The hiring decision was based upon political affiliation or political influence.

(d) The provisions of this section shall not apply to positions exempt from this Chapter, except that this section does apply to exempt managerial positions as defined by G.S. 126-5(b)(2). (1997-520, s. 1.)

§ 126-14.3. Open and fair competition.

The State Personnel Commission shall adopt rules or policies to:

(1) Assure recruitment, selection, and hiring procedures that encourage open and fair competition for positions in State government employment and that encourage the hiring of a diverse State government workforce.

(2) Assure the proper and thorough advertisement of job openings in State government employment and lengthen, as appropriate, the period for submitting applications for State government employment.

(3) Require that a closing date shall be posted for each job opening, unless an exception for critical classifications has been approved by the State Personnel Commission.

(4) Require that timely written notice shall be provided to each unsuccessful applicant for State employment who is in the pool of the most qualified applicants for a position, as defined by G.S. 126-14.2(b).

(5) Assure that State departments, agencies, and institutions follow similar selection processes when hiring State employees in accordance with this Chapter.

(6) Assure that State supervisory and management personnel, and personnel professionals, receive adequate training and continuing education to carry out the State's policy of hiring from among the most qualified persons.

(7) Establish a monitoring system to measure the effectiveness of State agency personnel procedures to promote fairness and reduce adverse impact on all demographic groups in the State government workforce.

(8) Otherwise implement the State's policy of nonpolitical hiring practices in accordance with this Chapter. (1997-520, s. 1.)

§ 126-14.4. Remedies.

(a) A State employee or applicant for initial State employment who has reason to believe that he or she was among the pool of the most qualified persons for a position in State government employment and was denied employment or promotion in violation of G.S. 126-14.2 because of political affiliation or political influence may complain directly through the Civil Rights Division of the Office of Administrative Hearings, which shall be responsible for making an initial determination of whether there is probable cause to believe that there has been a violation of G.S. 126-14.2.

The complaining State employee or applicant shall file a complaint with the Civil Rights Division of the Office of Administrative Hearings within 30 days after the complainant receives written notice that the position in question has been filled.

The Civil Rights Division of the Office of Administrative Hearings shall promptly make appropriate formal and informal inquiries in its investigatory, fact-finding role and may consider any matter, document, or statement deemed pertinent to the initial determination, including telephone conversations, in determining if there is probable cause to believe there has been a violation of G.S. 126-14.2. The Civil Rights Division may apply to an administrative law judge in the Office of Administrative Hearings for the issuance of oaths and subpoenas under G.S. 7A-756. The investigation and fact-finding phase of the complaint shall be completed by the Civil Rights Division within 30 days.

(b) The Civil Rights Division of the Office of Administrative Hearings shall notify the person alleged to have been hired in violation of G.S. 126-14.2 of the appeal, and the person may present any information to the Civil Rights Division that is pertinent to the initial determination of probable cause. The person alleged to have been hired in violation of G.S. 126-14.2 shall be notified of the results of the initial determination and shall have a right to intervene in any administrative proceedings pursuant to G.S. 150B-23(d).

(c) Upon an initial determination that there is probable cause to believe there has been a violation of G.S. 126-14.2, the complainant may file within 15 days a petition for a contested case pursuant to G.S. 126-34.1 and Article 3 of Chapter 150B of the General Statutes.

(d) An initial determination by the Civil Rights Division that there is not probable cause to believe there has been a violation of G.S. 126-14.2 shall be conclusive of any rights under that section but shall not be admissible or binding in any separate or subsequent civil action or proceeding.

(e) Within 90 days after the filing of a contested case petition, the administrative law judge shall issue a recommended decision to the State Personnel Commission which shall include findings of fact and conclusions of law and, if the administrative law judge has found a violation of G.S. 126-14.2, an appropriate recommended remedy.

(f) Within 60 days of receipt of the official record by the Office of Administrative Hearings, the State Personnel Commission shall make a final written decision as to whether there has been a violation of G.S. 126-14.2. In any case where a violation is found, the State Personnel Commission shall take suitable action to correct the violation, which may include:

(1) Directing the State agency, department, or institution to declare the position vacant, and to hire from among the most qualified State employees or applicants for initial State employment who had applied for the position, or

(2) Requiring that the vacancy be posted pursuant to this Chapter.

(g) A career State employee with:

(1) Less than 10 years of service who was placed in an exempt managerial position, as defined by G.S. 126-5(b)(2), shall be given priority consideration for a position at the same salary grade equal to that held in the most recent position before being placed in the exempt managerial position if he or she has to vacate because of violation of G.S. 126-14.2.

(2) 10 or more years of service who was placed in an exempt managerial position, as defined by G.S. 126-5(b)(2), shall be placed in a comparable position at the same grade and salary equal to that held in the most recent position before being placed in the exempt managerial position if he or she had to vacate because of violation of G.S. 126-14.2. (1997-520, s. 2; 2006-264, s. 12.)

Effect of Amendments. — Session Laws 2006-264, s. 12, effective August 27, 2006, substituted "before being placed in the exempt managerial position" for "prior to the promotion" in subdivisions (g)(1) and (g)(2).

§ 126-15. Disciplinary action for violation of Article.

Failure to comply with this Article is grounds for disciplinary action which, in case of deliberate or repeated violation, may include dismissal or removal from office. (1967, c. 821, s. 1.)

§ 126-15.1. Probationary State employee defined.

As used in this Article, "probationary State employee" means a State employee who is exempt from the Personnel Act only because he has not been continuously employed by the State for the period required by G.S. 126-1.1. (1985, c. 469, s. 4; 1987, c. 282, s. 19; 2006-264, s. 13.)

Effect of Amendments. — Session Laws 2006-264, s. 13, effective August 27, 2006, substituted "G.S. 126-1.1" for "G.S. 126-5(c)" at the end.

ARTICLE 6.

Equal Employment and Compensation Opportunity; Assisting in Obtaining State Employment.

§ 126-16. Equal opportunity for employment and compensation by State departments and agencies and local political subdivisions.

All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition as defined in G.S. 168A-3 to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age. (1971, c. 823; 1975, c. 158; 1977, c. 866, s. 7; 1979, c. 862, s. 3; 1983 (Reg. Sess., 1984), c. 1116, s. 111; 1985, c. 571, s. 2; 1991, c. 65, s. 6.)

CASE NOTES

Construction with Federal Provision. — Where a complainant steadfastly maintains that he has brought only a Title VII (of the Civil Rights Act of 1964) claim and the state referral agency unequivocally addresses only that claim, proceedings under state law have not commenced for purposes of 42 U.S.C.A. § 2000e-5(c). Davis v. North Carolina Dep't of Cors., 48 F.3d 134 (4th Cir. 1995).

Applicability. — State employee seeking review of her termination was entitled to enforce the rights implicated by G.S. 126-16, providing for equal employment opportunity, but G.S. 126-16 did not address the procedural avenues available to particular categories of state employees, did not entitle the employee to choose a review scheme from which she was otherwise excluded, and did not affirmatively grant her a remedy. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Employer's Use of Non-Objective Factors in Hiring. — Beyond the use of experience and training to limit a field of applicants, an employer is relatively free to value experience among the applicants as it sees fit in light of the skills required by the position to be filled. This freedom is of intrinsic value to the hiring process and business judgment of decision makers. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Burden-Shifting Analysis Applies. — North Carolina Supreme Court has adopted the United States Supreme Court's "burden shifting" scheme set out in the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668 (1973); therefore North Carolina courts look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. In properly applying the burden-shifting scheme the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Employer's Articulation of Nondiscriminatory Reasons for Hiring Decisions. — Although a female African-American social services employee had 20 years' experience and the white male who was promoted instead of her had only eight years, the employer articulated nondiscriminatory reasons for its hiring decision, including initiative, community outreach, and communications skills. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Employer's Burden to Rebut Presumption of Discrimination. — Employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons; the employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Evidence of Pretext for Discrimination. — Some of the factors that courts have considered as relevant evidence of pretext are: (1) Evidence that white employees involved in acts against the employer of comparable seriousness were retained or rehired, (2) Evidence of the employer's treatment of the employee during his term of employment, (3) Evidence of the employer's response to the employee's legitimate civil rights activities, and (4) Evidence of the employer's general policy and practice with respect to minority employees. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Plaintiff's Burden of Proving Discrimination. — Burden to establish a prima facie case of racial discrimination giving rise to a presumption of discrimination is as follows: (1) plaintiff is a member of a minority group; (2) she was qualified for a promotion; (3) she was passed over for the promotion; and (4) the person receiving the promotion was not a member of a protected class. To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence the nondiscriminatory reasons for the employee's rejection or discharge; the plaintiff must then show by a preponderance of the evidence that the proffered explanation by the State is pretextual in nature, and that the employer intentionally discriminated. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Evidence. — During an attempt to show that an employer's proffered explanation of a nondiscriminatory reason for an employee's rejection or discharge is pretextual, the plaintiff can reuse evidence from her prima facie showing to assist in carrying her burden as to pretext though the prima facie presumption has been dispelled. However, the court is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination: the sole question is what is the motivation behind the employer's decision. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Applied in Hubbard v. State Constr. Office, 130 N.C. App. 254, 502 S.E.2d 652, 1998 N.C. App. LEXIS 930 (1998), cert. denied, 349 N.C. 230, 515 S.E.2d 704 (1998).

Cited in Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22 (1984); North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990); Clay v. Employment Sec. Comm'n, 111 N.C. App. 599, 432 S.E.2d 873 (1993); Braswell v. Ellis, 950 F. Supp. 145 (E.D.N.C. 1995); Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996); Heckman v. University of N.C., 19 F. Supp. 2d 468 (M.D.N.C. 1998); Metts v. North Carolina Dep't of Revenue, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2567 (E.D.N.C. Jan. 9, 2000), aff'd, 230 F.3d 1353 (4th Cir. 2000); State Dep't of HHS v. Maxwell, 156 N.C. App. 260, 576 S.E.2d 688, 2003 N.C. App. LEXIS 131 (2003); Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 2004 U.S. Dist. LEXIS 20193 (W.D.N.C. 2004); Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

§ 126-16.1. Equal employment opportunity training.

Each State agency, each State Department, and The University of North Carolina shall:

(1) Enroll each newly appointed supervisor or manager within one year of appointment in the Equal Employment Opportunity Institute operated by the Division of Equal Opportunity Services of the Office of State Personnel. Current managers and supervisors are encouraged to enroll/participate in the Institute.

(2) Be responsible for providing supplies and resource materials for managers and supervisors who are enrolled from that department, agency or university. (1991, c. 416, s. 1.)

Editor's Note. — Session Laws 1991, c. 416, which enacted this section, in ss. 2 through 4 provided:

"Sec. 2. The Office of State Personnel, through its Division of Equal Opportunity Services, shall implement the provisions of this act.

"Sec. 3. Beginning January 1, 1992, the Office of State Personnel shall report semiannually to the Joint Legislative Commission on Governmental Operations concerning the implementation of this act.

"Sec. 4. This act shall not apply to the Judicial Branch or the Legislative Branch."

§ 126-17. Retaliation by State departments and agencies and local political subdivisions.

No State department, agency, or local political subdivision of North Carolina shall retaliate against an employee for protesting alleged violations of G.S. 126-16. (1977, c. 866, s. 8.)

§ 126-18. Compensation for assisting person in obtaining State employment barred; exception.

It shall be unlawful for any person, firm or corporation to collect, accept or receive any compensation, consideration or thing of value for obtaining on behalf of any other person, or aiding or assisting any other person in obtaining employment with the State of North Carolina; provided, however, any person, firm, or corporation that is duly licensed and supervised by the North Carolina Department of Labor as a private employment service acting in the normal course of business, may collect such regular and customary fees for services rendered pursuant to a written contract when such fees are paid by someone other than the State of North Carolina; however, any person, firm, or corporation collecting fees for this service must have been licensed by the North Carolina Department of Labor for a period of not less than one year.

Any person, firm or corporation collecting fees for this service must make a monthly report to the Department of Labor listing the name of the person, firm or corporation collecting fees and the person for whom a job was found, the nature and purpose of the job obtained, and the fee collected by the person, firm or corporation collecting the fee. Violation of this section shall constitute a Class 1 misdemeanor. (1977, c. 397, s. 1; 1993, c. 539, s. 933; 1994, Ex. Sess., c. 24, s. 14(c).)

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Referral Incentive Award Program. — A "Referral Incentive Award" program would not violate this section because it did not allow the referring state employee to receive any sort of compensation from any other source related to the referral and the program did not have any provision in it that would require or allow the state to pay any kind of fee that might be charged by a licensed referral source to the jobhunter. See opinion of Attorney General to Mr. Ronald G. Penny, State Personnel Director, 2000 N.C. AG LEXIS 10 (6/30/2000).

State's Use of Personnel Agency to Fill Positions. — This section does not prohibit the State or one of its agencies from utilizing the services of a personnel agency or search firm to find candidates for a difficult-to-recruit position after other efforts to fill the position have failed; however, the statutorily mandated promotional priority for state employees under this section restricts and limits the ability of state agencies to act in this situation. See opinion of Attorney General to Mr. Richard V. Lee, State Personnel Director, 58 N.C.A.G. 91 (1988).

§ 126-19. Equal employment opportunity plans; reports; maintenance of services by State Personnel Director.

(a) Each member of the Council of State under G.S. 143A-11, each of the principal departments enumerated in G.S. 143B-6, The University of North Carolina, the judicial branch, and the legislative branch, shall develop and submit an Equal Employment Opportunity plan which shall include goals and programs that provide positive measures to assure equitable and fair representation of North Carolina's citizens. The plans developed by the judicial branch and by the Legislative Services Office on behalf of the legislative branch shall be submitted to the General Assembly on or before June 1 of each year. All other such plans shall be submitted to the State Personnel Director for review and approval on or before March 1, of each year.

(b) The State Personnel Commission shall submit a report to the General Assembly concerning the status of Equal Employment Opportunity plans and programs for all State departments, agencies, [and] universities, which are required by this Chapter to report to the State Personnel Director, on or before June 1 of each year. If any plan has been disapproved, the report shall contain reasons for disapproval. The status report submitted to the General Assembly by the State Personnel Director and the plans submitted to the General Assembly by the judicial branch and the Legislative Services Office on behalf of the legislative branch shall contain the total number of persons employed in each job category, the race, sex, salary, and other demographics relative to persons hired and promoted during the reporting period, analysis of the data, and an indication as to which goals were achieved.

(c) The State Personnel Director shall at least maintain current services of Equal Employment Opportunity technical assistance, training, oversight, monitoring, evaluation, support programs, and reporting to assure that State government's work force at all occupational levels reflect North Carolina's population. To the extent reasonably possible, these services shall be provided by qualified personnel who have continuous experience in the field of Equal Employment Opportunity and affirmative action and who are sensitive to circumstances and experiences of individuals from diverse backgrounds and cultures, and recognize that efficient and effective government requires the talents, skills, and abilities of all available human resources. (1991 (Reg. Sess., 1992) c. 919, ss. 2-4.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 919, ss. 2-4, effective October 1, 1992, have been codified as this section at the direction of the Revisor of Statutes.

§§ 126-20, 126-21: Reserved for future codification purposes.

Article 7.

The Privacy of State Employee Personnel Records.

§ 126-22. Personnel files not subject to inspection under § 132-6.

(a) Except as provided in G.S. 126-23 and G.S. 126-24, personnel files of State employees shall not be subject to inspection and examination as authorized by G.S. 132-6.

(b) For purposes of this Article the following definitions apply:

(1) "Employee" means any current State employee, former State employee, or applicant for State employment.

(2) "Employer" means any State department, university, division, bureau, commission, council, or other agency subject to Article 7 of this Chapter.

(3) "Personnel file" means any employment-related or personal information gathered by an employer, the Retirement Systems Division of the Department of State Treasurer, or by the Office of State Personnel. Employment-related information contained in a personnel file includes information related to an individual's application, selection, promotion, demotion, transfer, leave, salary, contract for employment,

benefits, suspension, performance evaluation, disciplinary actions, and termination. Personal information contained in a personnel file includes an individual's home address, social security number, medical history, personal financial data, marital status, dependents, and beneficiaries.

(4) "Record" means the personnel information that each employer is required to maintain in accordance with G.S. 126-23.

(c) Personnel files of former State employees who have been separated from State employment for 10 or more years may be open to inspection and examination except for papers and documents relating to demotions and to disciplinary actions resulting in the dismissal of the employee and personnel files maintained by the Retirement Systems Division of the Department of State Treasurer. (1975, c. 257, s. 1; 1977, c. 866, s. 9; 2007-508, s. 4.5.)

Effect of Amendments. — Session Laws 2007-508, s. 4.5, effective August 30, 2007, rewrote the section.

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

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In order for personnel information to be protected by this section, it must meet two requirements: (1) it must have been gathered by an individual's employer (including the Office of State Personnel) or considered in an individual's application for employment; and (2) the information must relate to at least one of the enumerated activities by the employer with respect to the individual employee or applicant for employment. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Only personnel information about those employees gathered by the employing state agency is exempt from public inspection under this section. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Employee Information Not Gathered by Employer. — Unless information regarding state employees gathered by the State Bureau of Investigation for a Commission formed to investigate improprieties in a university athletic program was first gathered by the employing state agency or the Office of State Personnel, it would not be exempt under this section and would be subject to disclosure under the Public Records Act. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Where Commission was not the employer of any state employees questioned or mentioned in the Commission's meeting minutes, the minutes did not meet the definition of "personnel file" information set forth in this section because the information was not "gathered" by the employer state agency. Because the minutes did not fall within the statutory definition of "personnel file," they were not protected by the statute. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Breach of Confidentiality Shown. — Disclosure to the media of former state employee's social security number, medical diagnoses, family member names and addresses, and personal financial data for purposes of defending the propriety of a grievance settlement with the employee, was not excepted under G.S. 126-24 from the non-disclosure provisions of G.S. 126-22. Toomer v. Garrett, 155 N.C. App. 462, 574 S.E.2d 76, 2002 N.C. App. LEXIS 1613 (2002), cert. denied, appeal dismissed, 357 N.C. 66, 579 S.E.2d 576 (2003).

Breach of Confidentiality Not Shown. — There was insufficient evidence to show that employee "breached confidentiality" or that he "failed to provide complete responses to questions" causing the "omission of important facts" at officer's disciplinary hearing where the record showed that his comments were directed towards the handling of the pre-disciplinary conference for not being conducted behind closed doors and for being conducted rudely and loudly. These comments were not breaches of confidentiality, but rather criticisms of the manner and method of conducting pre-disciplinary hearings. North Carolina Dep't of Cors. v. Myers, 120 N.C. App. 437, 462 S.E.2d 824 (1995).

Cited in Durham Herald Co. v. County of Durham, 334 N.C. 677, 435 S.E.2d 317 (1993); News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

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Statewide flexible benefits plan could properly provide, through its third-party administrator, for the direct deposit of payments to spending account participants and could legally allow for the release of a participant's bank account information to the third-party administrator without violating any confidentiality or privacy laws; the third-party administrator acted as the agent of the state and of flexible benefits plan in administering the spending accounts of participants of flexible benefits plan. See opinion of Attorney General to Mr. Ronald Penny, State Personnel Director, 1999 N.C. AG LEXIS 24 (11/30/99).

§ 126-23. Certain records to be kept by State agencies open to inspection.

Each department, agency, institution, commission and bureau of the State shall maintain a record of each of its employees, showing the following information with respect to each such employee: name, age, date of original employment or appointment to the State service, the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the agency has the written contract or a record of the oral contract in its possession, current position, title, current salary, date and amount of most recent increase or decrease in salary, date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification, and the office or station to which the employee is currently assigned. For the purposes of this section, the term "salary" includes pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid by the employing entity. Subject only to rules and regulations for the safekeeping of the records, adopted by the State Personnel Commission, every person having custody of such records shall permit them to be inspected and examined and copies thereof made by any person during regular business hours. Any person who is denied access to any such record for the purpose of inspecting, examining or copying the same shall have a right to compel compliance with the provisions of this section by application to a court of competent jurisdiction for a writ of mandamus or other appropriate relief. (1975, c. 257, s. 1; c. 667, s. 2; 2007-508, s. 4.)

Effect of Amendments. — Session Laws 2007-508, s. 4, effective August 30, 2007, inserted "the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the board has the written contract or a record of the oral contract in its possession" in the middle of the first sentence, and added the second sentence.

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Contracts Between Universities and Coaches. — Contracts under which institutions employ coaches and contracts between the institutions and certain vendors or suppliers which involve or concern those coaches or other documents related to those contracts are public records. See opinion of Attorney General to Charles J. Waldrup, Associate Vice President for Legal Affairs, University of North Carolina, 2003 N.C.A.G. 2 (2/6/03).

§ 126-24. Confidential information in personnel files; access to such information.

All other information contained in a personnel file is confidential and shall not be open for inspection and examination except to the following persons:

(1) The employee, applicant for employment, former employee, or his properly authorized agent, who may examine his own personnel file in its entirety except for (i) letters of reference solicited prior to employ-

ment, or (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to a patient. An employee's medical record may be disclosed to a licensed physician designated in writing by the employee;

(2) The supervisor of the employee;

(3) Members of the General Assembly who may inspect and examine personnel records under the authority of G.S. 120-19;

(4) A party by authority of a proper court order may inspect and examine a particular confidential portion of a State employee's personnel file; and

(5) An official of an agency of the federal government, State government or any political subdivision thereof. Such an official may inspect any personnel records when such inspection is deemed by the department head of the employee whose record is to be inspected or, in the case of an applicant for employment or a former employee, by the department head of the agency in which the record is maintained as necessary and essential to the pursuance of a proper function of said agency; provided, however, that such information shall not be divulged for purposes of assisting in a criminal prosecution, nor for purposes of assisting in a tax investigation.

Notwithstanding any other provision of this Chapter, any department head may, in his discretion, inform any person or corporation of any promotion, demotion, suspension, reinstatement, transfer, separation, dismissal, employment or nonemployment of any applicant, employee or former employee employed by or assigned to his department or whose personnel file is maintained in his department and the reasons therefor and may allow the personnel file of such person or any portion thereof to be inspected and examined by any person or corporation when such department head shall determine that the release of such information or the inspection and examination of such file or portion thereof is essential to maintaining the integrity of such department or to maintaining the level or quality of services provided by such department; provided that prior to releasing such information or making such file or portion thereof available as provided herein, such department head shall prepare a memorandum setting forth the circumstances which the department head deems to require such disclosure and the information to be disclosed. The memorandum shall be retained in the files of said department head and shall be a public record. (1975, c. 257, s. 1; 1977, c. 866, s. 10; 1977, 2nd Sess., c. 1207.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

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Defending the Propriety of a Grievance Settlement Not a Valid Exception. — Disclosure to the media of former state employee's social security number, medical diagnoses, family member names and addresses, and personal financial data for purposes of defending the propriety of a grievance settlement with the employee, was not excepted under G.S. 126-24 from the non-disclosure provisions of G.S. 126-22. Toomer v. Garrett, 155 N.C. App. 462, 574 S.E.2d 76, 2002 N.C. App. LEXIS 1613 (2002), cert. denied, appeal dismissed, 357 N.C. 66, 579 S.E.2d 576 (2003).

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Pursuant to G.S. 147-64.13, the provisions of G.S. 147-64.7(a)(1) supersede the provisions of this section to the extent they conflict. Specifically, the Auditor's power to examine documents in the course of an authorized audit includes the power to examine confidential employee personnel files relevant to that audit without the consent of the employee or his employer. See opinion of Attorney General to The Honorable Ralph Campbell, Jr., State Auditor, 1999 N.C.A.G. 8 (3/5/99).

For a discussion of legal impediments which prohibit employers from disclosing personal information about their employees, see opinion of Attorney General to Bryan E. Beatty, Inspector General, North Carolina Department of Justice, 1998 N.C.A.G. 49 (12/1/98).

§ 126-25. Remedies of employee objecting to material in file.

An employee, former employee or applicant for employment who objects to material in his file may place in his file a statement relating to the material he considers to be inaccurate or misleading. An employee, former employee or applicant for employment who objects to material in his file because he considers it inaccurate or misleading may seek the removal of such material from his file in accordance with the grievance procedure of that department, including appeal to the State Personnel Commission. When a department, division, bureau, commission, or other agency agrees or is ordered by the State Personnel Commission or by the General Court of Justice of this State to remove inaccurate or misleading material from an employee's file, which information was placed in the file by the supervisor or other agent of management, it shall destroy the original and all copies of the material removed and may not retain any inaccurate or misleading information derived from the material removed. (1975, c. 257, s. 1; c. 667, s. 2; 1977, c. 866, s. 11; 1985, c. 638.)

CASE NOTES

Right to Appeal. — Petitioner had the right to appeal the respondent's action of not removing all the warnings from her file and the decision that no other warning could be put in place of one that was removed. Nailing v. UNC-CH, 117 N.C. App. 318, 451 S.E.2d 351 (1994), cert. denied, 339 N.C. 614, 454 S.E.2d 255 (1995).

Applied in Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22 (1984).

Cited in Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

§ 126-26. Rules and regulations.

The State Personnel Commission shall prescribe such rules and regulations as it deems necessary to implement the provisions of this Article. (1975, c. 257, s. 1; c. 667, s. 2.)

CASE NOTES

Cited in Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997), aff'd, 349 N.C. 315, 507 S.E.2d 272 (1998).

§ 126-27. Penalty for permitting access to confidential file by unauthorized person.

Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any portion of a personnel file designated as confidential by this Article, unless such person is one specifically authorized by G.S. 126-24 to have access thereto for inspection and examination, shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($500.00). (1975, c. 257, s. 1; 1993, c. 539, s. 934; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 126-28. Penalty for examining, copying, etc., confidential file without authority.

Any person, not specifically authorized by G.S. 126-24 to have access to a personnel file designated as confidential by this Article, who shall knowingly and willfully examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($500.00). (1975, c. 257, s. 1; 1993, c. 539, s. 935; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 126-29. Access to material in file for agency hearing.

A party to a quasi-judicial hearing of a State agency subject to Article 7 of this Chapter, or a State agency subject to Article 7 of this Chapter which is conducting a quasi-judicial hearing, may have access to relevant material in personnel files and may introduce copies of such material or information based on such material as evidence in the hearing either upon consent of the employee, former employee, or applicant for employment or upon subpoena properly issued by the agency either upon request of a party or on its own motion. Nothing in this Article shall impose liability on any agent or officer of the State for compliance with this provision, notwithstanding any other provision of this Article. (1977, c. 866, s. 12; 1987, c. 320, s. 5.)

§ 126-30. Fraudulent disclosure and willful nondisclosure on application for State employment; penalties.

(a) Any employee who knowingly and willfully discloses false or misleading information, or conceals dishonorable military service; or conceals prior employment history or other requested information, either of which are significantly related to job responsibilities on an application for State employment may be subjected to disciplinary action up to and including immediate dismissal from employment. Dismissal shall be mandatory where the applicant discloses false or misleading information in order to meet position qualifications. Application forms for State employment shall include a statement informing applicants of the consequences of such fraudulent disclosure or lack of disclosure.

(b) The employing authority within each department, university, board, or commission, shall verify the status of credentials and the accuracy of statements contained in the application of each new employee within 90 days from the date of the employees employment. Failure to verify the application shall not bar action under subsection (a) above.

(c) The State Personnel Commission shall issue rules and procedures to implement this section for all departments, agencies and institutions which are not exempted from the State Personnel Act under G.S 126-5(c1). Each agency, department and institution which is exempted under G.S. 126-5(c1) shall issue regulations to implement this section pursuant to the rulemaking procedures applicable to it. (1987, c. 666, s. 1.)

§§ 126-31 through 126-33: Reserved for future codification purposes.

Article 8.

Employee Appeals of Grievances and Disciplinary Action.

§ 126-34. Grievance appeal for career State employees.

Unless otherwise provided in this Chapter, any career State employee having a grievance arising out of or due to the employee's employment and who does not allege unlawful harassment or discrimination because of the employee's age, sex, race, color, national origin, religion, creed, handicapping condition as defined by G.S. 168A-3, or political affiliation shall first discuss the problem or grievance with the employee's supervisor and follow the grievance procedure established by the employee's department or agency. Any State employee having a grievance arising out of or due to the employee's employment who alleges unlawful harassment because of the employee's age, sex, race, color, national origin, religion, creed, or handicapping condition as defined by G.S. 168A-3 shall submit a written complaint to the employee's department or agency. The department or agency shall have 60 days within which to take appropriate remedial action. If the employee is not satisfied with the department or agency's response to the complaint, the employee shall have the right to appeal directly to the State Personnel Commission. (1975. c. 667, s. 10; 1987, c. 320, s. 6; 1991, c. 354, s. 4; 1998-135, s. 2.)

CASE NOTES

Construction. — There was no inconsistency between G.S. 126-34 and G.S. 126-5 because the legislature, having specifically excluded various classes of state employees from all of Chapter 126, except Articles 6 and 7, in G.S. 126-5, had no need to repeat the same list of excluded employees in other parts of Chapter 126. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Authority to Hear Action Brought by DOC Employee. — Among all the provisions of this Article, only G.S. 126-37 confers upon the State Personnel Commission or upon the Office of Administrative Hearings the jurisdiction or power to deal with an action brought by a correction employee who was reallocated pursuant to a managerial reallocation. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

To Whom Article Applicable. — A permanent state employee who alleges he has been reduced in position without just cause is entitled to the review and appeal provisions outlined in this Article, whether the motive for his demotion was illegally discriminatory or retaliatory, or apparently or actually disciplinary. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Petitioners, who alleged that they were arbitrarily selected for a pay freeze and prevented from transferring to reclassified positions, had to follow the grievance procedure of this section, since they did not allege one of the prohibited grounds of discrimination. Poret v. State Personnel Comm'n, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 314 N.C. 117, 332 S.E.2d 491, 332 S.E.2d 492 (1985), overruled on other grounds, Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Failure to Follow Established Grievance Procedure. — Department of Human Resource's dismissal of employee's appeal on grounds it was filed one day after the deadline was neither arbitrary or capricious where employee was informed of the time limits for perfecting appeal, offered assistance for complying with appeal procedures since legal representation was not allowed at that time of the proceeding, and employee's apparent justification for filing late was difficulty in retaining an attorney. Lewis v. North Carolina Dep't of Human Resources, 92 N.C. App. 737, 375 S.E.2d 712 (1989).

The State Personnel Act provides for administrative-type grievance procedures for violations of its provisions. The statute further provides that judicial review of unfavorable decisions may be had in superior court. Where a statute provides for an orderly procedure for an appeal to the superior court for review, this procedure is the exclusive means for obtaining judicial review, and a civil action is only proper after all administrative remedies have been exhausted. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); Jones v. Department of Human Resources, 44 N.C. App. 116, 260 S.E.2d 654 (1979); Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982); Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22 (1984); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Newberne v. Crime Control & Pub. Safety, 168 N.C. App. 87, 606 S.E.2d 742, 2005 N.C. App. LEXIS 176 (2005); Bobbitt v. N.C. State Univ., — N.C. App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006).

§ 126-34.1. Grounds for contested case under the State Personnel Act defined.

(a) A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues:

(1) Dismissal, demotion, or suspension without pay based upon an alleged violation of G.S. 126-35, if the employee is a career State employee.

(2) An alleged unlawful State employment practice constituting discrimination, as proscribed by G.S. 126-36, including:

  a. Denial of promotion, transfer, or training, on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

  b. Demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

(3) Retaliation against an employee, as proscribed by G.S 126-17, for protesting an alleged violation of G.S. 126-16.

(4) Denial of the veteran's preference granted in accordance with Article 13 of this Chapter in initial State employment or in connection with a reduction in force, for an eligible veteran as defined by G.S. 126-81.

(5) Denial of promotion for failure to post or failure to give priority consideration for promotion or reemployment, to a career State employee as required by G.S. 126-7.1 and G.S. 126-36.2.

(6) Denial of an employee's request for removal of allegedly inaccurate or misleading information from the employee's personnel file as provided by G.S. 126-25.

(7) Any retaliatory personnel action that violates G.S. 126-85.

(8) Denial of promotion in violation of G.S. 126-14.2, where an initial determination found probable cause to believe there has been a violation of G.S. 126-14.2.

(9) Denial of employment in violation of G.S. 126-14.2, where an initial determination found probable cause to believe that there has been a violation of G.S. 126-14.2.

(10) Harassment in the workplace based upon age, sex, race, color, national origin, religion, creed, or handicapping condition, whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

(11) Violation of any of the following federal statutes as applied to the employee:

a. The Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
b. The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.
c. The Family Medical Leave Act, 29 U.S.C. § 2601, et seq.
d. The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

(b) An applicant for initial State employment may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes based upon:

(1) Alleged denial of employment in violation of G.S. 126-16.
(2) Denial of the applicant's request for removal of allegedly inaccurate or misleading information from the personnel file as provided by G.S. 126-25.
(3) Denial of equal opportunity for employment and compensation on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes. This subsection with respect to equal opportunity as to age shall be limited to persons who are at least 40 years of age. An applicant may not, however, file a contested case where political affiliation was the reason for the person's nonselection for (i) an exempt policymaking position as defined in G.S. 126-5(b)(3), (ii) a chief deputy or chief administrative assistant position under G.S. 126-5(c)(4), or (iii) a confidential assistant or confidential secretary position under G.S. 126-5(c)(2).
(4) Denial of the veteran's preference in initial State employment provided by Article 13 of this Chapter, for an eligible veteran as defined by G.S. 126-81.
(5) Denial of employment in violation of G.S. 126-14.2, where an initial determination found probable cause to believe that there has been a violation of G.S. 126-14.2.

(c) In the case of a dispute as to whether a State employee's position is properly exempted from the State Personnel Act under G.S. 126-5, the employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes.

(d) A State employee or applicant for State employment may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes based upon a false accusation regarding, or disciplinary action relating to, the employee's alleged violation of G.S. 126-14 or G.S. 126-14.1.

(e) Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126. (1995, c. 141, s. 7; 1997-520, s. 4; 1998-135, s. 3; 2001-467, s. 2.)

Cross References. — For the State Employee Federal Remedy Restoration Act, waiving the sovereign immunity of the State for certain purposes, see G.S. 143-300.35.

CASE NOTES

Legislative Intent. — By enacting this section, the General Assembly has indicated its intent to create grounds for appeal to the Commission through a contested case hearing only on issues for which appeal has been specifically authorized in this section. Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996).

When a state employee sought review of the termination of her employment, G.S. 126-34.1(a)(2)(b) did not give her a right to a hearing before the Office of Administrative Hearings, because her job as "instructional and research staff of the University of North Carolina" was expressly exempt from the ambit of Chapter 126, the State Personnel Act, and the fact that the statute referred to state employees without adding "except those already exempted," did not require a different result. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Construction. — Language of G.S. 126-34.1 of the State Personnel Act clearly and unambiguously states that the statutory list of appeal grounds in G.S. 126-34.1 is exclusive, and this list does not provide for appeals to the Office of Administrative Hearings (OAH) of reductions in force (RIF) based on a lack of just cause; the North Carolina General Assembly clearly intended to deny the OAH jurisdiction over challenges to RIF on procedural violation grounds and to grant state employees the right to bring only those RIF claims that are specifically set out in G.S. 126-34.1 before OAH. Univ. of N.C. at Chapel Hill v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401, 2003 N.C. App. LEXIS 2277 (2003), cert. denied, 358 N.C. 380, 598 S.E.2d 380 (2004).

By its own terms of exclusion, G.S. 126-34.1 of the State Personnel Act supersedes and controls over any contrary earlier enactments, and given its clear and unambiguous language, the later enacted G.S. 126-34.1 supplants G.S. 126-35. Univ. of N.C. at Chapel Hill v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401, 2003 N.C. App. LEXIS 2277 (2003), cert. denied, 358 N.C. 380, 598 S.E.2d 380 (2004).

Applicability of the just cause requirement set forth in G.S. 126-5(a)(2) is determined by the permanency of employment and not by months of service; therefore, a terminated employee who worked less than 24 months before being terminated while on medical leave was entitled to file a contested case based on a lack of just cause since she had been an employee of the Department of Social Services, which was a local social services department. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Reduction in Force Based on Lack of Just Cause or Procedural Violations Not Reviewable. — Because under G.S. 126-34.1 of the State Personnel Act, the Office of Administrative Hearings (OAH) did not have jurisdiction to determine whether employees' terminations under reductions in force were based on a lack of just cause or procedural violations, the trial court erred in holding otherwise and the employees' petitions for OAH review were to be dismissed on remand. Univ. of N.C. at Chapel Hill v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401, 2003 N.C. App. LEXIS 2277 (2003), cert. denied, 358 N.C. 380, 598 S.E.2d 380 (2004).

The superior court properly determined that it had subject matter jurisdiction where the plaintiff sought injunctive relief ordering his reinstatement to the "same or similar position," a matter on which this section does not specifically authorize appeal; the State Personnel Act does not place jurisdiction over this matter with the State Personnel Commission. Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Superior court properly determined that it lacked subject matter jurisdiction over former state employee's disabilities discrimination claim where there was no evidence presented that the employee had been continuously employed by the State of North Carolina for the immediate 24 preceding months and thus she was not a career State employee. Campbell v. N.C. DOT - DMV, 155 N.C. App. 652, 575 S.E.2d 54, 2003 N.C. App. LEXIS 24 (2003), cert. denied, 357 N.C. 62, 579 S.E.2d 386 (2003).

Demotion and transfer were not politically-motivated in violation of this section where the evidence in the record failed to support a causal connection between his political affiliation and the employer's actions; petitioner admitted that the demotion and transfer were not the product of any disciplinary actions but was the result of the letters he wrote requesting a transfer, and that his testimony regarding people who "played politics" was nothing more than speculation. Curtis v. North Carolina DOT, 140 N.C. App. 475, 537 S.E.2d 498, 2000 N.C. App. LEXIS 1215 (2000).

Constructive Discharge. — When an employee is "deemed to have voluntarily resigned" by the State agency for being unable or unwilling to work in conditions that may constitute discrimination, such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination pursuant to G.S. § 126-34.1(a)(2)b. Campbell v. N.C. DOT - DMV, 155 N.C. App. 652, 575 S.E.2d 54, 2003 N.C. App. LEXIS 24 (2003), cert. denied, 357 N.C. 62, 579 S.E.2d 386 (2003).

Choice of Remedies. — State employee may choose to pursue a whistleblower claim pursuant to G.S. 126-85 in either the superior court or the Office of Administrative Hearings, but not both. Swain v. Elfland, 145 N.C. App. 383, 550 S.E.2d 530, 2001 N.C. App. LEXIS 663 (2001), cert. denied, 354 N.C. 228, 554 S.E.2d 832 (2001).

Trial court properly dismissed a judicial action brought by a former police officer under G.S. 126-86, which was commenced prior to the exhaustion of an administrative action before the Office of Administrative Hearings, that the former officer brought pursuant to G.S. 126-34.1(a)(7), alleging retaliation and racial discrimination in violation of G.S. 126-85. Newberne v. Crime Control & Pub. Safety, 168 N.C. App. 87, 606 S.E.2d 742, 2005 N.C. App. LEXIS 176 (2005).

Doctrine of administrative exhaustion did not prevent a state trooper from filing a whistleblower claim in a superior court because the state trooper had the choice to pursue the whistleblower claim in either a judicial forum, pursuant to G.S. 126-86, or an administrative forum, pursuant to G.S. 126-34.1, but not both. Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

Applied in Jordan v. DOT, 140 N.C. App. 771, 538 S.E.2d 623, 2000 N.C. App. LEXIS 1272 (2000), cert denied, 353 N.C. 376, 547 S.E.2d 412 (2001).

Cited in Metts v. North Carolina Dep't of Revenue, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2567 (E.D.N.C. Jan. 9, 2000), aff'd, 230 F.3d 1353 (4th Cir. 2000); Kea v. Dep't of Health & Human Servs., 153 N.C. App. 595, 570 S.E.2d 919, 2002 N.C. App. LEXIS 1246 (2002), appeal dismissed, 356 N.C. 673, 577 S.E.2d 120 (2003), 357 N.C. 654, 588 S.E.2d 467 (2003); Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

§ 126-34.2. Alternative dispute resolution.

(a) Notwithstanding the provisions of Articles 6 and 7 of this Chapter, or the other provisions of this Article, with the consent of the parties, a matter for which a State employee, a former State employee, or an applicant for State employment has filed a contested case under Article 3 of Chapter 150B of the General Statutes may be handled in accordance with alternative dispute resolution procedures adopted by the State Personnel Commission.

(b) In its discretion, the State Personnel Commission may adopt alternative dispute resolution procedures for the resolution of matters not constituting grounds for a contested case under G.S. 126-34.1.

(c) Nothing in this section shall be construed to limit the right of any person to file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes. (1995, c. 141, s. 8.)

§ 126-35. Just cause; disciplinary actions for State employees.

(a) No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department. However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. The employee, if he is not satisfied with the final decision of the head of the department, or if he is unable, within a reasonable period of time, to obtain a final decision by the head of the department, may appeal to the State Personnel Commission. Such appeal shall be filed not later than 30 days after receipt of notice of the department head's decision. The State Personnel Commission may adopt, subject to the approval of the Governor, rules that define just cause.

(b) Notwithstanding any other provision of this Chapter, a reduction in pay or position which is not imposed for disciplinary reasons shall not be considered a disciplinary action within the meaning of this Article. Disciplinary actions, for the purpose of this Article, are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on unsatisfactory job performance, unacceptable personal conduct or a combination of the two.

(c) For the purposes of contested case hearings under Chapter 150B, an involuntary separation (such as a separation due to a reduction in force) shall be treated in the same fashion as if it were a disciplinary action.

(d) In contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer. (1975, c. 667, s. 10; 1989 (Reg. Sess., 1990), c. 1025, s. 2; 1991, c. 65, s. 7; c. 354, s. 5; c. 722, s. 1; 2000-190, s. 13.)

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1040 (1981).

CASE NOTES

Constitutional Implications. — For case discussing the propriety under U.S. Const., Amends. I and XIV, of adverse personnel actions affecting State employees in exempt positions following the change from the Hunt administration to the Martin administration, see Stott v. Martin, 725 F. Supp. 1365 (E.D.N.C. 1989), rev'd on other grounds, 916 F.2d 134 (4th Cir. 1990).

The purpose of this section is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

This section was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Section Supplanted by Later-Enacted G.S. 126-34.1. — By its own terms of exclusion, G.S. 126-34.1 of the State Personnel Act supersedes and controls over any contrary earlier enactments, and given its clear and unambiguous language, the later enacted G.S. 126-34.1 supplants G.S. 126-35. Univ. of N.C. at Chapel Hill v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401, 2003 N.C. App. LEXIS 2277 (2003), cert. denied, 358 N.C. 380, 598 S.E.2d 380 (2004).

This section creates a reasonable expectation of continued employment and a property interest within the meaning of the Due Process Clause of the United States Constitution. Faulkner v. North Carolina Dep't of Cors., 428 F. Supp. 100 (W.D.N.C. 1977).

Where a State employee asserts civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the superior court retains its traditional power to grant preliminary injunctive relief without requiring him to exhaust the administrative remedies provided in Chapter 126 of the General Statutes. Williams v. Greene, 36 N.C. App. 80, 243 S.E.2d 156, appeal dismissed, 295 N.C. 471, 246 S.E.2d 12 (1978).

A State employee who could be discharged only for cause had a property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

To Whom Article Applicable. — A permanent state employee who alleges he has been reduced in position without just cause is entitled to the review and appeal provisions outlined in this article, whether the motive for his demotion was illegally discriminatory or retaliatory, or apparently or actually disciplinary. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

The plaintiff, a discharged Agricultural Extension Agent, could not establish a property right in his job through the State Personnel Act because he was part of the instructional staff of the UNC system and therefore exempt from this act. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

Applicability of the just cause requirement set forth in G.S. 126-5(a)(2) is determined by the permanency of employment and not by months of service; therefore, a terminated employee who worked less than 24 months before being terminated while on medical leave was entitled to file a contested case based on a lack of just cause since she had been an employee of the Department of Social Services, which was a local social services department. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Invocation of Jurisdiction. — Because this section deems such departmental or agency action "disciplinary," an allegation that an employee has been "demoted in rank without sufficient cause" invokes first the jurisdiction of the State Personnel Commission, then, on appeal, that of the Office of Administrative Hearings, even when there has been no documented misconduct by the employee. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Focus of Review. — Although referred to as "disciplinary," the focus of review under this section is justification of the adverse departmental action, without regard to whether it is taken in response to employee conduct or in response to the vicissitudes of a department's personnel needs. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Authority to Hear Action Brought by DOC Employee. — Among all the provisions of this article, only G.S. 126-37 confers upon the State Personnel Commission or upon the Office of Administrative Hearings the jurisdiction or power to deal with an action brought by a correction employee who was reallocated pursuant to a managerial reallocation. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

This section establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken: The employer must provide the employee with a written statement enumerating specific acts or reasons for the disciplinary action and containing a statement of the employee's appeal rights. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Property Interest in Employment. — A terminated career state employee was entitled to the "just cause" protection of this section and was therefore imbued with a constitutionally protected property interest in his employment as the Equal Employment Opportunity Officer of a state agency. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998).

"Just Cause". — This section provides that no employee may be reduced in "pay or position, except for just cause"; this section does not define "just cause," but giving the words their ordinary meaning, it would include either the undertaking of a private investigation of a superior or the refusal to answer questions in an investigation within a particular department. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979).

Just cause is not defined in this section. Words of statute are to be given their ordinary meaning. Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

The trial court correctly determined that the record lacked substantial evidence to support the Personnel Commission's conclusion that the Department of Correction had not met its burden of showing just cause for terminating correctional officer; said officer's behavior in leaving his post without authorization and failing to remain alert while on duty did not only constitute "unsatisfactory job performance" but fell squarely within the category of "unacceptable personal conduct" for which a DOC employee may be terminated without any prior warning. North Carolina Dep't of Cor. v. McNeely, 135 N.C. App. 587, 521 S.E.2d 730, 1999 N.C. App. LEXIS 1175 (1999).

There was just cause to demote the highway patrol employee as the employee drank three beers within a short period; proceeded to drive after drinking; exceeded the speed limit; and two alco-sensor tests registered 0.09 and 0.08 alcohol concentration readings. Davis v. N.C. Dep't of Crime Control & Pub. Safety, 151 N.C. App. 513, 565 S.E.2d 716, 2002 N.C. App. LEXIS 777 (2002).

Demotion of a state Department of Correction employee was not based on the just cause of sexual harassment, where unlawful sexual harassment was defined in the Department of Correction policy as including quid pro quo or hostile environment consequences, and the employee's sexual comments did not include quid pro quo or hostile environment consequences. Lewis v. N.C. Dep't of Corr., 153 N.C. App. 449, 570 S.E.2d 231, 2002 N.C. App. LEXIS 1168 (2002), aff'd, 357 N.C. 246, 580 S.E.2d 694 (2003).

When an employee was demoted from his position as a prison food service supervisor, there was substantial evidence, sufficient to satisfy the requirements of G.S. 126-35(a), that he did not satisfactorily meet his job requirements, which included supervising inmate workers and ensuring that the kitchen was kept in a clean and orderly fashion, and he received two written warnings concerning his poor job performance, detailing his failure to follow proper procedure and failure to maintain sanitary conditions in the kitchen. Skinner v.

N.C. Dep't of Corr., 154 N.C. App. 270, 572 S.E.2d 184, 2002 N.C. App. LEXIS 1473 (2002).

Summary judgment for a state agency employer in an employee's petition for review of his demotion was proper where the conduct admitted by the employee constituted "unacceptable personal conduct," and the State Personnel Commission determined that its regulations and work rules did not contain any qualification or exception for the explanations asserted by the employee. Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 620 S.E.2d 14, 2005 N.C. App. LEXIS 2121 (2005).

Summary judgment for a state agency employer in an employee's petition for review of his demotion was proper where the conduct admitted by the employee constituted "unacceptable personal conduct," and the State Personnel Commission determined that its regulations and work rules did not contain any qualification or exception for the explanations asserted by the employee. Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 620 S.E.2d 14, 2005 N.C. App. LEXIS 2121 (2005).

When Finding of Just Cause Is Required. — A finding of just cause is not required unless the employee is discharged, suspended, or reduced in pay or position. Gibbs v. Department of Human Resources, 77 N.C. App. 606, 335 S.E.2d 924 (1985).

Burden of Proof. — The State Personnel Commission was correct in requiring the Employment Security Commission to carry the burden of proving petitioner was terminated for just cause. Employment Sec. Comm'n v. Peace, 122 N.C. App. 313, 470 S.E.2d 63 (1996), review granted, 345 N.C. 640, 483 S.E.2d 706 (1997).

The burden of proof in "just cause" claims under this section may be allocated to an employee without violating due process. Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997), aff'd, 349 N.C. 315, 507 S.E.2d 272 (1998).

The government's interest in maintaining an efficient and productive government or private employee work force supports the allocation of the burden of proof on just cause to the employee. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998).

Failure to Show Just Cause. — The State Personnel Commission did not err in its conclusion that the Employment Security Commission failed to show "just cause" for its dismissal of petitioner. Employment Sec. Comm'n v. Peace, 122 N.C. App. 313, 470 S.E.2d 63 (1996), review granted, 345 N.C. 640, 483 S.E.2d 706 (1997).

Health board's dismissal of director for the omission a preaudit certificate on contracts was an error, as the board did not establish that the omission could produce disruption of work, a threat to persons or property, or any other serious effect that required immediate action, as required by G.S. 126-35. Steeves v. Scot. County Bd. of Health, 152 N.C. App. 400, 567 S.E.2d 817, 2002 N.C. App. LEXIS 913 (2002), cert. denied, 356 N.C. 444, 573 S.E.2d 512 (2002).

Although there was no bright line test to determine whether a ranger's conduct established unacceptable personal conduct, and thus "just cause" for a decision by the North Carolina Department of Environment and Natural Resources to demote him and reduce his pay, it was clear that the ranger's decision to use emergency devices on his vehicle and exceed posted speed limits in trying to reach his mother, who was undergoing a medical emergency, was not conduct that would give just cause for such a severe penalty as demotion; the ranger's conduct did not justifiably fall under the State Personnel Commission's regulatory definition of "unacceptable personal conduct," found in N.C. Admin. Code tit. 25, r. 1J .0614(i) (June 2004). N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

Internal Grievance Procedures to Be Followed. — Petitioner could not proceed under this section for a "just cause" violation without first following respondent's internal grievance procedure. Nailing v. UNC-CH, 117 N.C. App. 318, 451 S.E.2d 351 (1994), cert. denied, 339 N.C. 614, 454 S.E.2d 255 (1995).

Where petitioner made no application for leave without pay and respondent placed him involuntarily on sick leave until his accumulated time elapsed, then required him to expend his accumulated vacation, and finally placed him on leave without pay, this was, in essence, a suspension, which could not be made without just cause. White v. North Carolina Dep't of Cor., 117 N.C. App. 521, 451 S.E.2d 876 (1995).

Failure to Perform with Reasonable Care Essential to Just Cause. — Standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention. A State employee does not undertake any greater duty. In attempting to establish that it had just cause to terminate an employee, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough to establish just cause. The agency must show that quotas and job requirements were reasonable, and if so, that the employee made no reasonable effort to meet them. Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397

S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

Failure to Carry Out Supervisor's Directives. — Adequacy of an employee's work must be, to some extent, a subjective determination made by agency personnel. When an agency seeks to establish before the Commission that an employee was terminated for just cause, however, it cannot rest solely on the grounds that his supervisor's directives were not carried out to their fullest extent. Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

Where State employees were putting in extra effort to attempt to meet supervisor's requirements, which failed to take into account many realities of school caseload, and where there was nothing in the record which would indicate that the inability of the employees to meet the supervisor's goals adversely affected the agency in any way, and where findings indicated that the employer's clients were well served by each employee, the trial court correctly concluded that the Commission's own findings did not support its conclusion that just cause was established. Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

Reduced in Position. — An employee is reduced in position within the meaning of this section when he is placed in a lower paygrade. Gibbs v. Department of Human Resources, 77 N.C. App. 606, 335 S.E.2d 924 (1985).

Demotion and Transfer Were Not Done Without Just Cause. — Demotion and transfer were not done without just cause where the petitioner had specifically asked for a transfer back to the town where he had been originally working and expressed a willingness, however begrudgingly, to accept a demotion if that was required. Curtis v. North Carolina DOT, 140 N.C. App. 475, 537 S.E.2d 498, 2000 N.C. App. LEXIS 1215 (2000).

Contested Action Deemed "Disciplinary" Within Meaning of This Section. — Petitioner's allegation that he had been "demoted in rank without sufficient cause" stated grounds for his department's action to be deemed "disciplinary" within the meaning and intent of this section and for his case to be considered "contested" within the meaning and intent of G.S. 126-37(a). Because he had properly pursued all informal procedures mandated by the State Personnel Act and by the North Carolina Administrative Code for the resolution of his grievance, petitioner's appeal also fit the procedural profile of a "contested case" for purposes of its review by the Office of Administrative Hearings under Chapter 150B. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Discharge of Exempt Employees by Successor Governor. — Although the North Carolina State Personnel Act provides that no permanent employee subject thereto shall be discharged, suspended or reduced in pay or position except for just cause, the act exempts certain employees by its terms and allows the Governor to designate as exempt from the provisions of the act certain other policy-making or decision-making employees. Where plaintiffs having a position designated as policy-making or confidential by the previous Governor brought suit alleging that each was discharged from an exempt government position for the sole reason of political affiliation, there was a presumption that successor Governor's actions were proper if done for political patronage reasons that require, as a qualification for the performance of a job, a political affiliation. Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990).

Grounds for Dismissal. — A permanent state employee may be dismissed for (1) inadequate performance of duties or, (2) personal conduct detrimental to state service. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Procedural Safeguards. — Procedural safeguards within subsection (a) serve as a prophylactic protection against summary dismissal based on inadequate notice. Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 468 S.E.2d 813 (1996), discretionary review improvidently allowed, 344 N.C. 73, 477 S.E.2d 33 (1996).

Prior to dismissal for cause relating to performance of duties, a permanent State employee is entitled to three separate warnings that his performance is unsatisfactory, consisting of (1) an oral warning explaining how he is not meeting the job's requirements; (2) a second oral warning outlining his unsatisfactory performance, with a follow-up letter reviewing the points covered by the oral warning; (3) a final written warning setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. Jones v. Department of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).

The requirement of this section is that a permanent state employee is entitled to three separate warnings giving notice that his performance is unsatisfactory. Parks v. Department of Human Resources, 79 N.C. App. 125, 338 S.E.2d 826 (1986).

Written Notice at Time of Dismissal. — When an employee is being dismissed for personal misconduct, the requirement of timely written notice has been met where the written statement of the reasons for dismissal is given to the employee simultaneously with his dismissal. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Administrator received the notification mandated by G.S. 126-35 in an administrative proceeding concerning the administrator's dismissal from employment at a State facility for the mentally retarded; as the administrator received a dismissal letter which set forth the specific acts or omissions supporting his dismissal, as well as his appeal rights, and the fact that this notice was given simultaneously with the disciplinary action in this case was not a violation of G.S. 126-35. Kea v. Dep't of Health & Human Servs., 153 N.C. App. 595, 570 S.E.2d 919, 2002 N.C. App. LEXIS 1246 (2002), appeal dismissed, 356 N.C. 673, 577 S.E.2d 120 (2003), 357 N.C. 654, 588 S.E.2d 467 (2003).

Failure to Follow Internal Policy. — Employee's claim that his employer did not follow its internal policy in that he was not given an action plan after he received written warnings did not entitle him to relief regarding his eventual demotion because he did not show that there was a substantial chance that if the employer had followed this policy the result of his case would have been different. Skinner v. N.C. Dep't of Corr., 154 N.C. App. 270, 572 S.E.2d 184, 2002 N.C. App. LEXIS 1473 (2002).

Contents of Notice of Dismissal. — The notice of dismissal need not explain every step in the appeal process. Rather, it must inform the employee of his right to appeal. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Duty of State Agencies to Describe "Specific Acts or Omissions" with Particularity. — This section imposes an affirmative duty on State agencies to inform discharged employees, in writing, of the "specific acts or omissions" that were the reasons for the disciplinary action; "specific acts or omissions" implies that these incidents should be described with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. Employment Sec. Comm'n v. Wells, 50 N.C. App. 389, 274 S.E.2d 256 (1981).

This section requires that the acts or omissions be described with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Failure to include the specific names of the employee's accusers in her dismissal letter prejudiced her ability to fully prepare her appeal. Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 468 S.E.2d 813 (1996), discretionary review improvidently allowed, 344 N.C. 73, 477 S.E.2d 33 (1996).

Notice Held Inadequate. — The Employment Security Commission failed to give respondent proper notice of the reasons for his dismissal as an employee as required by this section where the only information given respondent concerning the reasons for his dismissal was contained in the letter of dismissal, which stated that respondent violated agency procedure in attempting to recruit migrant workers from Florida by phone and personal visit, that respondent had forced workers to work for a designated crew leader even though the workers preferred not to work in a crew, and that respondent violated agency procedure by not reporting illegal aliens, since the letter did not describe any incidents with sufficient particularity so that respondent could know precisely what acts or omissions were the basis of his discharge. Employment Sec. Comm'n v. Wells, 50 N.C. App. 389, 274 S.E.2d 256 (1981).

Although the Department of Human Resources' original notice to petitioner clearly stated the specific acts underlying its decision to take a particular disciplinary action, i.e., dismissal, the secretary's subsequent notice that her decision to demote petitioner was "based upon the information presented" was not an adequate statement of the specific acts or omissions underlying her decision to take a different disciplinary action, i.e., demotion. Meyers v. Department of Human Resources, 92 N.C. App. 193, 374 S.E.2d 280 (1988), cert. denied, 324 N.C. 247, 377 S.E.2d 754 (1989).

Warnings Required. — Where petitioner's performance of his duties as a wildlife officer were what had become accepted standards of reporting and performing his work, disciplinary action by petitioner's supervisors to halt these accepted standards would have propelled this behavior into the "unsatisfactory job performance" category rather than the "unacceptable personal conduct" category, for which certain warnings were required before petitioner's termination on the grounds of unsatisfactory job performance. Wilkie v. North Carolina Wildlife Resources Comm'n, 118 N.C. App. 475, 455 S.E.2d 871 (1995).

No Requirement for Administrative Warning Before Demotion. — There was no basis in this section or relevant regulations to conclude lawful procedure required petitioner be given any administrative warnings before his demotion. Meyers v. Department of Human Resources, 92 N.C. App. 193, 374 S.E.2d 280 (1988), cert. denied, 324 N.C. 247, 377 S.E.2d 754 (1989).

Written Statement of Appeal Rights Required. — Due process under the United States and North Carolina Constitutions requires that a permanent State employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before the 15- and 30-day time limits for notice of appeal provided in this section and

G.S. 126-38 commence to run. Luck v. Employment Sec. Comm'n, 50 N.C. App. 192, 272 S.E.2d 607 (1980).

Opportunity to Respond. — A State employee who has a right to continued employment subject to dismissal for just cause is entitled to a predetermination opportunity to respond. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Impartial Decision Maker. — A public employee facing an administrative hearing is entitled to an impartial decision maker. However, to make out a due process claim based on this theory, an employee must show that the decision making board or individual possesses a disqualifying personal bias. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Dean's consultation with members of the State Personnel Commission prior to dismissing petitioner could not be said to have deprived him of an impartial hearing where petitioner failed to show any disqualifying personal bias on the part of the decision makers because of familiarity with the facts of his case. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Failure to Follow Established Grievance Procedure. — Department of Human Resource's dismissal of employee's appeal on grounds it was filed one day after the deadline was neither arbitrary or capricious where employee was informed of the time limits for perfecting appeal, offered assistance for complying with appeal procedures since legal representation was not allowed at that time of the proceeding, and employee's apparent justification for filing late was difficulty in retaining an attorney. Lewis v. North Carolina Dep't of Human Resources, 92 N.C. App. 737, 375 S.E.2d 712 (1989).

School's failure to follow its internal review process did not automatically entitle petitioner to reversal of dismissal determination. In order to claim any relief based on a violation of internal appeal procedures, petitioner would have had to show that there was a substantial chance there would have been a different result in his case if the established internal procedures had been followed. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Record supported North Carolina Department of Health and Human Services' decision to terminate a health care technician's employment after other health care technicians saw the employee discard food meant for persons who were in the employee's care at a nursing home, distribute meals improperly, and fail to bathe a resident. Pittman v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 268, 573 S.E.2d 628, 2002 N.C. App. LEXIS 1579 (2002).

Dismissal Upheld. — Dismissal of petitioner from position as Director of Student Activities in the Student Services Department at the North Carolina School of the Arts for personal misconduct involving his role in assembling a meeting of other division directors to discuss complaints about their superior, the Dean of Student Services, in the absence of the Dean, would be upheld. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).

Dismissal of State Bureau of Investigation (SBI) agent for failure to comply with five day deadline for SBI agents to file reports was reasonable where the rule was promulgated for the purpose of providing timely written reports to district attorneys, to aid in prosecution, and to enhance the credibility of the testimony of SBI agents and the rule also provided that for legitimate reasons, the five day requirement could be extended. Gainey v. North Carolina Dep't of Justice, 121 N.C. App. 253, 465 S.E.2d 36 (1996).

State Personnel Commissioner did not err in affirming dismissal based on warnings that occurred two years prior to the actual dismissal, especially when the earlier violations related to the very reasons for which the employee was dismissed. Gainey v. North Carolina Dep't of Justice, 121 N.C. App. 253, 465 S.E.2d 36 (1996).

Substantial evidence supported an administrative law judge's (ALJ) ruling that the North Carolina Department of Transportation (DOT) had just cause to dismiss an employee for unacceptable personal conduct where he knowingly violated the DOT's Statement of Understanding and Internet Policy as: (1) the employee's denial of knowledge of the Statement of Understanding was not credible, (2) the employee's claim that he was unaware that he had to obtain his supervisor's approval before installing software on his work computer was not believed by the ALJ, (3) the employee admitted not having permission to install software on his computer, and (4) the unauthorized installation of software was inconsistent with the DOT's objective to ensure that its files and computer network system were properly protected. Teague v. N.C. DOT, 177 N.C. App. 215, 628 S.E.2d 395, 2006 N.C. App. LEXIS 863 (2006).

Dismissal Held Unjustified. — Dismissal of superintendent of the Department of Correction's Treatment Facility for Women (TFW) in Charlotte, a minimum custody prison or "halfway house", on grounds of insubordination held not justified under the evidence. Kandler v. Department of Cor., 80 N.C. App. 339, 342 S.E.2d 910 (1986).

Petitioner-employee was not fired for just cause where her termination was based on her refusal: (1) to provide services to a client whose dad was sexually harassing her and; (2) to attend several meetings with supervisors after her complaints about her client's sexual harassment were met with disbelief, little or no attention and investigation or ignored. Souther v. New River Area Mental Health Dev. Disabilities & Substance Abuse Program, 142 N.C. App. 1, 541 S.E.2d 750, 2001 N.C. App. LEXIS 29 (2001), aff'd, 354 N.C. 209, 552 S.E.2d 162 (2001).

Applied in North Carolina A & T Univ. v. Kimber, 49 N.C. App. 46, 270 S.E.2d 492 (1980); Floyd v. North Carolina Dep't of Commerce, 99 N.C. App. 125, 392 S.E.2d 660 (1990); Wiggins v. North Carolina Dep't of Human Resources, 105 N.C. App. 302, 413 S.E.2d 3 (1992); Sherrod v. North Carolina Dep't of Human Resources, 105 N.C. App. 526, 414 S.E.2d 50 (1992); Harding v. North Carolina Dep't of Cor., 106 N.C. App. 350, 416 S.E.2d 587 (1992); King v. North Carolina DOT, 121 N.C. App. 706, 468 S.E.2d 486 (1996); Soles v. City of Raleigh Civil Serv. Comm'n, 345 N.C. 443, 480 S.E.2d 685 (1997).

Cited in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976); Dyer v. Bradshaw, 54 N.C. App. 136, 282 S.E.2d 548 (1981); Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982); Burwell v. Griffin, 67 N.C. App. 198, 312 S.E.2d 917 (1984); Nadeau v. Employment Sec. Comm'n, 97 N.C. App. 272, 388 S.E.2d 145 (1990); Johnson v. Natural Resources & Community Dev., 98 N.C. App. 334, 391 S.E.2d 48 (1990); Debnam v. North Carolina Dep't of Cor., 107 N.C. App. 517, 421 S.E.2d 389 (1992); Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277 (1992); Cauthen v. North Carolina Dep't of Human Resources, 112 N.C. App. 238, 435 S.E.2d 81 (1993); Davenport v. North Carolina DOT, 3 F.3d 89 (4th Cir. 1993); Gray v. Laws, 915 F. Supp. 747 (E.D.N.C. 1994); White v. North Carolina Dep't of Envtl., Health, & Natural Resources, 117 N.C. App. 545, 451 S.E.2d 376 (1995); Soles v. City of Raleigh Civil Serv. Comm'n, 119 N.C. App. 88, 457 S.E.2d 746 (1995); Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995); Hanton v. Gilbert, 126 N.C. App. 561, 486 S.E.2d 432 (1997); Fearrington v. University of N.C., 126 N.C. App. 774, 487 S.E.2d 169 (1997); Wuchte v. McNeil, 130 N.C. App. 738, 505 S.E.2d 142 (1998); Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998); Simpson v. Macon County, 132 F. Supp. 2d 407, 2001 U.S. Dist. LEXIS 864 (2001); Kea v. Dep't of Health & Human Servs., 153 N.C. App. 595, 570 S.E.2d 919, 2002 N.C. App. LEXIS 1246 (2002), appeal dismissed, 356 N.C. 673, 577 S.E.2d 120 (2003), 357 N.C. 654, 588 S.E.2d 467 (2003); Leeks v. Cumberland County Mental Health Developmental Disability & Substance Abuse Facility, 154 N.C. App. 71, 571 S.E.2d 684, 2002 N.C. App. LEXIS 1415 (2002); Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

§ 126-36. Appeal of unlawful State employment practice.

(a) Any State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied the employee or that demotion, layoff, transfer, or termination of employment was forced upon the employee in retaliation for opposition to alleged discrimination or because of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by G.S. 168A-3 except where specific age, sex or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel Commission.

(b) Subject to the requirements of G.S. 126-34, any State employee or former State employee who has reason to believe that the employee has been subjected to any of the following shall have the right to appeal directly to the State Personnel Commission:

(1) Harassment in the workplace based upon age, sex, race, color, national origin, religion, creed, or handicapping condition, whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

(2) Retaliation for opposition to harassment in the workplace based upon age, sex, race, color, national origin, religion, creed, or handicapping condition, whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo. (1975, c. 667, s. 10; 1977, c. 866, ss. 13, 16; 1987, c. 320, s. 7; 1998-135, s. 4.)

Legal Periodicals. — For article discussing evidentiary standards in employment discrimination suits in light of Department of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983), see 6 Campbell L. Rev. 163 (1984).

CASE NOTES

The ultimate purpose of this section, G.S. 143-422.2, and Title VII (42 U.S.C. § 2000e et seq.) is the same; that is, the elimination of discriminatory practices in employment. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

North Carolina Supreme Court looks to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

To Whom Article Applicable. — A permanent state employee who alleges he has been reduced in position without just cause is entitled to the review and appeal provisions outlined in this article, whether the motive for his demotion was illegally discriminatory or retaliatory or apparently or actually disciplinary. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Statute merely provides a plaintiff with "the right to appeal" a wrongful retaliation claim directly to the State Personnel Commission. G.S. 126-36(b), and such "right to appeal" does not otherwise bar an action which meets the requirements of the Whistleblower Act, G.S. 126-84 et seq.; when G.S. 126-36(b) is read in para materia with the Whistleblower Act, the two statutes are not irreconcilable. Wells v. N.C. Dep't of Corr., 152 N.C. App. 307, 567 S.E.2d 803, 2002 N.C. App. LEXIS 929 (2002).

Employment of a trainee who was in a probationary period with the North Carolina Department of Revenue was not exempted by G.S. 126-5 from the appeals process through the North Carolina State Personnel Commission; although the trainee was not a ""career" state employee, G.S. 126-36(a) allowed the Commission to review his claims derived from alleged discrimination on the basis of religion. Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

Direct Appeal Permitted. — Where in his petition for a contested case hearing, an employee had alleged termination without just cause due to discrimination and had checked the appropriate lines labeled "race" and "age," he had therefore sufficiently asserted discrimination to petition directly to the State Personnel Commission. Bobbitt v. N.C. State Univ., — N.C. App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006).

Two Tests Applicable to Employment Decisions Based on Inherently Subjective Criteria. — When reviewing hiring and promotion decisions that were based on exercise of personal judgment or application of inherently subjective criteria, court may employ either "disparate treatment" test or "disparate impact" test, or both. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Definition of Promotion. — This section does not contain a definition of "promotion." Unless a word in a statute has acquired a technical meaning or the language of the statute indicates that a special use is intended, it must be given its "common and ordinary meaning." Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383, cert. denied, 333 N.C. 167, 424 S.E.2d 909 (1992).

The word "promotion" is not peculiar to any particular profession, but is universally used. Nothing in the text of this section indicates that the legislature sought to attach any technical meaning to its use. Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383, cert. denied, 333 N.C. 167, 424 S.E.2d 909 (1992).

The important criteria in both the dictionary and State Personnel Commission definitions of "promotion" are greater status and a higher standing in relation to others. Accordingly, to the extent any individual's relative standing among his peers was raised when the university police department reclassified ranks, that individual was promoted. Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383, cert. denied, 333 N.C. 167, 424 S.E.2d 909 (1992).

There is no mention in the definition of promotion of increased pay or change in job classification. This definition is consistent with other states' interpretations of promotion, which recognize that salary increases and changes in job classification are not the sole criteria for determining the existence of a promotion. Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383, cert. denied, 333 N.C. 167, 424 S.E.2d 909 (1992).

Reorganization Held Promotion Scheme. — Although changes in rank made pursuant to a reorganization involved no increase in salary or change in state job classification, the reorganization within the university police department was a promotion scheme and therefore within the appellate jurisdiction of

State Personnel Commission. Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383, cert. denied, 333 N.C. 167, 424 S.E.2d 909 (1992).

Racial Discrimination. — The State Personnel Commission has authority to determine whether a State employee has been discharged because of racial discrimination. Abron v. North Carolina Dep't of Cor., 90 N.C. App. 229, 368 S.E.2d 203 (1988).

Employer's Legitimate Nondiscriminatory Reason. — Legitimate nondiscriminatory reason is employer's promotion of an employee better qualified than complainant. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Although a female African-American social services employee had 20 years' experience and the white male who was promoted instead of her had only eight years, the employer articulated nondiscriminatory reasons for its hiring decision, including initiative, community outreach, and communications skills. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Burden and Order of Proof in Racial Discrimination Case. — In racial discrimination cases, the burdens and orders of presentation of proof are as follows: First, the employee carries the initial burden of establishing, by a preponderance of the evidence, a prima facie case of racial discrimination; second, if the employee makes out a prima facie case, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection; and third, if the employer meets its burden, the employee is given the opportunity to prove that the employer's stated reasons for termination were in fact a pretext for racial discrimination. Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22, cert. denied, 312 N.C. 81, 321 S.E.2d 893 (1984).

Once employee establishes prima facie case of racial discrimination, burden shifts to the employer to produce evidence showing legitimate, nondiscriminatory reason for its action. If the employer carries its burden to produce that evidence, the employee must then satisfy the trier of fact that the employer's stated reasons were merely a pretext for intentional discrimination. Abron v. North Carolina Dep't of Cor., 90 N.C. App. 229, 368 S.E.2d 203 (1988).

Disparate Treatment Claims. — When employee alleges that employer treated him or her in particular less favorably than other employees, employee raises claim of "disparate treatment." North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

According to "disparate treatment" analysis, employee has initial burden of proving, by preponderance of evidence, prima facie case of discrimination. [1] He applied for and was qualified for an available position, [2] that he was rejected, and that [3] after he was rejected employer filled position with white employee. Once employee establishes prima facie case, inference of discrimination arises. To rebut this inference, the employer must present evidence that employee was rejected, or other applicant was chosen, for legitimate, nondiscriminatory reason. Employee retains final burden of persuading jury of intentional discrimination. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Pretext. — After employer rebuts employee's prima facie showing, employee has opportunity to demonstrate that employer's proffered reasons for its decision were not its true reasons. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Employee may use various forms of evidence to demonstrate that state's proffered reason was not its true reason. An employee might seek to demonstrate that employer's claim to have promoted a better qualified applicant was pretextual by showing that he was in fact better qualified than person chosen for position. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

From whole record, substantial evidence supports commission's conclusion that employer's stated reasons were legitimate and not pretext for discrimination. Conversely, there is lacking substantial evidence that retaliation for past opposition to discrimination was "predominant reason." Gadson v. North Carolina Mem. Hosp., 99 N.C. App. 169, 392 S.E.2d 618 (1990).

Evidence of Discrimination. — In considering whether the employer's stated nondiscriminatory reasons were merely a pretext for discrimination, courts may consider the evidence the employee used to establish his prima facie case as well as: (1) Evidence that white employees involved in acts of comparable seriousness were retained; (2) evidence of the employer's treatment of the employee during his term of employment; (3) evidence of the employer's response to any legitimate civil rights activities of the employee; and (4) evidence of the employer's general policy and practice regarding minority employees. Abron v. North Carolina Dep't of Cor., 90 N.C. App. 229, 368 S.E.2d 203 (1988).

Record held to support the commission's ultimate finding of fact that petitioner assistant manager of soap plant at corrections department facility, was not a victim of racial discrimination. Abron v. North Carolina Dep't of Cor., 90 N.C. App. 229, 368 S.E.2d 203 (1988).

Since, under North Carolina law, plaintiff instructor was not required to employ the grievance procedures of a university

because he alleged race discrimination, but instead, he was entitled to appeal the decision directly to the State Personnel Commission, under G.S. 126-36(a), the court declined plaintiff's request to extend the attorney-client privilege to a lay member of the faculty. Nemecek v. Bd. of Governors, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 22340 (E.D.N.C. Sept. 27, 2000).

Remand for New Hearing. — Where the Commission erred by placing an improper burden of proof upon defendant employer to show an absence of discrimination, by reviewing the correctness of defendant's business judgment, and by failing to resolve the ultimate question of whether plaintiff was the victim of intentional discrimination, the case would be remanded to the State Personnel Commission for a new hearing. North Carolina Dep't of Cors. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

Applied in Brand v. N.C. Dep't of Crime Control & Pub. Safety, 352 F. Supp. 2d 606, 2004 U.S. Dist. LEXIS 26190 (M.D.N.C. 2004).

Cited in Faulkner v. North Carolina Dep't of Cors., 428 F. Supp. 100 (W.D.N.C. 1977); Davenport v. North Carolina DOT, 3 F.3d 89 (4th Cir. 1993); Booth v. North Carolina Dep't of Env't, Health & Natural Resources, 899 F. Supp. 1457 (E.D.N.C. 1995); Fearrington v. University of N.C., 126 N.C. App. 774, 487 S.E.2d 169 (1997); Candillo v. N.C. Dep't of Corr., 199 F. Supp. 2d 342, 2002 U.S. Dist. LEXIS 13272 (M.D.N.C. 2002); Wells v. N.C. Dep't of Corr., 152 N.C. App. 307, 567 S.E.2d 803, 2002 N.C. App. LEXIS 929 (2002); Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 2004 U.S. Dist. LEXIS 20193 (W.D.N.C. 2004); Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

§ 126-36.1. Appeal to Personnel Commission by applicant for employment.

Any applicant for State employment who has reason to believe that employment was denied in violation of G.S. 126-16 shall have the right to appeal directly to the State Personnel Commission. (1977, c. 866, s. 16.)

CASE NOTES

Appeal to Court Improper. — Trial court erred by not affirming the decision and order of the State Personnel Commission dismissing the petitioner's appeal for lack of jurisdiction as it was untimely filed where petitioner was an applicant for state employment who was over 40 years of age and whose grievance against the state alleged discrimination based on his age and veteran's preference; petitioner's only avenue for appeal was to the State Personnel Commission under this section. Clay v. Employment Sec. Comm'n, 111 N.C. App. 599, 432 S.E.2d 873 (1993), rev'd on other grounds, 340 N.C. 83, 455 S.E.2d 619 (1995).

Intermittent employee of Employment Security Commission (ESC) had a right to appeal ESC's allegedly discriminatory action to the personnel commission. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 457 S.E.2d 725 (1995).

Cited in Booth v. North Carolina Dep't of Env't, Health & Natural Resources, 899 F. Supp. 1457 (E.D.N.C. 1995); Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

§ 126-36.2. Appeal to Personnel Commission by career State employee denied notice of vacancy or priority consideration.

Any career State employee who has reason to believe that he was denied promotion due to the failure of the agency, department, or institution that had a job vacancy to:

(1) Post notice of the job vacancy pursuant to G.S. 126-7.1(a) or;

(2) Give him priority consideration pursuant to G.S. 126-7.1(c)

may appeal directly to the State Personnel Commission. (1987, c. 689, s. 3; 1991, c. 354, s. 6.)

§ 126-37. Personnel Commission to review Administrative Law Judge's recommended decision and make final decision.

(a) Appeals involving a disciplinary action, alleged discrimination or harassment, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B; provided that no grievance may be appealed unless the employee has complied with G.S. 126-34. The State Personnel Commission shall make a final decision in these cases as provided in G.S. 150B-36, except as provided in subsection (b1) of this section. The State Personnel Commission is hereby authorized to reinstate any employee to the position from which the employee has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority.

(b) Repealed by 1993 (Reg. Sess., 1994), c. 572, s. 1.

(b1) In appeals involving local government employees subject to this Chapter pursuant to G.S. 126-5(a)(2), except in appeals in which discrimination prohibited by Article 6 of this Chapter is found or in any case where a binding decision is required by applicable federal standards, the decision of the State Personnel Commission shall be advisory to the local appointing authority. The State Personnel Commission shall comply with all requirements of G.S. 150B-44 in making an advisory decision. The local appointing authority shall, within 90 days of receipt of the advisory decision of the State Personnel Commission, issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. If the local appointing authority rejects or modifies the advisory decision, the local appointing authority must state the specific reasons why it did not adopt the advisory decision. A copy of the final decision shall be served on each party personally or by certified mail, and on each party's attorney of record.

(b2) The final decision is subject to judicial review pursuant to Article 4 of Chapter 150B of the General Statutes. Appeals in which it is found that discrimination prohibited by Article 6 of this Chapter has occurred or in any case where a binding decision is required by applicable federal standards shall be heard as all other appeals, except that the decision of the State Personnel Commission shall be final.

(c) If the local appointing authority is other than a board of county commissioners, the local appointing authority must give the county notice of the appeal taken pursuant to subsection (a) of this section. Notice must be given to the county manager or the chairman of the board of county commissioners by certified mail within 15 days of the receipt of the notice of appeal. The county may intervene in the appeal within 30 days of receipt of the notice. If the action is appealed to superior court the county may intervene in the superior court proceeding even if it has not intervened in the administrative proceeding. The decision of the superior court shall be binding on the county even if the county does not intervene. (1975, c. 667, s. 10; 1981, c. 680, s. 1; 1985, c. 746, s. 15; 1985 (Reg. Sess., 1986), c. 1022, s. 10; 1987, c. 394; 1989 (Reg. Sess., 1990), c. 1025, s. 3; 1991, c. 103, s. 1; 1993 (Reg. Sess., 1994), c. 572, s. 1; 1998-135, s. 5.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Purpose of 1994 Amendment. — The 1994 amendment of (b1) reflected the intent of the legislature in enacting the original version of this section and was an effort by the legislature to clarify its original position. Cunningham v. Catawba County, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

Due Process Concerns in Discrimina-

tion Cases. — In discrimination cases, G.S. 126-37(b1) and G.S. 150B-36 provide that when the State Personnel Commission makes a finding of discrimination, this is binding upon the local appointing authority; the case is then subject to judicial review. Due process concerns are not as strong in discrimination cases because the local appointing authority will never have an opportunity to reverse a finding of discrimination by the State Personnel Commission. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Statutory Interaction with G.S. 150B-43. — This section does not create a cause of action but instead refers to judicial review provided by G.S. 150B-43. Hill v. Morton, 115 N.C. App. 390, 444 S.E.2d 683, cert. granted, 337 N.C. 692, 448 S.E. 2d 523 (1994), review improvidently granted, 340 N.C. 355, 457 S.E.2d 300 (1995).

Law Judge's Ruling Subject to Review by Personnel Commission. — The administrative law judge must render a decision on the motion which is presented, but the administrative law judge's ruling is subject to review by the ultimate factfinder, the Personnel Commission. Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

Failure to Follow Established Grievance Procedure. — The State Personnel Act provides for administrative-type grievance procedures for violations of its provisions. The statute further provides that judicial review of unfavorable decisions may be had in superior court. Where a statute provides for an orderly procedure for an appeal to the superior court for review, this procedure is the exclusive means for obtaining judicial review, and a civil action is only proper after all administrative remedies have been exhausted. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Because Chapter 126 makes compliance with the procedures of Article 3 of Chapter 150B mandatory, jurisdiction over a contested case hearing arising under Chapter 126 is not conferred upon the Office of Administrative Hearings unless petitioner follows such procedures. Nailing v. UNC-CH, 117 N.C. App. 318, 451 S.E.2d 351 (1994), cert. denied, 339 N.C. 614, 454 S.E.2d 255 (1995).

Sixty Days to File Petition. — Petitioner, an intermittent state employee who alleged discrimination on consideration of his application for state employment under G.S. 150B-23(f), had sixty days to file his petition for a contested case hearing; this period did not begin to run until petitioner received letter from agency chairman which indicated that no evidence of discrimination existed in the agency's selection. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 455 S.E.2d 619 (1995).

Local Appointing Authority. — A "local appointing authority," within the meaning of this section, is required to render its decision in accordance with G.S. 150B-36(b). Cunningham v. Catawba County, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

County Board of Social Services Is Not "Local Appointing Authority." — The sole involvement of the county board of social services in personnel matters is to select the county director of social services. And the director derives his authority to appoint personnel directly from the General Assembly, not from the board. Thus the local board does not become the "local appointing authority" pursuant to this section in the absence of a permanent full-time director. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

Under G.S. 126-37(b1), decisions regarding discrimination cases made by the State Personnel Commission are advisory to the local appointing authority. Should the situation arise, there are no statutory alternatives when the local appointing authority might desire to recuse herself or if she is disqualified from making the final decision. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Jurisdiction of OAH Derived from This Chapter. — The jurisdiction of the Office of Administrative Hearings over the appeals of state employee grievances derives not from Chapter 150B, but from this Chapter and is granted in subsection (a) of this section. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Invocation of Jurisdiction by Action Deemed "Disciplinary." — Because G.S. 126-35 deems such departmental or agency action "disciplinary," an allegation that an employee has been "demoted in rank without sufficient cause" invokes first the jurisdiction of the State Personnel Commission, then on appeal, that of the Office of Administrative Hearings, even when there has been no documented misconduct by the employee. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Jurisdiction to Hear Action Brought by DOC Employee. — Among all the provisions of this article, only this section confers upon the State Personnel Commission or upon the Office of Administrative Hearings the jurisdiction, or power, to deal with an action brought by a correction employee who was reallocated pursuant to a managerial reallocation. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Subject Matter Jurisdiction of Superior Court. — Where the superior court treated subsection (b) as creating a cause of action in which the court could make its own findings of fact and substitute its judgment for the State Personnel Commission's, the court exceeded its jurisdiction over state employee grievances. Hill v. Morton, 115 N.C. App. 390, 444 S.E.2d 683, cert. granted, 337 N.C. 692, 448 S.E. 2d 523 (1994), review improvidently granted, 340 N.C. 355, 457 S.E.2d 300 (1995).

The superior court was without jurisdiction to entertain a former employee's appeal of his dismissal, where the employee sought an order to affirm the recommended decision of the State Personnel Commission that he be reinstated with back pay prior to a final decision by the local appointing authority pursuant to subsection (b1). Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

Jurisdiction Where Appellant Not Employed Five Continuous Years. — The State Personnel Commission had jurisdiction to hear Employment Security Commission employee's appeal from a dismissal even though she had not been employed continuously for five years. Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982).

To Whom Article Applicable. — A permanent state employee who alleges he has been reduced in position without just cause is entitled to the review and appeal provisions outlined in this article, whether the motive for his demotion was illegally discriminatory or retaliatory, or apparently or actually disciplinary. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Meaning of "Contested Case." — Read in the context of subsection (a) of this section, which provides that appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B, "contested case" clearly derives its meaning from the latter, procedural statute. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Case Held "Contested" Within Meaning of Subsection (a). — Petitioner's allegation that he had been "demoted in rank without sufficient cause" stated grounds for his department's action to be deemed "disciplinary" within the meaning and intent of G.S. 126-35 and for his case to be considered "contested" within the meaning and intent of subsection (a) of this section. Because he had properly pursued all informal procedures mandated by the State Personnel Act and by the North Carolina Administrative Code for the resolution of his grievance, petitioner's appeal also fit the procedural profile of a "contested case" for purposes of its review by the Office of Administrative Hearings under Chapter 150B. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Subsection (a) allows the Commission to order reinstatement of an employee and direct other suitable relief, whenever it deems it necessary to correct the failure of a department or agency to follow policies or rules promulgated pursuant to G.S. 126-4. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988), overruled on other grounds, Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

No Restoration Without Finding of Wrongful Treatment. — The provision of this section giving the State Personnel Commission the authority to restore a State employee to a position from which he has been demoted must be read in conjunction with G.S. 126-35, which forbids demotion without just cause, and the Commission therefore does not have the power to restore a State employee to a position from which he had been demoted without some finding that the employee had been treated wrongfully. Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Brooks v. Best, 45 N.C. App. 540, 263 S.E.2d 362 (1980).

Pursuant to this section, the State Personnel Commission may reinstate a state employee to the position from which he has been removed. The implication in this section, however, is that the Commission can only act to correct an abuse or where there is a wrongful denial. North Carolina A & T Univ. v. Kimber, 49 N.C. App. 46, 270 S.E.2d 492 (1980).

Reinstatement Proper Though Not Identical. — Where employee was returned to the same pay grade and step as before his demotion even though the job was at a different location, he was properly reinstated. North Carolina Dep't of Cors. v. Myers, 120 N.C. App. 437, 462 S.E.2d 824 (1995).

Discretion of Personnel Commission. — Where a permanent State employee is dismissed for performance of duty reasons, without sufficient warnings as required by G.S. 126-35, upon reinstating the employee the decision whether or not to award back pay and benefits is within the sound discretion of the Personnel Commission. Jones v. Department of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).

Although this section authorizes the State Personnel Commission to reinstate an employee to the position from which he is removed and to order the transfer of an employee to whom it has been wrongfully denied, that authority is discretionary. North Carolina Dep't of Cors. v. Myers, 120 N.C. App. 437, 462 S.E.2d 824 (1995).

Reasons Recommendation Not Adopted to Be Stated. — DSS was required, in rejecting the recommended decision of the Commission, to state the specific reasons why it did not adopt the recommended decision and serve a copy of its final decision on the petitioner; however, because the legislature did not specifically require that the "local appointing authority" comply with G.S. 150B-36(b), there was no obligation to enter findings of fact and conclusions of law, as required by G.S. 150B-36(b). Cunningham v. Catawba County, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

Agency Decision Upheld Although Director Reviewed Own Employment Action. — Where substantial evidence existed to support an agency finding that petitioner voluntarily resigned and was not fired, the court upheld the decision as rendered properly pursuant to this section, and not in violation of petitioner's due process rights, even though the agency director/final decision-maker who disregarded the State Personnel Commission's recommendation that employee be reinstated was, in fact, evaluating factual issues involving his own testimony and credibility. Hearne v. Sherman, 350 N.C. 612, 516 S.E.2d 864 (1999).

Due process was not violated when the local appointing authority who had discretion to reject or accept the State Personnel Commission's findings in a discrimination case pursuant to G.S. 126-37(b1) was the same person who made the allegedly discriminatory hiring decision. Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004).

Attorney Fee Awards. — G.S. 6-19.1 authorizes a superior court to award fees to the employee of a county Department of Social Services who has prevailed under the State Personnel Act, G.S. 126-1 et seq.; therefore, a trial court was authorized to award fees for representation of a plaintiff during the administrative proceedings contesting her termination while on medical leave, which was adjudged without cause and wrongful. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Applied in Area Mental Health v. Speed, 69 N.C. App. 247, 317 S.E.2d 22 (1984).

Cited in Faulkner v. North Carolina Dep't of Cors., 428 F. Supp. 100 (W.D.N.C. 1977); North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990); Edwards v. University of N.C., 107 N.C. App. 606, 421 S.E.2d 383 (1992); Harding v. North Carolina Dep't of Cor., 334 N.C. 414, 432 S.E.2d 298 (1993); Clay v. Employment Sec. Comm'n, 111 N.C. App. 599, 432 S.E.2d 873 (1993); North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993); Davenport v. North Carolina DOT, 3 F.3d 89 (4th Cir. 1993); Gray v. Laws, 915 F. Supp. 747 (E.D.N.C. 1994); Conran v. New Bern Police Dep't, 122 N.C. App. 116, 468 S.E.2d 258 (1996); Beauchesne v. University of N.C, 125 N.C. App. 457, 481 S.E.2d 685 (1997); Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998); Wright v. Blue Ridge Area Auth., 134 N.C. App. 668, 518 S.E.2d 772, 1999 N.C. App. LEXIS 899 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999); Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000); Simpson v. Macon County, 132 F. Supp. 2d 407, 2001 U.S. Dist. LEXIS 864 (2001); Candillo v. N.C. Dep't of Corr., 199 F. Supp. 2d 342, 2002 U.S. Dist. LEXIS 13272 (M.D.N.C. 2002); Steeves v. Scot. County Bd. of Health, 152 N.C. App. 400, 567 S.E.2d 817, 2002 N.C. App. LEXIS 913 (2002), cert. denied, 356 N.C. 444, 573 S.E.2d 512 (2002); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 2004 U.S. Dist. LEXIS 20193 (W.D.N.C. 2004); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005); Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

§ 126-38. Time limit for appeals.

Any employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal. (1977, c. 866, s. 14; 1989 (Reg. Sess., 1990), c. 1025, s. 4.)

CASE NOTES

Status of Employee. — An intermittent state employee is not an "employee" for purposes of Chapter 126 because Article 8 of this chapter applies only to "career state employees." Clay v. Employment Sec. Comm'n, 340 N.C. 83, 455 S.E.2d 619 (1995).

This section, which establishes the time limit for appeals applies only to employees, not to an applicant for employment, even if the applicant is an intermittent state employee. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 455 S.E.2d 619 (1995).

Applicability of G.S. 150B-23(f). — The time limitation contained in G.S. 150B-23(f) applies to appeal of personnel decisions under Chapter 126 that are not covered by this section. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 455 S.E.2d 619 (1995).

Adequacy of Notice. — A notice which failed to inform petitioner of her right to contest the designation of her position as "exempt policymaking," the procedure for contesting the designation, or the time limits for filing her objection to the designation did not comply with the requirements of this section so as to start the time limit for appeals running. Jordan v. DOT, 140 N.C. App. 771, 538 S.E.2d 623, 2000 N.C. App. LEXIS 1272 (2000), cert denied, 353 N.C. 376, 547 S.E.2d 412 (2001).

Letter to an employee after her termination while on medical leave that expressed sympathy for her medical condition and reiterated facts regarding the employee's termination did not constitute sufficient notice of the decision or action regarding the grievance filed by the employee, which triggered the right to appeal for purposes of G.S. 126-38; because the employer, the Department of Social Services (DSS), failed to provide the notice required under G.S. 150B-23(f) as to appealing her termination, an administrative law judge properly denied the DSS' motion to dismiss the appeal as untimely. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Written Statement of Appeal Rights Required. — Due process under the United States and North Carolina Constitutions requires that a permanent State employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before the 15- and 30-day time limits for notice of appeal provided in G.S. 126-35 and this section commence to run. Luck v. Employment Sec. Comm'n, 50 N.C. App. 192, 272 S.E.2d 607 (1980).

Letter of Grievance. — Under the Administrative Procedure Act, all that is required in a letter of grievance is that there be a plain statement of the circumstances allegedly constituting an unlawful failure to offer employment, so that respondent may be put upon its defense. North Carolina Dep't of Cor. v. Hill, 313 N.C. 481, 329 S.E.2d 377 (1985).

Cited in Davenport v. North Carolina DOT, 3 F.3d 89 (4th Cir. 1993); Clay v. Employment Sec. Comm'n, 340 N.C. 83, 457 S.E.2d 725 (1995); Ritter v. Department of Human Resources, 118 N.C. App. 564, 455 S.E.2d 901 (1995); Shackleford-Moten v. Lenoir County Dep't of Soc. Servs., 155 N.C. App. 568, 573 S.E.2d 767, 2002 N.C. App. LEXIS 1630 (2002), cert. denied, 357 N.C. 252, 582 S.E.2d 609 (2003).

§ 126-39. Scope of this Article.

Except for positions subject to competitive service and except for appeals brought under G.S. 126-16, 126-25, and 126-36, this Article applies to all State employees who are career State employees at the time of the act, grievance, or employment practice complained of. (1977, c. 866, s. 15; 1985, c. 617, s. 4; 1987, c. 320, s. 8; 1991, c. 354, s. 7.)

CASE NOTES

An intermittent state employee is not an "employee" for purposes of Chapter 126 because Article 8 of this chapter applies only to "career state employees." Clay v. Employment Sec. Comm'n, 340 N.C. 83, 455 S.E.2d 619 (1995).

Petitioner, an intermittent state employee was not an "employee" for purposes of this chapter governing state personnel system which applies only to "career State employees" and which establishes the time limit for appeals, for employees and not applicants for employment like petitioner. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 457 S.E.2d 725 (1995).

Claims Brought by Department Trainee During Probationary Period. — G.S. 126-36(a) and G.S. 126-39 provided the North Carolina State Personnel Commission with jurisdiction over religious discrimination claims brought by a trainee with the North Carolina Department of Revenue during a probationary period, and the trainee satisfied the burden of proof required in discrimination actions to show his dismissal was based on illegitimate and discriminatory motives; furthermore, although the trial court did not specify the standard of review it applied, detail its findings of fact, or delineate its conclusions of law, appellate review of the whole record and transcripts showed no grounds existed to warrant reversal of the Commission's final decision. Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005).

Cited in Cauthen v. North Carolina Dep't of Human Resources, 112 N.C. App. 238, 435 S.E.2d 81 (1993).

§ 126-40: Repealed by Session Laws 1985, c. 746, s. 16.

§ 126-41. Attorney and witness fees.

The decision of the Commission assessing or refusing to assess reasonable witness fees or a reasonable attorney's fee as provided in G.S. 126-4(11) is a final agency decision appealable under Article 4 of Chapter 150B of the General Statutes. The reviewing court may reverse or modify the decision of the Commission if the decision is unreasonable or the award is inadequate. The reviewing court shall award court costs and a reasonable attorney's fee for representation in connection with the appeal to an employee who obtains a reversal or modification of the Commission's decision in an appeal under this section. (1985, c. 717; 1987, c. 827, ss. 1, 56.)

CASE NOTES

Attorney Fees. — Upon appeal of the Commission's decision not to award attorney's fees under G.S. 126-4(11), this section constrains the Superior Court to reverse or modify the Commission's order only if it is deemed unreasonable or inadequate. Morgan v. North Carolina DOT, 124 N.C. App. 180, 476 S.E.2d 431 (1996).

Employee who prevailed in a discrimination claim was properly awarded attorneys' fees and costs for representation before the administrative law judge, the North Carolina State Personnel Commission, and the trial court; the trial court did not err in determining that the administrative law judge's award was not unreasonable or inadequate, after reversing the Commission's decision in favor of the state agency the trial court was required to award the employee attorneys' fees and costs, and the trial court provided sufficient notice and time for both parties to respond to its request for affidavits in support of or in opposition to attorneys' fees and costs. Gordon v. N.C. Dep't of Corr., 173 N.C. App. 22, 618 S.E.2d 280, 2005 N.C. App. LEXIS 1918 (2005).

Cited in Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

§ 126-42: Reserved for future codification purposes.

Article 9.

The Administrative Procedure Act and Modifications.

§§ 126-43, 126-44: Repealed by Session Laws 1987, c. 320, s. 9.

§ 126-45: Repealed by Session Laws 1977, c. 866, s. 18.

§§ 126-46 through 126-50: Reserved for future codification purposes.

Article 10.

Interchange of Governmental Employees.

§ 126-51. Short title.

This Article shall be known and may be cited as the "North Carolina Interchange of Governmental Employees Act of 1977." (1977, c. 783, s. 1.)

§ 126-52. Definitions.

For purposes of this Article:

(1) "Assigned employee" means an employee of a sending agency who is assigned or detailed to a receiving agency as part of the employee's regular duties with the sending agency.

(2) "Employee on leave" means an employee on leave of absence without pay from a sending agency who becomes an employee of a receiving agency while on leave from the sending agency.

(3) "Receiving agency" means any division, department, agency, instrumentality, authority, or political subdivision of the federal government or of a state or local government which, under this Article, receives an employee of another governmental division, department, agency, instrumentality, authority, or political subdivision of the federal government or of a state or local government.

(4) "Sending agency" means any division, department, agency, instrumentality, authority, or political subdivision of the federal government or of a state or local government which, under this Article, sends any employee thereof to another governmental division, department, agency, instrumentality, authority, or political subdivision of the federal government or of a state or local government. (1977, c. 783, s. 1.)

§ 126-53. Authority to interchange employees.

(a) Any division, department, agency, instrumentality, authority, or political subdivision of the State of North Carolina is authorized to participate in a program of interchange of employees with divisions, departments, agencies, instrumentalities, authorities, or political subdivisions of the federal government, of another state, or of this State, as a sending agency or a receiving agency.

(b) The period of individual assignment, detail, or leave of absence under an interchange program shall not exceed two years.

(c) The temporary assignment of the employee may be terminated by mutual agreement between the sending agency and the receiving agency.

(d) Elected officials may not participate in a program of interchange under this Article. (1977, c. 783, s. 1.)

§ 126-54. Status of employees of sending agency.

(a) Employees of a sending agency participating in an exchange of personnel authorized by G.S. 126-53 may be considered during such participation to be either assigned employees or employees on leave.

(b) Assigned employees shall be entitled to the same salary and employment benefits to which they would be entitled as employees of the sending agency and shall remain employees of the sending agency for all purposes unless otherwise provided in this Article or in a written agreement between the sending agency and the receiving agency.

(c) Employees on leave shall have the same rights, benefits and obligations as other State or local employees subject to this Chapter who are granted leaves of absences, unless otherwise provided in this Article, or in a written agreement between the sending agency and the receiving agency.

(d) When a division, department, agency, instrumentality, authority or political subdivision of the State of North Carolina acts as a sending agency, employees participating in an exchange of personnel authorized by G.S. 126-53, whether considered assigned employees or employees on leave, shall have the same rights, benefits and obligations to participate in and receive benefits, including death benefits, from any retirement system of which they are members as employees of the sending agency, whether they are members of the Teachers' and State Employees' Retirement System, the North Carolina Local Governmental Employees' Retirement System, the Law Enforcement Officers' Benefit and Retirement Fund, or other Retirement System which has been or may be established by the State for public employees; provided, however, that the receiving agency agrees to and makes the employer contributions and deducts from the salary of the employee the employee contributions for continued membership in such Retirement System. Provided, further, that if no contributions are paid into the appropriate Retirement System during the period that the employee participates in the exchange of personnel authorized by this Article, such employee shall remain entitled to death benefits resulting from his death during the period of the exchange. Provided, that where duplicate benefits would otherwise be payable on account of disability or death, the employee or his estate shall elect, within one year of the date of disability or death, which benefits to receive. (1977, c. 783, s. 1.)

§ 126-55. Travel expenses of employees from this State.

A sending agency in this State shall not pay the travel expenses of its assigned or on leave employees and shall not pay the travel expenses of such employees incurred in the course of performing work for the receiving agency. Such expenses shall be borne by the receiving agency. (1977, c. 783, s. 1.)

§ 126-56. Status of employees of other governments.

(a) When a division, department, agency, instrumentality, authority or political subdivision of the State of North Carolina acts as a receiving agency, assigned employees of the sending agency remain the employees of the sending agency and continue to receive the employment benefits of the sending agency unless otherwise specified in a written agreement between the sending agency and the receiving agency.

(b) When a division, department, agency, instrumentality, authority or political subdivision of this State acts as a receiving agency, employees on leave from the sending agency will receive appointments as employees with the receiving agency and will be entitled to the same employment benefits as other employees of the receiving agency unless otherwise specified in a written agreement between the sending agency and the receiving agency. Such appointments may be made without regard to any rules or regulations of the receiving agency regarding the selection of employees; but all rules of the State Personnel Act shall apply to State employees. (1977, c. 783, s. 1.)

§ 126-57. Travel expenses of employees of other governments.

A receiving agency in the State of North Carolina may, in accordance with its travel regulations and travel regulations by law, pay the travel expenses incurred in the course of an assigned employee's duties or incurred in the course of the duties of an employee on leave with the receiving agency on the same basis as the travel expenses of regular employees are paid. (1977, c. 783, s. 1.)

§ 126-58. Administration.

The State Personnel Commission and any State division, department, agency, instrumentality, authority or political subdivision participating in an interchange of employees program may promulgate rules or regulations necessary for the administration of such program, so long as such rules or regulations do not conflict with the provisions of this Article or any other provision of law. (1977, c. 783, s. 1.)

§§ 126-59 through 126-63: Reserved for future codification purposes.

Article 11.

Governor's Commission on Governmental Productivity.

§§ 126-64 through 126-73: Repealed by Session Laws 1985, c. 479, s. 153(a).

Article 12.

Work Options Program for State Employees.

§ 126-74. Work Options Program established.

There is established a Work Options Program for State employees in the Office of State Personnel to be administered by the State Personnel Commission. The State Personnel Director shall assign an employee within the Office of State Personnel, to be known as the State Work Options Coordinator, to direct the Work Options Program as established in this Article. (1981, c. 917, s. 1; 1991, c. 65, s. 8.)

Editor's Note. — Session Laws 1981, c. 917, s. 2 provided: "Nothing herein contained shall be construed to obligate the General Assembly to appropriate any additional funds, nor permit coverage under the Teachers' and State Employees' Retirement System and health benefits program in Articles 1 and 3 of Chapter 135 except as otherwise provided for therein."

§ 126-75. Work options for State employees.

(a) The following work options allowed State employees are to be included in the program administered under this Article:

(1) Flexible work hours as established by the State Personnel Commission;
(2) Job sharing as permitted by the State Personnel Commission;
(3) Permanent part-time positions as established under the State Personnel Act.

(b) The State Personnel Commission shall examine the present options listed in subsection (a) of this section available to State employees and other options the State Personnel Commission may make available for a comprehensive program of work options for State employees. The State Personnel

Commission shall, with the concurrence of the agency, determine the need for additional permanent part-time positions within State Government and how increased use of these positions could benefit employee morale and productivity as well as increase the use of the available labor force. None of the provisions of this Article shall be administered to reduce the total number of hours per day a State office normally is open to serve the public. (1981, c. 917, s. 1.)

CASE NOTES

Cited in Wiebenson v. Board of Trustees, 123 N.C. App. 246, 472 S.E.2d 592 (1996).

§ 126-76. Promoting Work Options Program.

The State Personnel Commission shall develop a program to expand the use of work options. This program shall include training sessions for agency personnel to instruct them in the use of work options available to State employees. The State Personnel Commission shall also provide technical assistance to agency personnel in developing a Work Options Program for each agency or expanding existing programs in each agency. The Work Options Coordinator shall also identify personnel positions within the State Personnel System which can effectively be structured in job sharing or permanent part-time employment positions. (1981, c. 917, s. 1.)

§ 126-77. Authority of agencies to participate.

The State Personnel Commission shall request from each agency assistance in formulating the Work Options Program. Any division, department, agency, instrumentality or authority shall participate in the program of work options as established in this Article. (1981, c. 917, s. 1.)

§ 126-78. Administration.

The State Personnel Commission and any State division, department, agency, instrumentality or authority participating in the State Work Options Program shall promulgate rules necessary for the administration of the program. (1981, c. 917, s. 1; 1987, c. 827, s. 57.)

§ 126-79. Report required.

The State Personnel Commission shall require a biennial report of each State division, department, agency, instrumentality or authority on the status of the Work Options Program. The State Personnel Commission shall in turn make a biennial report to the General Assembly on the status of the Work Options Program, including any increase in the use of job sharing, flexible work hours and any other approved work option for State employees. (1981, c. 917, s. 1.)

Article 13.

Veteran's Preference.

§ 126-80. Declaration of policy.

It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution. (1987 (Reg. Sess., 1988), c. 1064, s. 1.)

CASE NOTES

Construction with Other Sections. — Pursuant to G.S. 126-83, employees of the System designated in G.S. 126-5(a)(2) are expressly excluded from the preference afforded by this section but, if qualified under G.S. 128-15, are entitled to the veterans preference thereunder applicable to all employees of State departments, agencies and institutions. Wright v. Blue Ridge Area Auth., 134 N.C. App. 668, 518 S.E.2d 772, 1999 N.C. App. LEXIS 899 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999).

Cited in Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996); Heckman v. University of N.C., 19 F. Supp. 2d 468 (M.D.N.C. 1998).

§ 126-81. Definitions.

As used in this Article:

(1) "A period of war" includes World War I (April 16, 1917, through November 11, 1918), World War II (December 7, 1941, through December 31, 1946), the Korean Conflict (June 27, 1950, through January 31, 1955), the period of time between January 31, 1955, and the end of the hostilities in Vietnam (May 7, 1975), or any other campaign, expedition, or engagement for which a campaign badge or medal is authorized by the United States Department of Defense.

(2) "Veteran" means a person who served in the Armed Forces of the United States on active duty, for reasons other than training, and has been discharged under other than dishonorable conditions.

(3) "Eligible veteran" means:
  a. A veteran who served during a period of war; or
  b. The spouse of a disabled veteran; or
  c. The surviving spouse or dependent of a veteran who dies on active duty during a period of war either directly or indirectly as a result of such service; or
  d. A veteran who suffered a service-connected disability during peacetime; or
  e. The spouse of a veteran described in subdivision d. of this subsection; or
  f. The surviving spouse or dependent of a person who served in the Armed Forces of the United States on active duty, for reasons other than training, who died for service-related reasons during peacetime. (1987 (Reg. Sess., 1988), c. 1064, s. 1.)

§ 126-82. State Personnel Commission to provide for preference.

(a) The State Personnel Commission shall provide that in evaluating the qualifications of an eligible veteran against the minimum requirements for obtaining a position, credit shall be given for all military service training or schooling and experience that bears a reasonable and functional relationship to the knowledge, skills, and abilities required for the position. This preference applies to initial employment with the State and extends to other employment events including subsequent hirings, promotions, reassignments, and horizontal transfers.

(b) The State Personnel Commission shall provide that if an eligible veteran has met the minimum requirements for the position, after receiving experience credit under subsection (a) of this section, he shall receive experience credit as determined by the Commission for additional related and unrelated military service. This preference applies to initial employment with the State and extends to other employment events including subsequent hirings, promotions, reassignments, and horizontal transfers.

(c) The State Personnel Commission may provide that in reduction in force situations where seniority or years of service is one of the considerations for retention, an eligible veteran shall be accorded credit for military service.

(d) Any eligible veteran who has reason to believe that he or she did not receive a veteran's preference in accordance with the provisions of this Article or rules adopted under it may appeal directly to the State Personnel Commission.

(e) The willful failure of any employee subject to the provisions of Article 8 of this Chapter to comply with the provisions of this Article or rules adopted under it constitutes personal misconduct in accordance with the provisions and promulgated rules of this Chapter, including those for suspension, demotion, or dismissal. (1987 (Reg. Sess., 1988), c. 1064, s. 1; 2007-286, s. 2.)

Editor's Note. — Session Laws 2007-286, s. 3, provides that the State Personnel Commission and State agencies, departments, and institutions shall adopt rules to implement this act.

Effect of Amendments. — Session Laws 2007-286, s. 2, effective July 27, 2007, added the last sentences in subsections (a) and (b).

CASE NOTES

Veteran's Preference. — The Commission's rule that the veteran's preference applies only to "initial selection" and "reduction in force" situations was reasonable and permissible. Dunn v. North Carolina Dep't of Human Resources, 124 N.C. App. 158, 476 S.E.2d 383 (1996).

OPINIONS OF ATTORNEY GENERAL

The State Personnel Commission has the statutory authority, under this section and G.S. 126-4, to promulgate a rule regarding the application of a veteran's preference in the form of an additional ten points to be awarded where a numerically scored examination is used as part of the selection process. See opinion of Attorney General to Mr. Ronald Penny, State Personnel Director, Office of State Personnel, 1998 N.C.A.G. 10 (2/12/98).

§ 126-83. Exceptions.

Notwithstanding G.S. 126-5, and notwithstanding provisions in that section that only certain Articles of this Chapter apply to some employees, this Article applies to all persons covered by this Chapter except those exempted by G.S. 126-5(c)(2), G.S. 126-5(c)(3), G.S. 126-5(c)(4), G.S. 126-5(c1), G.S. 126-5(c2), or G.S. 126-5(c3), but this Article does not apply to those persons covered by G.S. 126-5(a)(2). G.S. 128-15 shall apply to those persons exempted from coverage of this Article, but shall not apply to any person covered by this Article. (1987 (Reg. Sess., 1988), c. 1064, s. 1; 1991, c. 65, s. 9.)

CASE NOTES

Application of Veterans Preference. — Pursuant to this section, employees of the System designated in G.S. 126-5(a)(2) are expressly excluded from the preference afforded by G.S. 126-80 but, if qualified under G.S. 128-15, are entitled to the veterans preference thereunder applicable to all employees of State departments, agencies and institutions. Wright

v. Blue Ridge Area Auth., 134 N.C. App. 668, 518 S.E.2d 772, 1999 N.C. App. LEXIS 899 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999).

ARTICLE 14.

Protection for Reporting Improper Government Activities.

§ 126-84. Statement of policy.

(a) It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

(1) A violation of State or federal law, rule or regulation;
(2) Fraud;
(3) Misappropriation of State resources;
(4) Substantial and specific danger to the public health and safety; or
(5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

(b) Further, it is the policy of this State that State employees be free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels. (1989, c. 236, s. 1; 1997-520, s. 5.)

CASE NOTES

Purpose of Act to Protect State Employee From Retaliation for Truthful Reporting, Not to Condone Untruthful Conduct. — Trial court properly granted a motion to dismiss by state agencies and officials of a former law enforcement officer's action under the Whistleblower Act, G.S. 126-84 et seq., where the officer admitted that he failed to file a complete and accurate report of an arrest incident that he observed involving another trooper and a suspect, wherein excessive force was suspected; the purpose of the Whistleblower Act was to protect a state employee from retaliation when he engaged in truthful reporting, not to condone untruthful conduct. Newberne v. Crime Control & Pub. Safety, 168 N.C. App. 87, 606 S.E.2d 742, 2005 N.C. App. LEXIS 176 (2005).

Construction with Other Statutes. — G.S. 126-36(b) merely provides a plaintiff with "the right to appeal" a wrongful retaliation claim directly to the State Personnel Commission. and such "right to appeal" does not otherwise bar an action which meets the requirements of the Whistleblower Act, G.S. 126-84 et seq.; when G.S. 126-36(b) is read in para materia with the Whistleblower Act, the two statutes are not irreconcilable. Wells v. N.C. Dep't of Corr., 152 N.C. App. 307, 567 S.E.2d 803, 2002 N.C. App. LEXIS 929 (2002).

Burden of Persuasion. — Claims brought under the North Carolina Whistleblower Act, G.S. 126-84 through 126-88, should be adjudicated according to the following procedures: (1) the plaintiff must endeavor to establish a prima facie case of retaliation under the statute, the plaintiff should include any available direct evidence that the adverse employment action was retaliatory along with circumstantial evidence to that effect; (2) the defendant should present its case, including its evidence as to legitimate reasons for the employment decision; and (3) once all the evidence has been received, the court should determine whether the McDonnell Douglas or Price Waterhouse framework properly applies to the evidence before it. If the plaintiff has demonstrated that he or she engaged in a protected activity and the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further established by direct evidence that the protected conduct was a substantial or motivating factor in the adverse employment action, then the defendant bears the burden to show that its legitimate reason, standing alone, would have induced it to make the same decision; if, however, the plaintiff has failed to satisfy the Price Waterhouse threshold, the case should be decided under the principles enunciated in McDonnell Douglas and Burdine, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken for retaliatory purposes. Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

Sufficiency of Complaint. — State trooper's claim for wrongful termination in violation of the North Carolina Whistleblower Act, G.S. 126-84 through 126-88, was wrongfully dismissed where the trooper, who alleged that the actual reason for his termination was his disclosure of a possible abuse of authority in an amended statement that corrected a possibly misleading statement, stated a claim for relief under G.S. 126-84(a). Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

Earlier Suit Was Not Basis for Claim Under Whistleblower Act. — Employee was not entitled to seek relief for alleged employment retaliation under the Whistleblower Act, G.S. 126-84, on the theory that his earlier suit seeking reinstatement into his former position constituted reporting to "another appropriate authority" since the earlier suit did not concern matters affecting general public policy. Hodge v. N.C. DOT, 175 N.C. App. 110, 622 S.E.2d 702, 2005 N.C. App. LEXIS 2726 (2005), cert. denied, 360 N.C. 533, 633 S.E.2d 816 (2006).

Cited in Kennedy v. Guilford Technical Community College, 115 N.C. App. 581, 448 S.E.2d 280 (1994); Aune v. University of N.C., 120 N.C. App. 430, 462 S.E.2d 678 (1995); Wells v. N.C. Dep't of Corr., 152 N.C. App. 307, 567 S.E.2d 803, 2002 N.C. App. LEXIS 929 (2002); Jenkins v. Trs. of Sandhills Cmty. College, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25252 (M.D.N.C. Dec. 3, 2002); Brookshire v. N.C. DOT, DMV, — N.C. App. —, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

§ 126-85. Protection from retaliation.

(a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

(a1) No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.

(b) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the State employee has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation or poses a substantial and specific danger to the public health and safety.

(b1) No State employee shall retaliate against another State employee because the employee has refused to carry out a directive which may constitute a violation of State or federal law, rule or regulation, or poses a substantial and specific danger to the public health and safety.

(c) The protections of this Article shall include State employees who report any activity described in G.S. 126-84 to the State Auditor as authorized by G.S. 147-64.6(c)(16). (1989, c. 236, s. 1; 1997-520, s. 6.)

CASE NOTES

Exhaustion of Remedies. — Trial court properly dismissed a judicial action brought by a former police officer under G.S. 126-86, which was commenced prior to the exhaustion of an administrative action before the Office of Administrative Hearings, that the former officer brought pursuant to G.S. 126-34.1(a)(7), alleging retaliation and racial discrimination in violation of G.S. 126-85. Newberne v. Crime Control & Pub. Safety, 168 N.C. App. 87, 606 S.E.2d 742, 2005 N.C. App. LEXIS 176 (2005).

Interest on Backpay Award Not Allowed. — Superior court erred when it awarded a terminated state employee interest on a backpay award, which was entered after a jury rendered a verdict for the employee on his retaliation claim under G.S. 126-85(a) because pursuant to 25 N.C. Admin. Code 1B.0425, North Carolina could not be required to pay interest on any backpay award. Brookshire v.

N.C. DOT, DMV, — N.C. App. —, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

Summary Judgment Appropriate. — Where although plaintiff's complaint contained allegations of Whistleblower violations, plaintiff's concessions made it clear that certain defendants committed no violations of the Whistleblower Act, the trial court should have granted summary judgment on these claims. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994).

Where defendant's motion for summary judgment was amply supported by evidence establishing a legitimate reason for plaintiff's transfer to a substantially similar job, and plaintiff failed to meet her burden of coming forward with a showing that defendant's stated reasons were not simply a pretext for discrimination, the trial court properly granted summary judgment in favor of defendant. Kennedy v. Guilford Technical Community College, 115 N.C. App. 581, 448 S.E.2d 280 (1994).

Trial court properly granted summary judgment for the university and university officials on a campus police officer's claim that the officer was disciplined in retaliation for refusing to withdraw a citation issued to a university trustee's child; the officer failed to appeal an administrative order that upheld the disciplinary action, and therefore failed to exhaust administrative remedies. Swain v. Elfland, 145 N.C. App. 383, 550 S.E.2d 530, 2001 N.C. App. LEXIS 663 (2001), cert. denied, 354 N.C. 228, 554 S.E.2d 832 (2001).

Summary Judgment Not Appropriate. — State trooper's claim for wrongful termination in violation of the North Carolina Whistleblower Act, G.S. 126-84 through 126-88, was wrongfully dismissed for failure to state a cause of action because the trooper, who alleged that the actual reason for his termination was his disclosure of a possible abuse of authority in an amended statement that corrected a possibly misleading statement, stated a claim for relief under G.S. 126-84(a). Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

A prima facie claim under this statute consists of the following elements: (1) plaintiff engaged in protected activity, (2) followed by an adverse employment action, and (3) that the protected conduct was a substantial or motivating factor in the adverse action. Hanton v. Gilbert, 126 N.C. App. 561, 486 S.E.2d 432 (1997).

No Private Cause of Action. — The plain language of G.S. 126-85 addresses only state employees and agencies, and nothing in the Whistleblower Act indicates that it was intended to serve as public policy for the public at large; thus, the Act did not create a private cause of action for a former at-will employee's wrongful termination action against his private employer and corporate officers. Hardin v. Belmont Textile Mach., Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54452 (W.D.N.C. Aug. 3, 2006).

Retaliatory Discharge Motivated by Complaints of Racial Discrimination. — Leave to amend to add a claim under the North Carolina Whistleblower Act was granted because the provisions of that Act referring to retaliation for reporting a violation of state or federal statutes applied to claims for retaliatory discharge motivated by the employee's complaint of racial discrimination. Jenkins v. Trs. of Sandhills Cmty. College, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25252 (M.D.N.C. Dec. 3, 2002).

Retaliatory Firing Not Shown. — Where the evidence was that there were questions regarding the adequacy of plaintiff's performance, of which plaintiff had knowledge, even before his reports and the nonappointment was based on the plaintiff's inability to collaborate with others the evidence was simply too speculative to support a finding that the plaintiff's nonrenewal was in any way related to the report. Aune v. University of N.C., 120 N.C. App. 430, 462 S.E.2d 678 (1995).

Where defendants motion for summary judgment was supported with evidence that teacher's termination was based on insubordination and the teacher failed to meet her burden of coming forward with evidence which showed that whistleblowing activity was a substantial causative factor for her dismissal, summary judgment for defendants was appropriate. Hanton v. Gilbert, 126 N.C. App. 561, 486 S.E.2d 432 (1997).

Superior court did not abuse its discretion when it denied defendants' motions for a directed verdict and for a judgment notwithstanding a jury's verdict because the fired state employee who filed the suit against defendants presented sufficient evidence to support submitting his retaliation claim under G.S. 126-85 to the jury; the employee presented more than a mere scintilla of evidence showing that he had engaged in protected activity by participating in a state investigation of his state agency employer, that he was terminated after his supervisors learned of that activity, and that the activity was a substantial or motivating factor in his termination. Brookshire v. N.C. DOT, DMV, — N.C. App. —, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

Cited in Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998), cert. denied, 349 N.C. 353, 517 S.E.2d 888 (1998), aff'd, 350 N.C. 89, 511 S.E.2d 304 (1999).

§ 126-86. Civil actions for injunctive relief or other remedies.

Any State employee injured by a violation of G.S. 126-85 may maintain an action in superior court for damages, an injunction, or other remedies provided in this Article against the person or agency who committed the violation within one year after the occurrence of the alleged violation of this Article; provided, however, any claim arising under Article 21 of Chapter 95 of the General Statutes may be maintained pursuant to the provisions of that Article only and may be redressed only by the remedies and relief available under that Article. (1989, c. 236, s. 1; 1991 (Reg. Sess., 1992), c. 1021, s. 6.)

CASE NOTES

Application to District Attorneys. — The former administrative assistant to a district attorney made a prima facie claim of retaliatory discharge under this section, where her evidence tended to show that she had received satisfactory performance evaluations before she spoke to state investigators concerning their investigation of the district attorney but was discharged almost immediately thereafter. Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998), cert. denied, 349 N.C. 353, 517 S.E.2d 888 (1998), aff'd, 350 N.C. 89, 511 S.E.2d 304 (1999).

Claims for Retaliatory Discharge Motivated by Complaints of Racial Discrimination. — Leave to amend to add a claim under the North Carolina Whistleblower Act was granted because the provisions of that Act referring to retaliation for reporting a violation of state or federal statutes applied to claims for retaliatory discharge motivated by the employee's complaint of racial discrimination. Jenkins v. Trs. of Sandhills Cmty. College, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25252 (M.D.N.C. Dec. 3, 2002).

Earlier Suit Was Not Basis for Claim under Whistleblower Act. — Employee was not entitled to seek relief for alleged employment retaliation under the Whistleblower Act, G.S. 126-84, on the theory that his earlier suit seeking reinstatement into his former position constituted reporting to "another appropriate authority" since the earlier suit did not concern matters affecting general public policy. Hodge v. N.C. DOT, 175 N.C. App. 110, 622 S.E.2d 702, 2005 N.C. App. LEXIS 2726 (2005), cert. denied, 360 N.C. 533, 633 S.E.2d 816 (2006).

Choice of Remedies. — State employee may choose to pursue a whistleblower claim pursuant to G.S. 126-85 in either the superior court or the Office of Administrative Hearings, but not both. Swain v. Elfland, 145 N.C. App. 383, 550 S.E.2d 530, 2001 N.C. App. LEXIS 663 (2001), cert. denied, 354 N.C. 228, 554 S.E.2d 832 (2001).

Trial court properly dismissed a judicial action brought by a former police officer under G.S. 126-86, which was commenced prior to the exhaustion of an administrative action before the Office of Administrative Hearings, that the former officer brought pursuant to G.S. 126-34.1(a)(7), alleging retaliation and racial discrimination in violation of G.S. 126-85. Newberne v. Crime Control & Pub. Safety, 168 N.C. App. 87, 606 S.E.2d 742, 2005 N.C. App. LEXIS 176 (2005).

Doctrine of administrative exhaustion did not prevent a state trooper from filing a whistleblower claim in a superior court because the state trooper had the choice to pursue the whistleblower claim in either a judicial forum, pursuant to G.S. 126-86, or an administrative forum, pursuant to G.S. 126-34.1, but not both. Additionally, the trooper, while he requested an administrative hearing on an issue, did not request a hearing on his whistleblower claim. Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

§ 126-87. Remedies.

A court, in rendering a judgment in an action brought pursuant to this Article, may order an injunction, damages, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, costs, reasonable attorney's fees or any combination of these. If an application for a permanent injunction is granted, the employee shall be awarded costs and reasonable attorney's fees. If in an action for damages the court finds that the employee was injured by a willful violation of G.S. 126-85, the court shall award as damages three times the amount of actual damages plus costs and reasonable attorney's fees against the individual or individuals found to be in violation of G.S. 126-84. (1989, c. 236, s. 1.)

CASE NOTES

Interest on Backpay Award Not Allowed. — Superior court erred when it awarded a terminated state employee interest on a backpay award, which was entered after a jury rendered a verdict for the employee on his retaliation claim under G.S. 126-85(a) because pursuant to 25 N.C. Admin. Code 1B.0425, North Carolina could not be required to pay interest on any backpay award. Brookshire v. N.C. DOT, DMV, — N.C. App. —, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

§ 126-88. Notice of employee protections and obligations.

It shall be the duty of an employer of a State employee to post notice in accordance with G.S. 95-9 or use other appropriate means to keep his employees informed of their protections and obligations under this Article. (1989, c. 236. s. 1.)

CASE NOTES

Cited in Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005).

§ 126-89: Reserved for future codification purposes.

Article 15.

Communications With Members of the General Assembly.

§ 126-90. Communications with members of the General Assembly.

A State employee's right to speak to a member of the General Assembly at the member's request shall not be directly or indirectly limited by the employee's supervisor or by any policy of the department, agency, or institution that employs that State employee. (1997-443, s. 22.2(a).)

§§ 126-91 through 126-94: Reserved for future codification purposes.

Article 16.

Flexible Compensation Plan.

§ 126-95. Flexible compensation plan.

(a) The Director of the Budget may provide eligible officers and employees of State departments, institutions, and agencies not covered by the provisions of G.S. 116-17.2 a program of dependent care assistance as available under section 129 and related sections of the Internal Revenue Code of 1986, as amended. The Director of the Budget may authorize State departments, institutions, and agencies to enter into annual agreements with employees who elect to participate in the program to provide for a reduction in salary.

With the approval of the Director of the Budget, savings in the employer's share of contributions under the Federal Insurance Contributions Act on account of the reduction in salary may be used to pay some or all of the administrative expenses of the program. Should the Director of the Budget decide to contract with a third party to administer the terms and conditions of a program of dependent care assistance, the Director of the Budget may select a contractor only upon a thorough and completely competitive procurement process.

(b) Notwithstanding any other provisions of law relating to the salaries of officers and employees of departments, institutions, and agencies of State government, the Director of the Budget may provide a plan of flexible compensation to eligible officers and employees of State departments, institutions, and agencies not covered by the provisions of G.S. 116-17.2 for benefits available under section 125 and related sections of the Internal Revenue Code of 1986, as amended. This plan shall not replace, substitute for, or duplicate any benefits provided to employees and officers under Article 1A of Chapter 120 of the General Statutes and Articles 1, 3, 4, and 6 of Chapter 135 of the General Statutes. The plan may, however, include offerings for products and benefits that are supplemental or additional to these statutory benefits. In providing a plan of flexible compensation, the Director of the Budget may authorize State departments, institutions, and agencies to enter into agreements with their employees for reductions in the salaries of employees electing to participate in the plan of flexible compensation provided by this section. With the approval of the Director of the Budget, savings in the employer's share of contributions under the Federal Insurance Contributions Act on account of the reduction in salary may be used to pay some or all of the administrative expenses of the program. Should the Director of the Budget decide to contract with a third party to administer the terms and conditions of a plan of flexible compensation as provided by this section, it may select such a contractor only upon a thorough and completely advertised competitive procurement process. (2007-117, s. 3.)

Editor's Note. — Session Laws 2007-117, s. 8, made this Article effective July 1, 2007.

§§ 126-96 through 126-99: Reserved for future codification purposes.

Chapter 127.

Militia.

§§ 127-1 through 127-127: Repealed by Session Laws 1975, c. 604, s. 1.

Cross References. — For present provisions relating to the militia, see G.S. 127A-1 et seq.

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Militia.

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Editor's Note. — Session Laws 1975, c. 604, repealed Chapter 127 and Article 23 of Chapter 143 and enacted this Chapter in lieu thereof. Where appropriate, the historical citations to the sections of the repealed Chapter and Article have been added to the corresponding sections of the new Chapter.

Session Laws 1977, c. 70, s. 2, provided that whenever the words "Department of Military and Veterans Affairs" were used in G.S. 127A-1 through G.S. 127A-195, the same would be deleted and the words "Department of Crime Control and Public Safety" would be inserted in lieu thereof. The act made no mention of the Secretary of Military and Veterans Affairs; however, in order to give effect to its obvious intent, the editors have substituted "Secretary of Crime Control and Public Safety" for "Secretary of Military and Veterans Affairs" throughout this Chapter.

Article 1.

Classification of Militia.

§ 127A-1. Composition of militia.

The militia of the State shall consist of all able-bodied citizens of the State and of the United States and such other able-bodied persons who have or shall declare their intention to become citizens of the United States, subject to such qualifications as may be hereinafter prescribed, who shall be drafted into said militia or shall voluntarily accept commission, appointment, or assignment to duty therein. (1917, c. 200, s. 1; C.S., s. 6791; 1949, c. 1130, s. 1; 1957, c. 1043, s. 1; 1963, c. 1016, s. 2; 1967, c. 563, s. 1; 1975, c. 604, s. 2.)

§ 127A-2. Classification of militia.

The militia shall be divided into the organized and unorganized militia. The organized militia shall consist of four classes: the North Carolina national guard, the naval militia, the State defense militia and historic military commands. (1975, c. 604, s. 2.)

§ 127A-3. Organized militia; national guard.

The North Carolina national guard, both army and air, shall consist of regularly commissioned, warrant and enlisted personnel between such ages as may be established by regulations promulgated by the secretary of the appropriate service and shall be organized, governed, armed, equipped and have such duties and responsibilities as hereinafter provided. (1917, c. 200, s. 2; C.S., s. 6792; 1949, c. 1130, s. 1; 1957, c. 136, s. 1; 1961, c. 192, s. 1; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-4. Organized militia; naval militia.

The naval militia shall consist of regularly commissioned, warrant and enlisted personnel between such ages as may be established by regulations promulgated by the secretary of the appropriate service and shall be organized, governed, armed, equipped and have such duties and responsibilities as hereinafter provided. (1917, c. 200, s. 3; C.S., s. 6793; 1949, c. 1130, s. 1; 1975, c. 604, s. 2.)

§ 127A-5. Organized militia; State defense militia.

The State defense militia shall consist of commissioned, warrant and enlisted personnel called, ordered, appointed or enlisted therein by the Governor under the provisions of Article 5 of this Chapter and shall be organized, governed, armed, equipped and have such duties and responsibilities as hereinafter provided. (1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-6. Organized militia; historic military commands.

Historic military commands are those historic groups which remain active by meeting at least once a month and which follow military procedures. Only such groups as may be designated by the Governor shall fall within this branch of the militia. Any maximum age limits prescribed by this Chapter shall not be applicable to members of historic military commands. (1957, c. 1043, s. 2; 1967 c. 563, s. 2; 1975, c. 604, s. 2.)

§ 127A-7. Composition of unorganized militia.

The unorganized militia shall consist of all other able-bodied citizens of the State and of the United States and such other able-bodied persons who have or shall declare their intention to become citizens of the United States, who shall be at least 17 years of age, except those who have been convicted of a felony or discharged from any component of the military under other than honorable conditions. (1917, c. 200, s. 4; C.S., s. 6794; 1949, c. 1130, s. 1; 1963, c. 1016, s 2; 1975, c. 604, s. 2; 1983, c. 314, s. 1.)

§ 127A-8. Exemptions from duty with the militia.

The officers, judicial and executive, of the government of the United States and the State of North Carolina, persons in the military or naval service of the

United States, customhouse clerks, persons employed by the United States in the transmission of mail, artificers and personnel employed in the armories, arsenals and navy yards of the United States, pilots, mariners actually employed in the sea service of any citizen or merchant within the United States shall be exempt from duty with the militia without regard to age, and all persons who, because of religious beliefs, shall claim exemption from duty with the militia, if the conscientious holding of such belief by such person shall be established under such regulations as are or may be prescribed for exemption from service with the armed forces of the United States, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that shall be declared noncombatant for the armed forces of the United States. (1917, c. 200, s. 5; C.S., s. 6795; 1975, c. 604, s. 2.)

§ 127A-9. Number of troops authorized.

In time of peace the State shall maintain only such troops as may be authorized by the President of the United States; but nothing contained in this Chapter shall be construed as limiting the rights of the State in the use of the national guard or the State defense militia or both within its borders in time of peace. Nothing contained in this Chapter shall prevent the organization and maintenance of State police or constabulary. (1917, c. 200, s. 8; C.S., s. 6797; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-10. Corps entitled to retain privileges.

Any corps of artillery, cavalry, or infantry existing in the State on the passage of the act of Congress of May 8, 1792, which by the laws, customs, or usages of the State has been in continuous existence since the passage of such act, under its provisions and under the provisions of section 232 and sections 1625 to 1660, both inclusive, of Title 16 of the revised statutes of 1873 and the act of Congress of January 21, 1903, relating to the militia, shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of the militia; but such organizations may be a part of the national guard, and entitled to all the privileges of this Chapter, and shall conform in all respects to the organization, discipline, and training of the national guard in time of war. For purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving. (1917, c. 200, s. 87; C.S., s. 6798; 1975, c. 604, s. 2.)

§§ 127A-11 through 127A-15: Reserved for future codification purposes.

ARTICLE 2.

General Administrative Officers.

§ 127A-16. Governor as commander in chief.

(a) The Governor shall be commander in chief of the militia and shall have power to call out the militia to execute the laws, secure the safety of persons and property, suppress riots or insurrections, repel invasions and provide disaster relief.

(b) The Governor shall have the additional power, subject to the availability of funding, to place individuals, units, or parts of units of the North Carolina National Guard in a State Active Duty status to assist with the planning, support, and execution of activities connected with the swearing in and installation of the Governor and other members of the Council of State. (1917, c. 200, s. 11; C.S., s. 6799; 1975, c. 604, s. 2; 1999-442, s. 1.)

§ 127A-17. Commander in chief to prescribe regulations.

The commander in chief shall have the power and it shall be his duty from time to time to issue such orders and to prescribe such regulations relating to the organized and unorganized militia as will cause the same at all times to conform to the federal requirements of the United States government relating thereto. (1917, c. 200, s. 36; C.S., s. 6800; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-17.1. Confidentiality of national guard records.

Notwithstanding any provision of Chapter 143B, no records of the national guard in the Department of Crime Control and Public Safety shall be disclosed or used for any purpose except for official purposes, and no records shall be disclosed, destroyed or used in any manner which is in violation of any existing federal law or regulation. Nothing in this Chapter shall convert records which are the property of the federal government into State property. (1977, c. 70, s. 3.)

§ 127A-18. Personal staff of Governor.

The Governor may detail not more than 10 active national guard members and two active naval militia members who shall in addition to their regular duties, perform the duties of aides-de-camp on the personal staff of the Governor. (1917, c. 200, s. 12; C.S., s. 6801; 1959, c. 218, s. 1; 1975, c. 604, s. 2.)

§ 127A-19. Adjutant General.

The military head of the militia shall be the Adjutant General who shall hold the rank of major general. The Adjutant General shall be appointed by the Governor in his capacity as commander in chief of the militia, in consultation with the Secretary of Crime Control and Public Safety, and shall serve at the pleasure of the Governor. No person shall be appointed as Adjutant General who has less than five years' commissioned service in an active status in any component of the armed forces of the United States. The Adjutant General, while holding such office, may be a member of the active national guard or naval militia.

Subject to the approval of the Governor and in consultation with the Secretary, Department of Crime Control and Public Safety, the Adjutant General may appoint a deputy adjutant general for Army National Guard, an assistant adjutant general for Army National Guard, and an assistant adjutant general for Air National Guard, each of whom may hold the rank of brigadier general and who shall serve at the pleasure of the Governor. The Adjutant General may also employ such staff members and other personnel as may be authorized by the Secretary and funded. (1917, c. 200, s. 14; C.S., s. 6802; 1925, c. 54; 1939, c. 14; 1949, c. 1225; 1959, c. 218, s. 2; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2; 1979, c. 481; 1995, c. 122, s. 1; 2005-314, s. 1.)

§ 127A-20. Administrative and operational relationships of the Adjutant General.

In all administrative and operational matters affecting the militia while under State control, the Adjutant General shall be responsible to and subject to the direction and supervision of the Secretary of Crime Control and Public Safety. (1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-21. United States property and fiscal officer.

(a) The Governor of the State, in consultation with the Secretary of Crime Control and Public Safety, shall appoint, designate, or detail, subject to the approval of the Secretary of the Army and the Secretary of the Air Force, a qualified commissioned officer of the North Carolina national guard who is also a commissioned officer of the army national guard of the United States or the air national guard of the United States, as the case may be, to be the United States property and fiscal officer for North Carolina. If the officer is not on active duty, the President may order him to active duty, with his consent, to serve as a property and fiscal officer.

(b) The status of the United States property and fiscal officer is that of a reserve commissioned officer of the army or air force, as appropriate, on extended active duty and detailed for duty with the National Guard Bureau for administrative purposes. In his capacity as United States property and fiscal officer, he will function under the direction of and cooperate fully with the State Adjutant General.

(c) The assumption and performance of duties and responsibilities, pay and allowances, and other personnel actions to include retention and retirement of an officer appointed and serving as the United States property and fiscal officer will be governed by regulations promulgated by the National Guard Bureau or pursuant to regulations promulgated by the secretary of the appropriate service. (1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-22. North Carolina property and fiscal officer.

(a) Upon full mobilization of the North Carolina national guard into federal service to the extent that the functions of a United States property and fiscal officer no longer exist or are authorized under federal statutes, the Governor of the State, in consultation with the Secretary of Crime Control and Public Safety, may appoint, designate or detail a qualified individual to serve at the pleasure of the Governor as the North Carolina property and fiscal officer for any composition of a nonfederally recognized State national guard or State defense militia organized under the provisions of G.S. 127A-1 et seq.

(b) In consideration of his services for the responsibility, care, utilization, and issue of State or federal facilities and property, under the jurisdiction of the State of North Carolina, the North Carolina property and fiscal officer shall receive from the State such salary as the Governor may authorize to be just and proper; the salary to constitute a charge upon appropriations made to the Department of Crime Control and Public Safety.

(c) The property and fiscal officer for North Carolina shall be an employee of the Department of Crime Control and Public Safety. He shall be required to give good and sufficient bond to the State, the amount thereof to be determined by the Governor, for the faithful performance of his duties and for the safekeeping and proper distribution of such funds and property entrusted to his care. He shall receipt for and account for all funds and property allotted to his custody from the appropriation for military purposes by State and federal agencies, and shall make such returns and reports through the Secretary of

Crime Control and Public Safety concerning same as may be required by the Governor or State laws. (1917, c. 200, ss. 24, 25; C.S., ss. 6804, 6805; 1929, c. 317, s. 1; 1957, c. 136, s. 3; 1963, c. 1016, s. 2; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-23. Commissions for commandants and officers at qualified educational institutions.

The Governor of North Carolina is authorized to appoint and commission, as staff officers of the North Carolina unorganized militia, the officers of any university, college, academy or other educational institution which qualifies as herein provided. Any university, college, academy or other educational institution shall be qualified under this section when such institution has been regularly incorporated under and by virtue of the laws of North Carolina; the institution, as a part of its courses of study, regularly teaches military science and tactics; the Department of Defense at Washington, D.C., has detailed an officer of the armed forces as professor or assistant professor of military science and tactics; the institution has been designated as qualified by the secretary of the appropriate service and has been made a unit of the Senior or Junior Reserve Officers' Training Corps, or the institution, not having a unit of the Reserve Officers' Training Corps, has been approved and authorized by the Secretary of Defense to participate in the National Defense Cadet Corps Training Program or other military training programs under Title 10, United States Code, sections 3540 and 4651.

Any qualified institution desiring the appointment of officers in the North Carolina unorganized militia shall make application to the Governor setting forth all requisite facts as to its qualifications, the names of the persons to be commissioned, the rank desired for each, and the person's position at the institution. The application shall be signed by the chancellor, president, superintendent or other presiding official, under the seal of the institution. Upon receipt of the application, the Governor may appoint and commission the officers of such qualified institution as follows: the chancellor, president, superintendent or other presiding official, as colonel; the vice-president, principal or other officer second in authority, as major; the professors and members of the faculty, as captains. The persons so commissioned shall have no connection with the national guard or other military forces of the State, nor shall they exercise any military authority other than in the discharge of their duties at their respective institutions. The commissions issued under this section may be terminated at the will of the Governor. (1919, c. 265, ss. 1, 2, 3; C.S., s. 6812; 1929, c. 61, s. 1; 1963, c. 1095; 1973, c. 476, s. 128; 1975, c. 604, s. 2.)

§§ 127A-24 through 127A-28: Reserved for future codification purposes.

ARTICLE 3.

National Guard.

§ 127A-29. National guard.

The national guard class of the four classes of the organized militia as established under G.S. 127A-2 is hereby designated the North Carolina national guard. Those elements of the North Carolina national guard which receive federal recognition by the United States government shall hold a dual status both as State troops and as a reserve component of the armed forces of the United States. In its federal status, the North Carolina national guard shall be subject to federal laws and regulations pertaining thereto. The Adjutant General shall insure compliance with such federal laws and regulations and with all State laws and orders of the Governor not inconsistent with those federal laws and regulations. (1975, c. 604, s. 2.)

Cross References. — As to transfer of the North Carolina National Guard to the Department of Crime Control and Public Safety, see G.S. 143B-475.

§ 127A-30. Organization of national guard units.

Except as otherwise specifically provided by the laws of the United States, the organization of the national guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the regular army or air force subject in time of peace to such general exceptions as may be authorized by the Secretary of Defense. (1917, c. 200, s. 7; C.S., s. 6808; 1959, c. 218, s. 4; 1975, c. 604, s. 2.)

§ 127A-31. Location of units.

The Governor shall determine and fix the location of the units and headquarters of the national guard within the State; but no organization of the national guard, members of which shall be entitled to and shall have received compensation under the provisions of the act of Congress approved June 3, 1916, as amended, shall be disbanded without the consent of the President, nor without such consent shall the commissioned or enlisted strength of any such organization be reduced below the minimum that is now or shall be hereafter prescribed therefor by the President. (1917, c. 200, s. 9; C.S., s. 6809; 1921, c. 120, s. 2; 1975, c. 604, s. 2.)

§ 127A-32. Officers appointed and commissioned; oath of office.

All officers of the national guard shall be appointed and commissioned by the Governor as follows, viz.:

(1) Except as otherwise specifically provided by the laws of the United States, the qualifications for appointment as an officer in the national guard shall be the same as those prescribed for the regular establishment, subject to such general exceptions as may be authorized by the Secretary of Defense.

(2) Candidates for such appointment shall make written application therefor on such forms as may be prescribed by the secretary of the appropriate service, to the Adjutant General, State of North Carolina, through command channels for comment by endorsements thereon.

(3) No person shall hereafter be appointed an officer of the national guard unless he has established to the satisfaction of a board of officers his physical, moral, and professional qualifications to perform the duties of the grade and position for which examined, subject to such general exceptions as may be authorized by the Secretary of Defense. The board shall consist of three or more commissioned officers of the appropriate service, appointed under such regulations as may be promulgated by the secretary of the appropriate service.

(4) Candidates appointed as officers of the national guard shall take and subscribe to the following oath of office:

"I, (First Name — Middle Name — Last Name), do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of North Carolina against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey orders of the President of the United States and of the Governor of the State of North Carolina; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of (Grade) (Branch) in the National Guard of the State of North Carolina upon which I am about to enter, so help me God." (1917, c. 200, s. 15; C.S., s. 6811; 1921, c. 120, s. 3; 1959, c. 218, s. 5; 1973, c. 620, s. 9; 1975, c. 604, s. 2.)

§ 127A-33. Promotion of officers by seniority and in accordance with regulations.

The promotion of all officers shall be by seniority as far as the same is practicable and to the best interest of the service within the organization, and in accordance with regulations promulgated by the secretary of the appropriate service. (1917, c. 200, s. 17; C.S., s. 6814; 1921, c. 120, s. 4; 1959, c. 218, s. 7; 1975, c. 604, s. 2.)

§ 127A-34. Relative rank among officers of same grade.

Officers of the North Carolina national guard in the same grade rank among themselves according to the date of rank established by regulations promulgated by the secretary of the appropriate service and the Adjutant General of the State of North Carolina. (1917, c. 200, s. 19; C.S., s. 6816; 1921, c. 120, s. 5; 1927, c. 227, s. 1; 1959, c. 218, s. 8; 1961, c. 192, s. 2; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-35. Elimination and disposition of officers; efficiency board; transfer to inactive status.

(a) Whenever the efficiency or general fitness, including physical fitness, of a national guard officer is in question, the Adjutant General, State of North Carolina, may order him to appear before an efficiency board to determine whether or not the appointment of the officer should be withdrawn. The efficiency board will be composed of not less than three commissioned officers, all senior in rank to the officer undergoing investigation. A member of the board serving in a legal or medical advisory capacity may be junior to any person, other than a judge advocate, law specialist, or medical officer being considered. The findings of an efficiency board are not final until reviewed and approved by the Secretary of the Department of Crime Control and Public Safety and the Governor of the State of North Carolina.

(b) Commissions of officers of the national guard may be vacated upon resignation, absence without leave for 30 days, pursuant to sentence of a court martial, or pursuant to regulations promulgated by the secretary of the appropriate service.

(c) Officers of the national guard may, upon their own request, be transferred to the inactive national guard, subject to such exceptions as may be authorized by the Adjutant General, State of North Carolina, or the Secretary of Defense. (1917, c. 200, s. 28; C.S., s. 6818; 1959, c. 218, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-36. Retirement of officers.

Retirement of officers shall be regulated so as to conform to federal laws and regulations of the United States relating to retirement of national guard officers. (1917, c. 200, s. 29; C.S., s. 6819; 1949, c. 1130, s. 2; 1975, c. 604, s. 2.)

§ 127A-37. Enlistments in national guard; oath of enlistment.

(a) Enlistments in the national guard shall be for such periods and subject to such qualifications as prescribed by the secretary of the appropriate service.

(b) Enlisted men shall not be recognized as members of the national guard until they shall have subscribed to the following oath of enlistment:

"I do hereby acknowledge to have voluntarily enlisted this ________day of ____________, ________, in the (Army) (Air) National Guard of the State of North Carolina and as a Reserve of the (Army) (Air Force) with membership in the (Army National Guard of the United States) (Air National Guard of the United States) for a period of (Years — Months — Days) under the conditions prescribed by law, unless sooner discharged by proper authority.

"I, (First Name — Middle Name — Last Name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and of the State of North Carolina against all enemies, foreign and domestic; that I will bear true faith and allegiance to them; and that I will obey the orders of the President of the United States and the Governor of North Carolina and the orders of the officers appointed over me, according to law, regulations, and the Uniform Code of Military Justice, so help me God." (1917, c. 200, s. 30; C.S., s. 6820; 1921, c. 120, s. 6; 1957, c. 136, s. 6; 1959, c. 218, s. 10; 1975, c. 604, s. 2; 1999, c. 456, s. 59.)

CASE NOTES

Enlisted Man Within Workers' Compensation Act. — A private who has enlisted in the North Carolina national guard and taken the prescribed oath is an employee of the State within the meaning of the Workers' Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute. Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931). See § 97-2(2).

§ 127A-38. Discharge of enlisted personnel.

(a) Enlisted personnel discharged from service in the national guard shall receive a discharge in writing in such form and with such classification as is or shall be prescribed under regulations promulgated by the appropriate service.

(b) Discharges may be given prior to the expiration of terms of enlistment under such regulations as may be prescribed by the Adjutant General, State of North Carolina, or pursuant to regulations promulgated by the secretary of the appropriate service. (1917, c. 200, s. 32; C.S., s. 6822; 1959, c. 218, s. 12; 1975, c. 604, s. 2.)

§ 127A-39. Membership continued in the national guard.

When called or ordered into federal service and discharged therefrom, members shall continue their membership in the national guard until the expiration of their enlistment or appointment, unless sooner terminated by proper authority. (1921, c. 120, s. 8; C.S., s. 6822(a); 1959, c. 218, s. 13; 1975, c. 604, s. 2.)

§ 127A-40. Pensions for the members of the North Carolina national guard.

(a) Every member and former member of the North Carolina national guard who meets the requirements hereinafter set forth shall receive, commencing at age 60, a pension of ninety-five dollars ($95.00) per month for 20 years' creditable military service with an additional nine dollars fifty cents ($9.50) per month for each additional year of such service; provided, however, that the total pension shall not exceed one hundred ninety dollars ($190.00) per month. The requirements for such pension are that each member shall:

(1) Have served and qualified for at least 20 years' creditable military service, including national guard, reserve and active duty, under the same requirement specified for entitlement to retired pay for nonregular service under Chapter 67, Title 10, United States Code.
(2) Have at least 15 years of the aforementioned service as a member of the North Carolina national guard.
(3) Have received an honorable discharge from the North Carolina national guard.

(b) Payment to a retired member of the North Carolina national guard under the provisions of this section will cease at the death of the individual and no payment will be made to beneficiaries or to the decedent's estate.

(c) No individual receiving retired pay as a result of length of service, age or physical disability retirement from any of the regular components of the armed forces of the United States will be eligible for benefits under this section.

(d) Nothing contained in this section shall preclude or in any way affect the benefits that an individual may be entitled to from State, federal or private retirement systems.

(e) Repealed by Session Laws 1989, c. 792, s. 2.3.

(f) The Secretary of Crime Control and Public Safety shall determine the eligibility of guard members for the benefits herein provided and shall certify those eligible to the State Treasurer. In addition, the Department of Crime Control and Public Safety shall, on and after July 1, 1983, provide the Department of State Treasurer with an annual census population, by age and the number of years of creditable service, for all former members of the National Guard in receipt of a pension as well as for all active members of the National Guard who are not in receipt of a pension and who have seven and more years of creditable service. The Department of Crime Control and Public Safety shall also provide the State Treasurer a census population of all former members of the National Guard who are not in receipt of a pension and who have 15 and more years of creditable service. The Department of State Treasurer shall make pension payments to those persons certified from the North Carolina National Guard Pension Fund, which shall include general fund appropriations made to and transferred from the Department of Crime Control and Public Safety. The Department of State Treasurer shall have performed an annual actuarial valuation of the fund and shall have the financial responsibility for maintaining the fund on a generally accepted actuarial basis. The Department of Crime Control and Public Safety shall provide the Department of State Treasurer with whatever assistance is required by the State Treasurer in carrying out his financial responsibilities.

(g) The provisions of this section shall apply to any member or former member of the North Carolina national guard who is qualified for the above retirements with eligibility of such person commencing at age 60 or July 1, 1974, whichever is the later date.

(h) If, for any reason, the North Carolina National Guard Pension Fund shall be insufficient to pay in full any pension benefits, or other charges, then all benefits or payments shall be reduced pro rata, for as long as the deficiency in amount exists. No claim shall accrue with respect to any amount by which a pension or benefit payment shall have been reduced.

(h1) Any member or former member of the North Carolina national guard who is qualified for benefits under this section and who is a member of a domiciled employees' or retirees' association that has at least 2,000 members, the majority of whom are active or retired employees of the State or public school employees, may authorize, in writing, the periodic deduction from the member's retirement benefits a designated lump sum to be paid to the employees' or retirees' association. The authorization shall remain in effect until revoked by the member. A plan of deductions pursuant to this subsection shall become void if the employees' or retirees' association engages in collective bargaining with the State, any political subdivision of the State, or any local school administrative unit.

(i) Pensions for members of the North Carolina National Guard shall be subject to future legislative change or revision. (1973, c. 625, s. 1; c. 1241, ss. 1-3; 1975, c. 604, s. 2; 1977, c. 70, s. 2; 1979, c. 870; 1983, c. 761, ss. 250, 251; 1989, c. 792, s. 2.3; 2002-126, s. 6.4(g); 2005-276, s. 29.27; 2006-66, s. 22.20; 2007-323, s. 28.21A.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 22.20, effective July 1, 2006, in the first sentence of subsection (a), substituted "eighty dollars ($80.00)" for "seventy five dollars ($75.00)," "eight dollars ($8.00)" for "seven dollars and fifty cents ($7.50)" and "one hundred sixty dollars ($160.00)" for "one hundred fifty dollars ($150.00)."

Session Laws 2007-323, s. 28.21A, effective July 1, 2007, in the first sentence of subsection (a), substituted "ninety-five dollars ($95.00)" for "eighty dollars ($80.00)", substituted "nine dollars fifty cents ($9.50)" for "eight dollars", and substituted "one hundred ninety dollars ($190.00)" for "one hundred sixty dollars ($160.00)."

OPINIONS OF ATTORNEY GENERAL

Prerequisites to Receipt of Pension. — A member of the North Carolina National Guard may receive the pension authorized by this section only after he meets the statutory age and length of service requirements and separates from the Guard with an honorable discharge. See opinion of Attorney General to Mr. Robert A. Melott, Deputy Secretary, Department of Crime Control and Public Safety, 52 N.C.A.G. 118 (1983).

§ 127A-41. Uniforms, arms and equipment.

The national guard shall, as far as practicable, be uniformed, armed and equipped with the same type of uniforms, arms and equipment as is or shall be provided for the appropriate regular service. (1917, c. 200, s. 37; C.S., s. 6824; 1959, c. 218, s. 15; 1975, c. 604, s. 2.)

§ 127A-41.1. Stay of legal and court proceedings because of State military service.

At any stage of any legal proceeding in any court in which a person called into service of the State by the Governor is involved, either as plaintiff or defendant, during the period of service or within 60 days after the conclusion of the period of active service, all actions and proceedings:

(1) May be stayed by the court on its own motion; or

(2) Shall be stayed on application by the member or by a person acting on behalf of the member, unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his

defense is not materially affected by reason of the military service. (1997-153, s. 5.)

§ 127A-41.2. Operation of post exchanges.

(a) The North Carolina national guard is authorized to operate post exchanges.

(b) The North Carolina national guard is authorized to enter into agreements with the Army & Air Force Exchange Service to operate post exchanges. (2007-60, s. 2.)

Editor's Note. — Session Laws 2007-60, s. 2, made this section effective May 31, 2007.

§ 127A-42. Distinguished Service Medal by Governor of North Carolina.

There is hereby created the North Carolina Distinguished Service Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor. Upon the recommendation of the Secretary of Crime Control and Public Safety and a board consisting of the Adjutant General and all other general officers and officers assigned to authorized general-officer-grade vacancies, North Carolina national guard, the Governor is authorized to present such medal to any member or former member of the armed forces discharged under honorable conditions, who has distinguished himself by exceptionally meritorious conduct in the performance of outstanding service to the North Carolina national guard. The Governor, on his own authority, may award such medal to the Secretary of Crime Control and Public Safety, the Adjutant General, or any other active or inactive general officer of the armed forces, who has distinguished himself by especially meritorious conduct in the performance of his duties. (1955, c. 255, s. 2; 1963, c. 1016, s. 2; 1973, c. 1124; 1975, c. 604, s. 2; 1977, c. 230, s. 1.)

§ 127A-43. North Carolina National Guard Meritorious Service Medal.

There is hereby created the North Carolina National Guard Meritorious Service Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The Governor or his designated representative is authorized to award this medal upon the recommendation of the Secretary of Crime Control and Public Safety in consultation with the Adjutant General and a board of officers appointed by the Adjutant General. Any member or former member of the armed forces discharged under honorable conditions, who has distinguished himself by heroism, meritorious achievement, or meritorious service to the North Carolina national guard, is eligible for this award. The Governor, on his own authority, may award such medal to the Secretary of Crime Control and Public Safety, the Adjutant General or any other active or inactive general officer of the armed forces who has distinguished himself by heroism, meritorious achievement, or meritorious service to the North Carolina national guard. The required heroism, achievement, or service, while of a lesser degree than that required for awarding of the North Carolina Distinguished Service Medal, must nevertheless be accomplished with distinction. (1973, c. 966, s. 1; 1975, c. 604, s. 2; 1977, c. 230, s. 2.)

§ 127A-44. North Carolina National Guard Commendation Medal.

There is hereby created the North Carolina National Guard Commendation Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The Adjutant General of North Carolina or his designated representative, who shall not be below the rank of colonel (O-6), may award this medal. Any member or former member of the armed forces discharged under honorable conditions, who distinguishes himself by his example or the performance of a specific act in behalf of the North Carolina National Guard, is eligible for this award. (1975, c. 604, s. 2; 1977, c. 230, s. 3; 1991, c. 367, s. 2.)

§ 127A-44.1. North Carolina National Guard Achievement Medal.

There is hereby created the North Carolina National Guard Achievement Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The Adjutant General of North Carolina or his designated representative, who shall not be below the rank of lieutenant colonel (O-5), may award this medal. Any member or former member of the armed forces discharged under honorable conditions, who distinguishes himself by his example or the performance of a specific act in behalf of the North Carolina National Guard, is eligible for this award. (1991, c. 367, s. 3.)

§ 127A-45. North Carolina National Guard State Active Duty Award.

There is hereby created the North Carolina National Guard State Active Duty Award which shall be a ribbon of appropriate design. This ribbon and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The Adjutant General of North Carolina may present this ribbon to members of the North Carolina National Guard who, by order of the Governor, satisfactorily serve a tour of State active duty. To be worthy of this award, the nature of the tour of State active duty must have been a distinct and notable service to the State or to a community, as determined by the Adjutant General of North Carolina. On or after July 1, 1991, this award may also be presented to active guard personnel and reserve personnel who satisfactorily participate in tours of State active duty. (1973, c. 966, s. 2; 1975, c. 604, s. 2; 1991, c. 367, s. 1.)

§ 127A-45.1. North Carolina National Guard Governor's Unit Citation.

There is hereby created the North Carolina National Guard Governor's Unit Citation which shall be a streamer, a unit emblem, and a certificate, all of appropriate design as approved by the Governor or his designated representative. The Governor or his designated representative is authorized to present such unit citation, upon recommendation of the Adjutant General, subject to the approval of the Secretary, to any unit of North Carolina national guard distinguishing itself by extraordinary heroism or meritorious service while in a State active duty status. The unit must display such gallantry, determination, and esprit de corps in accomplishing its mission under conditions which set it apart and above other units. (1977, c. 229, s. 1.)

§ 127A-45.2. North Carolina National Guard Meritorious Unit Citation.

There is hereby created the North Carolina National Guard Meritorious Unit Citation which shall be a streamer, a unit emblem, and a certificate, all of appropriate design as approved by the Governor or his designated representative. The Adjutant General is authorized to present such citation to any unit of the North Carolina national guard distinguishing itself through heroism or meritorious service to the State of North Carolina. The required heroism or meritorious service, while of a lesser degree than that required for the award of the North Carolina National Guard Governor's Unit Citation, must nevertheless have been accomplished with distinction. (1977, c. 229, s. 2.)

§ 127A-45.2A. North Carolina National Guard Outstanding Unit Award.

There is hereby created the North Carolina National Guard Outstanding Unit Award which shall be a streamer, a unit emblem, and a certificate, all of appropriate design as approved by the Governor or his designated representative. The Adjutant General may present this citation to any unit of the North Carolina National Guard distinguishing itself through meritorious achievement or service to the State of North Carolina. The required meritorious service, while of a lesser degree than that required for the award of the North Carolina National Guard Meritorious Unit Citation, must nevertheless have been accomplished with distinction. (1991, c. 367, s. 4.)

§ 127A-45.3. North Carolina National Guard Distinguished Civilian Service Medal.

There is hereby created the North Carolina National Guard Distinguished Civilian Service Medal which shall be of appropriate design, rosette or other device to be worn in lieu thereof, and citation certificate, of a design approved by the Governor or his designated representative. The Governor or his designated representative is authorized to award this medal upon the recommendation of the Adjutant General of North Carolina and a board of officers and noncommissioned officers appointed by the Adjutant General, to United States citizens and governmental officials at the policy development level who render distinguished service to the North Carolina national guard. (1977, c. 796.)

§ 127A-45.4. North Carolina National Guard Outstanding Civilian Service Medal.

There is hereby created the North Carolina National Guard Outstanding Civilian Service Medal which shall be of appropriate design, rosette or other device to be worn in lieu thereof, and citation certificate, of a design approved by the Governor or his designated representative. The Adjutant General of North Carolina is authorized to award this medal upon the recommendation of a board of officers and noncommissioned officers, appointed by the Adjutant General, to United States citizens and governmental officials who render outstanding service to the North Carolina national guard. (1977, c. 796.)

§ 127A-45.5. North Carolina National Guard Meritorious Civilian Service Award.

There is hereby created the North Carolina National Guard Meritorious Civilian Service Award which shall consist of a certificate of a design approved by the Governor or his designated representative. The Adjutant General of North Carolina or a designated representative, who shall not be below the grade of general officer, is authorized to confer this award. This award may be granted to individuals, organizations, corporations, associations and other groups, making a substantial contribution to the North Carolina national guard. (1977, c. 796.)

§ 127A-45.5A. Other awards.

The Adjutant General may, from time to time, create such other awards and medals to recognize meritorious service or outstanding achievement. The creation of such awards and medals shall be approved by the Governor. The Governor or his designee shall approve the design of such awards and medals. (1991, c. 367, s. 5.)

§ 127A-46. Authority to wear medals, ribbons and other awards.

The Adjutant General may prescribe those medals, ribbons and other awards and decorations which may be worn by members of the militia, not inconsistent with regulations of the respective armed services of the United States. (1939, c. 344; 1959, c. 218, s. 16; 1967, c. 563, s. 4; 1975, c. 604, s. 2.)

§ 127A-47. Courts-martial for national guard.

Courts-martial for organizations of the national guard not in the service of the United States shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted, have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the law and regulations governing the armed forces of the United States, and the proceedings of courts-martial of the national guard shall follow the forms and modes of procedure prescribed for such similar courts. (1917, c. 200, s. 55; C.S., s. 6825; 1963, c. 1018, s. 1; 1975, c. 604, s. 2.)

§ 127A-48. General courts-martial.

General courts-martial of the national guard not in the service of the United States may be convened by orders of the Governor of the State, and such courts shall have the power to impose fines not exceeding two hundred dollars ($200.00); sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of enlisted personnel to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts. (1917, c. 200, s. 56; C.S., s. 6826; 1957, c. 136, s. 7; 1963, c. 1018, s. 2; 1975, c. 604, s. 2.)

§ 127A-49. Special courts-martial; appointments, power and authority.

In the national guard, not in the service of the United States, special courts-martial may be appointed by:

(1) The commander of a brigade, regiment, comparable or higher command of the North Carolina army national guard;
(2) The commander of a wing, group, separate squadron, comparable or higher command of the North Carolina air national guard;
(3) The commander or officer in charge of any North Carolina national guard command when empowered by the Governor or the Adjutant General of North Carolina.

Except as to commissioned officers, such courts-martial shall have the power and authority to try any person subject to military law for any crimes or offenses within the jurisdiction of a general military court. Such courts-martial shall have the same powers of punishment as general courts-martial except that fines imposed by such courts-martial shall not exceed one hundred dollars ($100.00), and such courts-martial shall not have the power of dismissal from the national guard. (1917, c. 200, s. 57; C.S., s. 6827; 1957, c. 136, s. 8; 1963, c. 1018, s. 3; 1973, c. 1123; 1975, c. 604, s. 2.)

§ 127A-50. Summary courts-martial.

In the national guard, not in the service of the United States, summary courts-martial may be appointed by the commander of any company, battery, detachment, squadron, or any other federally recognized unit, either army or air. Such court shall consist of one officer, who shall have the power to administer oaths and try enlisted personnel of each respective command for breaches of discipline and violations of laws governing such organizations. Such courts shall also have the power to impose fines not exceeding twenty-five dollars ($25.00) for any single offense, may sentence to forfeiture of pay and allowances, or may sentence enlisted personnel to reduction in rank; but in the case of noncommissioned officers above the fourth enlisted grade, may not adjudge reduction except to the next inferior grade. There shall be no right to demand trial by special court-martial. (1917, c. 200, s. 58; C.S., s. 6828; 1957, c. 136, s. 9; 1963, c. 1018, s. 4; 1975, c. 604, s. 2; 1983, c. 315, s. 1.)

§ 127A-50.1. Military judges.

The Adjutant General shall appoint military judges to preside over courts-martial of the National Guard not in federal service. Minimum requirements for appointment as a military judge shall be:

(1) Licensed to practice law in this State or certified as a military judge by the Judge Advocate General of the Army, Air Force, Navy, or Marines;
(2) Designation as a judge advocate by The Judge Advocate General of the Army, Navy, Air Force, or Marines; and
(3) Membership in the North Carolina National Guard, the National Guard of another state, or the active or reserve components of any of the military services. (1987, c. 649, s. 1.)

§ 127A-51. Nonjudicial punishment.

Any commander of the national guard, not in the service of the United States, may, in addition to or in lieu of admonition or reprimand, impose nonjudicial punishment in like manner and to the extent prescribed by Article 15 of the Uniform Code of Military Justice, Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States except that there shall be no right to demand trial by special court-martial. (1957, c. 136, s. 10; 1975, c. 604, s. 2; 1983, c. 315, s. 2; c. 316, s. 1.)

§ 127A-52. Jurisdiction of courts-martial.

The jurisdiction of courts-martial of the national guard, not in the service of the United States, except as to punishments, shall be as prescribed by the

Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States. Such courts-martial shall have jurisdiction to try accused persons for offenses committed while serving without the State and while going to and returning from such service without the State in like manner and to the same extent as while serving within the State. (1957, c. 136, s. 10; 1975, c. 604, s. 2; 1983, c. 316, s. 2.)

§ 127A-53. Manual for Courts-Martial.

Trials and proceedings by all courts and boards shall be in accordance with the plans and procedures laid down in the Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States, except as modified by this Chapter. (1917, c. 200, s. 64; C.S., s. 6831; 1957, c. 136, s. 14; 1975, c. 604, s. 2; 1983, c. 316, s. 3.)

§ 127A-54. Sentences; where executed.

All sentences to confinement imposed by any military court of this State shall be executed in such prisons as the court may designate. (1917, c. 200, s. 61; C.S., s. 6832; 1975, c. 604, s. 2.)

§ 127A-55. Forms for courts-martial procedure.

In the national guard, not in the service of the United States, forms for courts-martial procedure shall be substantially as those set forth in the Appendices, Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States. (1957, c. 136, s. 13; 1975, c. 604, s. 2; 1983, c. 316, s. 4.)

§ 127A-56. Powers of courts-martial.

In the national guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue commitments in carrying out sentences of confinement, and to issue subpoenas and subpoenas duces tecum, and to enforce by attachment attendance of witnesses and the production of books, papers, records and other articles subject to a subpoena duces tecum, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts. He shall also have power to punish for contempt occurring in the presence of the court.

In addition to the power to issue warrants set forth in the first paragraph of this section, the arrest and confinement of persons subject to this Chapter may be accomplished by the means and under the procedures set forth in Articles 9 and 10 of the Uniform Code of Military Justice, Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States. (1917, c. 200, s. 60; C.S., s. 6830; 1957, c. 136, s. 12; 1975, c. 604, s. 2; 1983, c. 316, s. 5.)

§ 127A-57. Execution of processes and sentences.

All processes and sentences of any of the military courts of this State shall be executed by any sheriff, deputy sheriff, or police officer into whose hands the same may be placed for service or execution, and such officer shall make return thereof to the officer issuing or imposing the same. Such service or execution of process or sentence shall be made by such officer without tender or advancement of fee therefor; but all costs in such cases shall be paid from funds appropriated for military purposes. The actual necessary expenses of conveying a prisoner from one county in the State to another, when the same is authorized and directed by the Adjutant General of the State, shall be paid from the military funds of the State upon a warrant approved by the Adjutant General. (1917, c. 200, s. 62; C.S., s. 6833; 1973, c. 108, s. 80; 1975, c. 604, s. 2.)

§ 127A-58. Sentence of confinement.

All courts-martial of the national guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: Provided, that such sentences of confinement shall not exceed one day for each one dollar ($1.00) of fine authorized. (1917, c. 200, s. 59; C.S., s. 6829; 1949, c. 1130, s. 3; 1957, c. 136, s. 11; 1963, c. 1018, s. 5; 1975, c. 604, s. 2.)

§ 127A-59. Commitments.

When any sentence to fine or imprisonment shall be imposed by any military court of this State, it shall be the duty of the president of said court, or summary court officer, upon the approval of the findings and sentence of such court, to make out and sign a certificate entitling the case, giving the name of the accused, the date and place of trial, the date of approval of sentence, the amount of fine or manner, place, and duration of confinement, and deliver such certificate to the sheriff, or deputy sheriff, or police officer of the county wherein the sentence is to be executed; and it shall thereupon be the duty of such officer to carry said sentence into execution in the manner prescribed by law for the collection of fines or commitment to service of terms of imprisonment in criminal cases determined in the courts of this State. (1917, c. 200, s. 63; C.S., s. 6834; 1973, c. 108, s. 81; 1975, c. 604, s. 2.)

§ 127A-60. Sentence of dismissal.

No sentence of dismissal from the service or dishonorable discharge, imposed by a national guard court-martial not in the service of the United States, shall be executed until approved by the Governor. Any officer convicted by a general court-martial and dismissed from the service shall be forever disqualified from holding a commission in the militia. (1917, c. 200, s. 65; C.S., s. 6835; 1975, c. 604, s. 2.)

§ 127A-61. Disposition of fines.

Fines imposed by courts-martial under this Chapter shall be disposed of as prescribed in Article IX, Sec. 7, of the Constitution of North Carolina. (1975, c. 604, s. 2.)

§§ 127A-62 through 127A-66: Reserved for future codification purposes.

ARTICLE 4.

Naval Militia.

§ 127A-67. Organization and equipment.

The organization of the naval militia shall be units of convenient size, in each of which the number and rank of officers and the distribution of the total enlisted strength among the several ratings of petty officers and other enlisted personnel shall be such as are prescribed by the Secretary of the Navy, who may also prescribe the number of officers and the number of petty officers and other enlisted personnel required for the organization of such units into larger bodies for administrative and other purposes, and the arms and equipment of the naval militia shall be those which are now or may hereafter be prescribed by the Secretary of the Navy. (1917, c. 200, s. 66; C.S., s. 6836; 1975, c. 604, s. 2.)

§ 127A-68. Officers appointed to naval militia.

Officers of the United States navy and marine corps may, with the approval of the Secretary of the Navy, be appointed by the Governor and commissioned as officers of the naval militia. (1917, c. 200, s. 67; C.S., s. 6837; 1975, c. 604, s. 2.)

§ 127A-69. Officers assigned to duty.

Line officers of the naval militia may be for line duties only, for engineering duties only, or for aeronautic duties only. (1917, c. 200, s. 68; C.S., s. 6838; 1975, c. 604, s. 2.)

§ 127A-70. Discipline in naval militia.

The naval militia shall be subject to the system of discipline prescribed for the United States navy and marine corps, and the commanding officer of a naval militia battalion or brigade, or a naval militia officer in command of naval militia forces on shore or on any vessel of the navy loaned to the State, or on any vessel on which such forces are training, whether within or without the State, or wherever, either within or without the State, naval militia forces of the State shall be assembled pursuant to orders, shall have power without trial by courts-martial to impose upon members of the naval militia the punishments which the commanding officer of a vessel of the navy is authorized by law to impose. (1917, c. 200, s. 69; C.S., s. 6839; 1975, c. 604, s. 2.)

§ 127A-71. Disbursing and accounting officer.

The Governor shall appoint a disbursing officer, approved by and of such rank as may be prescribed by the Secretary of the Navy, to perform such duties as the Secretary of the Navy may prescribe. The Governor shall also appoint the above described disbursing officer, or such other officer of the pay corps of the naval militia as he may elect, as accounting officer for each battalion thereof, or at his option for each larger unit or combination of units of the same, who shall be responsible for the proper accounting for all public property issued to and for the use of such battalion or larger unit or combination of units. (1917, c. 200, s. 70; C.S., s. 6840; 1975, c. 604, s. 2.)

§ 127A-72. Rendition of accounts.

Accounting officers shall render accounts as prescribed by the Governor or by the Secretary of the Navy, and shall be required to give good and sufficient bond to the State and to the United States, in such sums as the Governor or the Secretary of the Navy may direct, and conditioned upon the faithful accounting for all public property and for the safekeeping of such part thereof as may be in the personal custody of such officer. Accounting officers may issue any or all such property to other officers or enlisted personnel of the naval militia under such rules and regulations as may be prescribed. (1917, c. 200, s. 71; C.S., s. 6841; 1975, c. 604, s. 2.)

§ 127A-73. Disbandment of naval militia.

No part of the naval militia which is entitled to compensation under the provisions of an act of Congress approved August 29, 1916, shall be disbanded without the consent of the President. (1917, c. 200, s. 86; C.S., s. 6842; 1975, c. 604, s. 2.)

§ 127A-74. Courts-martial for naval militia.

Courts-martial for the naval militia, not in the service of the United States, shall be organized, have the same powers, functions and authorities, and follow the same procedures as courts-martial for the national guard as set forth in G.S. 127A-47 through 127A-61. (1975, c. 604, s. 2.)

§§ 127A-75 through 127A-79: Reserved for future codification purposes.

Article 5.

State Defense Militia.

§ 127A-80. Authority to organize and maintain State defense militia of North Carolina.

(a) The Governor is authorized to organize such part of the unorganized militia as a State force for discipline and training, into companies, battalions, regiments, brigades or similar organizations, as may be deemed necessary for the defense of the State; to maintain, uniform and equip such military force within the appropriations available; to exercise discipline in the same manner as is now or may hereafter be provided by the laws of the State for the national guard. Such military force shall be subject to the call or the order of the Governor to execute the law and secure the safety of persons and property, suppress riots or insurrections, repel invasions or provide disaster relief, as may now or hereafter be provided by law for the national guard or for the State militia.

(b) Such military force shall be designated as the “North Carolina State Defense Militia” and shall be composed of personnel of the unorganized militia as may volunteer for service therein or be drafted as provided by law. To be eligible for service in an enlisted status, a person must be at least 17 years of age. To be eligible for service as an officer, a person must be at least 18 years of age. The force and its personnel shall be additional to and distinct from the national guard organized under existing law. A person may not become a member of the defense militia established under this section, if a member of a reserve component of the armed forces.

(c) The Governor is hereby authorized: to prescribe rules and regulations governing the appointment of officers, the enlistment of other personnel, the organization, administration, equipment, discipline and discharge of the personnel of such military force; to requisition from the Secretary of Defense such arms and equipment as may be in possession of and can be spared by the Department of Defense; and to furnish the facilities of available armories, equipment, State premises and property, for the purpose of drill and instruction.

(d) Such force shall not be called, ordered, or in any manner drafted, as such, into the military service of the United States, but no person shall by reason of membership therein, be exempt from military service under any federal law.

(e) The Governor is hereby authorized to transfer to the benefit of the State defense militia any available and unexpended funds which he shall find necessary for its use from any appropriations to the national guard by the General Assembly, and for the same purpose to allot moneys from the Contingency and Emergency Fund with the concurrence of the Council of State. Upon disbandment of the State defense militia any moneys or balance to the credit of any unit of this organization shall be paid into the State treasury for the benefit of the national guard, and all property, clothing, and equipment belonging to the State shall be transferred to the account of the national guard for disposition in accordance with the best interests of the State and as deemed advisable by the Governor. Upon disbandment of any unit of the State defense militia prior to the disbandment of the entire organization, the Governor is authorized to direct the transfer of any State property or balance of funds of the disbanded unit to any other unit, including any new unit or units organized to fill vacancies, or otherwise, as the Governor may direct.

(f) The North Carolina State defense militia shall be subject to the military laws of the State not inconsistent with or contrary to the provisions contained in this Article with the following exceptions:

The provisions of G.S. 127A-117, 127A-118, [and] 127A-139 as amended, shall not be applicable to the personnel and units of the State defense militia.

(g) There shall be allowed annually to each unit or company of the State defense militia such funds as may be necessary to be applied to the payment of armory rent, heat, light, stationery, printing, and other expenses.

(h) All payments are to be made by the Secretary of the Department of Crime Control and Public Safety in accordance with State laws in semiannual installments on the first day of July and the first day of January of each year, but no payment shall be made unless all assemblies and duties required by law are duly performed by all organizations named.

(i) The commander of each organization participating in the appropriation herein named shall render an itemized statement of all funds received from any source whatsoever for the support of the organization in such manner and on such forms as may be prescribed by the Secretary of the Department of Crime Control and Public Safety. Failure on the part of any commander to submit promptly when due the financial statement of the organization will be sufficient cause to withhold all appropriations for the organization. (1941, c. 43; 1943, c. 166; 1945, c. 209, s. 1; c. 835; 1957, c. 1083; 1963, c. 1016, s. 1; 1975, c. 604, s. 2; 1977, c. 70, s. 2; c. 553; 1983, c. 314, ss. 2, 3.)

§ 127A-81. State defense militia cadre.

(a) The Governor is authorized: to organize and regulate part of the unorganized militia as a State defense militia cadre in units or commands which he may deem necessary to provide a cadre for an active State defense militia; to prescribe regulations for the maintenance of the property and equipment of the cadre, for the exercise of its discipline, and for its training and duties.

(b) The cadre shall be designated the "North Carolina State Defense Militia Cadre" and shall be composed of a force of officers and enlisted personnel raised by appointment of the Governor, or otherwise, as may be provided by law. The Secretary of the Department of Crime Control and Public Safety may reimburse cadre members for expenses actually incurred, not to exceed the amount appropriated and authorized for such purposes by the General Assembly.

(c) The Governor's authority hereunder shall not be subject to regulations prescribed by the Secretary of Defense. Age and membership requirements for the State defense militia generally, as set forth in G.S. 127A-80 shall apply. The training of the cadre need not be in accordance with training regulations issued by the Department of Defense. The provisions of G.S. 127A-80 (c), (d), (g), (h) and (i) shall also apply to cadres.

(d) The total authorized strength of the cadre, its authorized officer and enlisted strength, the composition of each of its units or commands, and the allocation of cadre units or commands among the counties, cities, and towns of the State, shall be as prescribed by the Governor in suitable regulations enforced through the Adjutant General, or as otherwise provided by law.

(e) The duties of the State defense militia cadre shall be as ordered and directed by the Governor from time to time, or in regulations, and may include authority to take charge of armories and other military installations and real properties used by the North Carolina national guard, together with such other property as the regulations may provide, when and if the North Carolina national guard, or any part thereof, may be inducted into the service of the United States, or, for any extended period of time, may be absent on any duty from its home station. In addition, the cadre shall have duties appropriate to the organization, maintenance, and training of a military cadre to act as a nucleus for the organization of an active State defense militia whenever the necessity may arise. (1963, c. 1016, s. 1; 1975, c. 604, s. 2; 1977, c. 70, s. 2; 1983, c. 314, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 35.)

§§ 127A-82 through 127A-86: Reserved for future codification purposes.

Article 6.

Unorganized Militia.

§ 127A-87. Unorganized militia ordered out for service.

The commander in chief may at any time, in order to execute the law, secure the safety of persons and property, suppress riots or insurrections, repel invasions or provide disaster relief, in addition to the national guard, the State defense militia and the naval militia, order out the whole or any part of the unorganized militia. When the militia of this State or a part thereof is called forth under the Constitution and laws of the United States, the Governor shall first order out for service the national guard, the State defense militia or naval militia, or such thereof as may be necessary, and if the number available be insufficient, he shall then order out such a part of the unorganized militia as he may deem necessary. During the absence or organizations of the national guard or naval militia in the service of the United States, their state designations shall not be given to new organizations. (1917, c. 200, s. 46; C.S., s. 6860; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-88. Manner of ordering out unorganized militia.

The Governor shall, when ordering out the unorganized militia, designate the number. He may order them out either by calling for volunteers or by draft. He may attach them to the several organizations of the national guard, the State defense militia or naval militia, as may be best for the service. (1917, c. 200, s. 47; C.S., s. 6861; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§ 127A-89. Draft of unorganized militia.

If the unorganized militia is ordered out by draft, the Governor shall designate the persons in each county to make the draft, and prescribe rules and regulations for conducting the same. (1917, c. 200, s. 48; C.S., s. 6862; 1975, c. 604, s. 2.)

§ 127A-90. Punishment for failure to appear.

Every member of the militia ordered out for duty, or who shall volunteer or be drafted, who does not appear at the time and place ordered, shall be liable to such punishment as a court-martial may determine. (1917, c. 200, s. 49; C.S., s. 6863; 1975, c. 604, s. 2.)

§ 127A-91. Promotion of marksmanship.

The Adjutant General is authorized to detail a commissioned officer of the North Carolina national guard or member of the State defense militia to promote rifle marksmanship among the State defense militia and the unorganized militia of the State. Such officer or member so detailed shall serve without pay and it shall be his duty to organize and supervise rifle clubs in schools, colleges, universities, clubs and other groups, under such rules and regulations as the Adjutant General shall prescribe and in such manner to make them, when duly organized, acceptable for membership in the National Rifle Association. Provided, that such duties and efforts shall in nowise interfere or conflict with clubs of schools or units operating in R.O.T.C. or similar schools under the supervision of armed forces instructors. (1937, c. 449; 1963, c. 1016, s. 2; 1975, c. 604, s. 2.)

§§ 127A-92 through 127A-96: Reserved for future codification purposes.

Article 7.

Regulations as to Active Service.

§ 127A-97. National guard and naval militia first ordered out.

In all cases the national guard and naval militia as provided for in this Chapter shall be first ordered into service. (1917, c. 200, s. 44; C.S., s. 6857; 1975, c. 604, s. 2.)

§ 127A-98. Regulations enforced on active State service.

Whenever any portion of the militia shall be called into active State service to execute the law, secure the safety of persons and property, suppress riots or insurrections, repel invasions or provide disaster relief, the provisions of the Uniform Code of Military Justice of the United States, governing the armed forces of the United States, and the regulations prescribed for the armed forces of the United States, and the regulations issued thereunder, shall be enforced and regarded as part of this Chapter until said forces shall be relieved from such duty. As to offenses committed when such provisions of the Uniform Code of Military Justice of the United States are so enforced, courts-martial shall possess, in addition to the jurisdiction and power of sentence and punishment herein vested in them, all additional jurisdiction and power of sentence and punishment exercisable by like courts under such provisions of the Uniform Code of Military Justice of the United States or regulations or laws governing the United States armed forces or the customs and usages thereof; but no punishment under such Code which shall extend to the taking of life shall in any case be inflicted except in case of war, invasion, or insurrection, declared by a proclamation of the Governor to exist and then only after approval by the Governor of the sentence inflicting such punishment. Imprisonment other than in guardhouse shall be executed in county jails or other prisons designated by the Governor for that purpose. (1917, c. 200, s. 45; C.S., s. 6858; 1963, c. 1018, s. 6; 1975, c. 604, s. 2.)

§ 127A-99. Regulations governing unorganized militia.

Whenever any part of the unorganized militia is ordered out, it shall be governed by the same rules and regulations and be subject to the same penalties as the national guard or naval militia. (1917, c. 200, s. 35; C.S., s. 6859; 1975, c. 604, s. 2.)

§§ 127A-100 through 127A-104: Reserved for future codification purposes.

ARTICLE 8.

Pay of Militia.

§ 127A-105. Rations and pay on State service.

The militia of the State, both officers and enlisted personnel, when called into the service of the State by the Governor shall receive the same pay as when called or ordered into the service of the United States, and shall be rationed or paid the equivalent thereof, provided that no officer or enlisted personnel shall receive less than 18 times the minimum hourly wage per day as provided for in G.S. 95-25.3(a). (1813, c. 850, s. 5, P.R.; R.C., c. 70, s. 84; Code, s. 3248; Rev., s. 4856; 1907, c. 316; 1917, c. 200, s. 50; C.S., s. 6864; 1935, c. 452; 1959, c. 218, s. 17; 1975, c. 604, s. 2; 1997-153, s. 2; 1997-443, s. 7.12(c).)

§ 127A-106. Paid by the State.

When the militia or any portion thereof shall be ordered by the Governor into State service, the pay (including payment for any leave earned as a result of more than 30 days of continuous service), subsistence, transportation and other necessary expenses incident thereto shall be paid by the State Treasurer, upon the approval of the Governor. (1917, c. 200, s. 52; C.S., s. 6866; 1975, c. 604, s. 2; 1993, c. 257, s. 12; 1997-153, s. 6; 1997-443, s. 7.12(c).)

§ 127A-107. Rate of pay for other service.

The Governor may, whenever the public service requires it, order upon special or regular duty any officer or enlisted member of the national guard or naval militia, and the expenses and compensation therefor of such officer and enlisted member shall be paid out of the appropriations made to the Department of Crime Control and Public Safety. Such officers and enlisted members shall receive the same rate of pay as officers and enlisted members of the same grade and like service of the regular service, provided that no such officer or enlisted member shall receive less than 18 times the minimum hourly wage per day as provided for in G.S. 95-25.3(a). Officers and enlisted members when on duty in connection with examining boards, efficiency boards, advisory boards, courts of inquiry or similar duty shall be allowed per diem and subsistence prescribed for lawful State boards and commissions generally for such duty. Officers and enlisted members serving on general or special courts-martial shall receive the base pay of their rank. No staff officer or enlisted member who receives a salary from the State as such shall be entitled to any additional compensation other than actual and necessary expenses incurred while traveling upon orders issued by the proper authority. (1917, c. 200, s. 51; C.S., s. 6865; 1935, c. 451; 1949, c. 1130, s. 4; 1959, c. 218, s. 18; 1963, c. 1019, s. 1; 1969, c. 986; 1971, c. 204; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2; 1997-153, s. 3; 1997-443, s. 7.12(c).)

§ 127A-108. Pay and care of soldiers, airmen and sailors disabled in service.

A member of the national guard, the State defense militia, or the naval militia who without fault or negligence on his part is disabled through illness, injury, or disease contracted or incurred while on duty or by reason of duty in the service of the State or while reasonably proceeding to or returning from such duty shall receive the actual necessary expenses for care and medicine and medical attention at the expense of the State and if such shall temporarily incapacitate him for pursuing his usual business or occupation he shall receive during such incapacity the pay and allowances as are provided for the same grade and rating in like circumstances in the active armed forces of the United States. If such member is permanently disabled, he shall receive the pensions and rewards that persons under similar circumstances in the military service of the United States receive from the United States. In case any such member shall die as a result of such injury, illness or disease within one year after it has been incurred or contracted, the surviving spouse, minor children, or dependent parents of the member shall receive such pension and rewards as persons under similar circumstances receive from the United States.

The cost incurred by reason of this section shall be paid out of the Contingency and Emergency Fund, or such other fund as may be designated by law.

The Adjutant General, with the approval of the Governor, shall make and publish such regulations pursuant to this section as may be necessary for its implementation. Before the name of any person is placed on the disability or pension rolls of the State under this section, proof shall be made in accordance with such regulations that the applicant is entitled to such care, pension, or reward.

Nothing herein shall in any way limit or condition any other payment to such member as by law may be allowed: Provided, however, any payments made under the provisions of Chapter 97 of the General Statutes or under federal statutes as now or hereafter amended shall be deducted from the payments made under this section. (1917, c. 200, s. 54; C.S., s. 6868; 1959, c. 218, s. 19; c. 763; 1965, c. 1058; 1975, c. 604, s. 2.)

§ 127A-109. Pay of general and field officers.

General and field officers when away from their home stations visiting the organizations of their commands, for inspection and instruction under orders from proper authority, shall receive actual necessary expenses and the pay of their rank. (1917, c. 200, s. 53; C.S., s. 6867; 1975, c. 604, s. 2.)

§ 127A-110. Proceedings against third party injuring or killing guard personnel.

(a) The right to compensation and other benefits under G.S. 127A-108 shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the State to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the guard member under this Article, and the State, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The guard member or personal representative if guard member be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the guard member or personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, then all rights of the guard member, or personal representative if guard member be dead, against the third party shall pass by operation of the period fixed by the statute of limitations applicable to such rights and if the State shall not have settled with or instituted proceedings against the third party within such time, then all such rights shall revert to the guard member or personal representative 60 days before the expiration of the applicable statute of limitations.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the guard member or personal representative and the State shall not be a necessary or proper party thereto. If the guard member or personal representative should refuse to cooperate with the State by being the party plaintiff, then the action shall be brought in the name of the State and the guard member or personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall not be admissible in evidence in any proceeding against the third party. If the third party defending such proceeding, by answer duly served on the State, sufficiently alleges that actionable negligence of the State joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of the State joined and concurred with the negligence of the third party in producing the injury or death. The State shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though it were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the State did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the State would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the guard member or personal representative free of any claim by the State and the third party shall have no further right by way of contribution or otherwise against the State, except any right which may exist by reason of an express contract of indemnity between the State and the third party, which was entered into prior to the injury to the guard member.

(f)(1) Any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the court for the following purposes and in the following order of priority:
  a. First to the payment of actual court costs taxed by judgment.
  b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not exceed one third of the amount obtained or recovered of the third party.
  c. Third to the reimbursement of the State for all benefits by way of compensation or medical treatment expense paid or to be paid by the State pursuant to G.S. 127A-108.
  d. Fourth to the payment of any amount remaining to the guard member or personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the guard member and the State in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of the party's interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the guard member or personal representative nor the State shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both State and guard member or personal representative join therein; provided, that this sentence shall not apply if the State is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the guard member. The Attorney General shall have the right on behalf of the State to reduce by compromise its claim.

(h) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other. (1967, c. 1081, s. 1; 1975, c. 604, s. 2.)

§ 127A-111. Civilian leave option.

(a) A member of the North Carolina National Guard called into service of the State by the Governor shall have the right to take leave without pay from his or her civilian employment. No member of the North Carolina National Guard shall be forced to use or exhaust his or her vacation or other accrued leaves from his or her civilian employment for a period of active service. The choice of leave shall be solely within the discretion of the member.

(b) The Commissioner of Labor shall enforce the provisions of this section pursuant to Chapter 95 of the General Statutes. (1997-153, s. 4.)

§§ 127A-112 through 127A-115: Reserved for future codification purposes.

Article 9.

Privilege of Organized State Militia and Reserve Components of the United States Armed Forces.

§ 127A-116. Leaves of absence for State officers and employees.

The Governor or the Governor's designee shall promulgate appropriate policy and regulations relating to leaves of absence for short periods of military training and for State or federal military duty or special emergency management service of all officers and employees of the State and its political subdivisions, including officers and employees of public educational facilities under the sponsorship of the State, without loss of pay, time or efficiency rating. (1917, c. 200, s. 88; C.S., s. 6869; 1937, c. 224, s. 1; 1949, c. 1274; 1975, c. 604, s. 2; 2001-513, s. 23(b).)

§ 127A-117. Contributing members.

Each organization of the national guard and naval militia may, besides its regular and active members, enroll contributing members on payment in advance by each person desiring to become such contributing member of not less than ten dollars ($10.00) per annum, which money shall be paid into the unit fund. Each contributing member shall be entitled to receive from the commanding officer thereof a certificate of membership. (1917, c. 200, s. 90; C.S., s. 6871; 1967, c. 218, s. 3; 1975, c. 604, s. 2.)

§ 127A-118. Organizations may own property; actions.

Organizations of the national guard and naval militia shall have the right to own and keep real and personal property, which shall belong to the organization; and the commanding officer of any organization may recover for its use debts or effects belonging to it, or damages for injury to such property, action for such recovery to be brought in the name of the commanding officer thereof before any court of justice within the State having jurisdiction; and no suit or complaint pending in his name shall be abated by his ceasing to be commanding officer of the organization; but upon motion of the commander succeeding him such commander shall be admitted to prosecute the suit or complaint in like manner and with like effect as if it had been originally commenced by him. (1917, c. 200, s. 92; C.S., s. 6872; 1975, c. 604, s. 2.)

§ 127A-119. When families of soldiers, airmen and sailors supported by county.

When any citizen of the State is absent on duty as a member of the national guard, State defense militia or naval militia, and his family are unable to support themselves during his absence, the board of commissioners of his county, on application, shall make towards their maintenance such allowance as may be deemed reasonable. (1917, c. 200, s. 93; C.S., s. 6873; 1963, c. 1019, s. 2; 1975, c. 604, s. 2.)

§§ 127A-120 through 127A-124: Reserved for future codification purposes.

ARTICLE 10.

Care of Military Property.

§ 127A-125. Custody of military property.

All public military property, except when used in the performance of military duty, shall be kept in armories, or other properly designated places of deposit; and it shall be unlawful for any person charged with the care and safety of said public property to allow the same out of his custody, except as above specified. (1917, c. 200, s. 38; C.S., s. 6874; 1975, c. 604, s. 2.)

§ 127A-126. Other suitable storage facilities.

All public military property of every description which may not be distributed among the units of the national guard or State defense militia according to law shall be stored and kept at suitable storage facilities as determined by the Adjutant General. (1917, c. 200, s. 39; C.S., s. 6875; 1959, c. 218, s. 20; 1963, c. 1019, s. 3; 1975, c. 604, s. 2.)

§ 127A-127. Property kept in good order.

Every officer and enlisted member belonging to any unit equipped with public military property shall keep and preserve such property in good order; and for neglect to do so may be punished as a court-martial may direct. (1917, c. 200, s. 40; C.S., s. 6877; 1959, c. 218, s. 22; 1975, c. 604, s. 2.)

§ 127A-128. Equipment and vehicles.

Equipment and vehicles issued by the Department of Defense to the national guard or State defense militia shall be used solely for military purposes, except in those specific cases where nonmilitary use is authorized by the Department of Defense and/or the Governor. Necessary expense in maintaining such equipment and vehicles, not provided for by the federal government shall be a proper charge against State funds appropriated for the national guard: Provided, such expense shall be specifically authorized by the Governor and certified by the Adjutant General. (1917, c. 200, s. 41; C.S., s. 6878; 1921, c. 120, s. 9; 1959, c. 218, s. 23; 1963, c. 1019, s. 4; 1967, c. 563, s. 5; 1975, c. 604, s. 2.)

§ 127A-129. Transfer of property.

All officers accountable or responsible for public funds, property, or books, before being relieved from the duty, shall turn over the same according to the regulations prescribed by the Governor. (1917, c. 200, s. 42; C.S., s. 6879; 1975, c. 604, s. 2.)

§ 127A-130. Replacement of lost or damaged property.

Whenever any military property issued to the national guard or State defense militia of the State shall have been lost, damaged, or destroyed, and upon report of a disinterested surveying officer it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage or destruction could have been avoided by exercise of able care, the money value of such property shall be charged to the responsible officer or enlisted member, and the pay of such officers and enlisted members from both federal and State funds at any time accruing may be stopped and applied to the payment of any such indebtedness until same is discharged. (1917, c. 200, s. 43; C.S., s. 6880; 1959, c. 218, s. 24; 1963, c. 1019, s. 5; 1975, c. 604, s. 2.)

§ 127A-131. Unlawful conversion or willful destruction of military property.

(a) If any person shall willfully or wantonly destroy or injure, willfully retain after demand made or otherwise convert to his own use any property of the State or of the United States issued for the purpose of arming or equipping the militia of the State or if any person shall purchase any property of the State or of the United States knowing it to be unlawfully obtained, he shall be guilty of a Class 1 misdemeanor.

(b) Any person, firm or corporation receiving in pledge or buying from any other person, firm or corporation for the purpose of resale any goods, to include arms, ammunition, explosives, equipment, clothing, supplies and materials, which may reasonably be thought to be the property of the armed forces of the United States and their reserve components or of the militia of the State of North Carolina, shall keep a register and shall enter therein a true and accurate record of each purchase, showing the name, social security number and address of the person from whom purchased, the name and address of the firm or corporation from whom purchased, together with the amount paid for each item or lot of small items, the date of purchase, the serial numbers of all items bearing serial numbers, and any other marks, brands or descriptions which will serve to identify the items purchased. The register shall be at all times open to the inspection of the public. Any person, firm or corporation failing to comply with this provision shall be guilty of a Class 1 misdemeanor; and any person, firm or corporation making a false entry in such register shall be guilty of a Class 1 misdemeanor. (1876-7, c. 272, s. 19; Code, s. 3274; Rev., ss. 3536, 3537; C.S., ss. 6881, 6882; 1959, c. 218, s. 25; 1963, c. 1019, s. 6; 1975, c. 604, s. 2; 1993, c. 539, s. 936; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 127A-132 through 127A-136: Reserved for future codification purposes.

ARTICLE 11.

Support of Militia.

§ 127A-137. Requisition for federal funds.

The Governor shall make requisition upon the secretary of the appropriate service for such State allotment from federal funds as may be appropriate for the support of the militia. (1917, c. 200, s. 23; C.S., s. 6887; 1921, c. 120, s. 10; 1963, c. 1019, s. 8; 1975, c. 604, s. 2.)

§ 127A-138. Local appropriations; unit funds.

(a) Every municipality and county within the State is hereby authorized and empowered to appropriate for the benefit of any unit or units of the militia such amounts of public funds from year to year as the governing body of such municipality or county may deem wise, patriotic and expedient; and is further authorized, either alone or in connection with others, to provide heat, electricity, water, telephone service and other costs of operation and maintenance of any armory. Such appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 or by the allocation of other revenues whose use is not otherwise restricted by law.

(b) Any funds donated to any unit or units of the militia by local governments, civic organizations or private sources, short-term rental of their armory buildings, or funds earned through vending machine commissions and items of similar nature shall remain at the unit or units to be expended in accordance with rules and regulations prescribed by the Secretary. (1947, c. 1010, s. 8; 1975, c. 604, s. 2; 1979, c. 701, s. 1.)

§ 127A-139. Allowances made to different organizations and personnel.

(a) There may be allowed each year to the following officers, under rules and regulations prescribed by the Secretary of Crime Control and Public Safety, as follows: to general officers, and commanders of divisions, corps, groups, brigades, regiments, separate battalions, squadrons or similar organizations, not to exceed two hundred and twenty-five dollars ($225.00); to commanding officers of companies, batteries, troops, detachments and similar units not to exceed two hundred dollars ($200.00); to executive officers, adjutants, plans and training officers, logistical officers and commissioned officers in comparable assignments in divisions, corps, groups, brigades, regiments, battalions, squadrons and similar organizations, not to exceed two hundred dollars ($200.00). No officer shall be entitled to receive any part of the amounts named herein unless he has performed satisfactorily all duties required of him by law and regulations and has pursued such course of instruction as may from time to time be required.

(b) There may be allowed annually to the supply sergeant of each company, battery, troop, detachment, and similar organizations, a sum of money not to exceed one hundred dollars ($100.00) for services satisfactorily performed.

(c) There shall be allowed annually sufficient funds to be allocated by the Secretary of Crime Control and Public Safety among the federally recognized units of the national guard and their headquarters, NCNG State Pistol Team, NCNG State Rifle Team, NCARNG Aviation Support Facility, and NCARNG Aviation Flight Activity for administrative and operating expenses, including heat, electricity, telephone, postage, office supplies and equipment, minor repairs and replacement of equipment, and such other expenses and special items of equipment not otherwise provided as may be authorized in accordance with national guard rules and regulations.

(d) Repealed by Session Laws 1979, c. 701, s. 2.

(e) The commanding officers of all organizations participating in the appropriations herein made shall render an itemized statement of all funds received from any source whatever for the support of their respective organizations in such manner and on such forms as may be prescribed by the Secretary through the Adjutant General. Failure on the part of any officer to submit promptly when due the financial statement of his organization will be sufficient cause to withhold all appropriations for such organizations. (1917, c. 200, s. 97; 1919, c. 311; C.S., s. 6889; 1921, c. 120, s. 11; 1923, c. 24; 1924, c. 6; 1927, c. 227, s. 2; 1949, c. 1130, s. 5; 1951, c. 1144, s. 1; 1953, c. 1246; 1959, c. 421; 1963, c. 1020; 1967, c. 563, s. 6; 1973, c. 1460; 1975, c. 604, s. 2; 1977, c. 70, s. 2; 1979, c. 701, s. 2.)

§§ 127A-140 through 127A-144: Reserved for future codification purposes.

ARTICLE 12.

General Provisions.

§ 127A-145. Reports of officers.

All officers of the national guard, the State defense militia, and the naval militia shall make such returns and reports to the Governor, Secretary of Defense, or to such officers as they may designate at such times and in such form as may from time to time be prescribed. (1917, c. 200, s. 21; C.S., s. 6890; 1963, c. 1019, s. 10; 1975, c. 604, s. 2.)

§ 127A-146. Officer to give notice of absence.

When any officer shall have occasion to be absent from his usual residence one week or more, he shall notify the officer next in command, and also his next superior officer in command, of his intended absence, and shall arrange for the officer next in command to handle and attend to all official communications. (1917, c. 200, s. 22; C.S., s. 6891; 1975, c. 604, s. 2.)

§ 127A-147. Orders, rules, regulations and Uniform Code of Military Justice applicable to militia when not in service of United States.

The national guard, State defense militia and naval militia, when not in the service of the United States, shall except as to punishments, be governed by the orders, rules and regulations of the Adjutant General, regulations promulgated by the secretary of the appropriate service of the armed forces of the United States, and the Uniform Code of Military Justice, as amended from time to time. (1917, c. 200, s. 34; C.S., s. 6892; 1963, c. 1018, s. 7; 1975, c. 604, s. 2.)

§ 127A-148. Commander may prevent trespass and disorder.

The commander upon any occasion of duty may place in arrest during the continuance thereof any person who shall trespass upon the campground, parade ground, armory, or other place devoted to such duty, or who shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms, or shall disturb or prevent the passage of troops going to or returning from any duty. He may prohibit and prevent the sale or use of all spirituous liquors, wine, ale, beer, or cider, the holding of huckster or auction sales, and all gambling within the limits of the post, campground, place of encampment, parade, or drill under his command, or within such limits not exceeding one mile therefrom as he may prescribe. And he may in his discretion abate as common nuisance all such sales. (1917, c. 200, s. 94; C.S., s. 6893; 1975, c. 604, s. 2.)

§ 127A-149. Power of arrest in certain emergencies.

In the event members of the North Carolina national guard or State defense militia are called out by the Governor pursuant to the authority vested in him by the Constitution, they shall have such power of arrest as may be reasonably necessary to accomplish the purpose for which they have been called out. (1959, c. 453; 1963, c. 1019, s. 11; 1975, c. 604, s. 2.)

§ 127A-150. Immunity of guardsmen from civil and criminal liability.

(a) A member of the North Carolina national guard or State defense militia, while acting in aid of civil authorities and in the line of duty, shall have the immunities of a law-enforcement officer.

(b) Whenever members of the North Carolina national guard or State defense militia are called upon to execute the laws, engage in disaster relief, suppress or prevent actual or threatened riot or insurrection, repel invasion, apprehend or disburse [disperse] any sniper, rioters, mob or unlawful assembly, they shall have the immunities of a law-enforcement officer.

(c) Any civil claim against a member of the national guard or State defense militia allegedly arising from the action or inaction of such member of the national guard or State defense militia while in line of duty shall be filed within two years of the date of the occurrence or forever barred. (1969, c. 969; 1975, c. 604, s. 2.)

§ 127A-151. Organizing company without authority.

If any person shall organize a military company, or drill or parade under arms as a military body, except under the militia laws and regulations of the State, or shall exercise or attempt to exercise the power or authority of a military officer in this State, without holding a commission from the Governor, he shall be guilty of a Class 1 misdemeanor. (1893, c. 374, s. 38; Rev., s. 3538; C.S., s. 6894; 1975, c. 604, s. 2; 1993, c. 539, s. 937; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 127A-152. Placing name on muster roll wrongfully.

If any officer of the militia of the State shall knowingly or willfully place, or cause to be placed, on any muster roll the name of any person not regularly or lawfully enlisted, or the name of any enlisted man who is dead or who has been discharged, transferred, or has lost membership for any cause whatsoever, or who has been convicted of any infamous crime, he shall be guilty of a Class 1 misdemeanor. (1893, c. 374, s. 33; Rev., s. 3539; C.S., s. 6895; 1975, c. 604, s. 2; 1993, c. 539, s. 938; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 127A-153. Protection of uniform.

(a) The wearing of any military uniform of the United States government by members of the militia shall be pursuant to applicable regulations promulgated by the respective armed services of the United States and regulations of the Adjutant General of North Carolina not inconsistent with federal uniform regulations.

(b) The wearing of any military uniform of the North Carolina State government by members of the militia shall be pursuant to applicable regulations promulgated by the Adjutant General of North Carolina.

(c) Members of the militia who violate the regulations referred to in (a) and (b) above shall, upon conviction by a court-martial, be punished by a fine not exceeding fifty dollars ($50.00) or by imprisonment not exceeding 30 days, or by both fine and imprisonment, for each offense.

(d) Persons not subject to courts-martial who violate the regulations referred to in (a) and (b) above may be charged and tried in the State courts and upon conviction shall be punished as provided in (c) above. (1921, c. 120, s. 12; C.S., s. 6895(a); 1963, c. 1017; 1975, c. 604, s. 2.)

§ 127A-154. Upkeep of properties.

There shall be paid from the appropriations from the national guard such amounts as may be necessary for the maintenance, upkeep, and improvement of State military properties and facilities. Provided, such expenditures shall be approved and authorized by the Governor. (1921, c. 120, s. 13; C.S., s. 6895(b); 1975, c. 604, s. 2.)

§ 127A-155. When officers authorized to administer oaths.

Officers of the national guard are authorized to administer oaths in all circumstances pertaining to any military matter whenever an oath is required. (1949, c. 1130, s. 6; 1975, c. 604, s. 2.)

§§ 127A-156 through 127A-160: Reserved for future codification purposes.

Article 13.

Armories.

§ 127A-161. Definitions.

As used in this Article, the following terms mean:

(1) Armory: Any building or building complex and related facilities, including the lands for them, which are intended to be utilized by the militia for training, administration, storage, and the maintenance and servicing of equipment.
(2) Armory site: That land, meeting federal and State specifications, upon which an armory may be constructed.
(3) Department: The North Carolina Department of Crime Control and Public Safety.
(4) Facilities: Those adjuncts to an armory, including but not limited to yards, storage buildings, sheds, ramps, racks, target ranges, furniture, fixtures and other equipment and installations.
(5) Funds: Any moneys appropriated by any municipality, county, the State or the United States government and made available for the purpose of acquiring armory sites or constructing or repairing any armory, warehouse, or other facility for the use of any unit or for any other purpose in connection with the housing, training, instruction or promotion of the interest of any unit.
(6) Municipality: Any incorporated city, town or village.
(7) Unit: Any organizational entity of the militia. (1947, c. 1010, s. 1; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-162. Authority to foster development of armories and facilities.

The Department of Crime Control and Public Safety is authorized and empowered to foster the development in North Carolina of adequate armories and other necessary facilities for the proper housing, instruction, training and administration of all units and facilities necessary for the proper protection, care, maintenance, repair, issue and upkeep of public and military property issued to or for the use of any unit. (1947, c. 1010, s. 4; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-163. Powers of Department specified.

The Department of Crime Control and Public Safety is further authorized and empowered:

(1) To act as an agency of the State of North Carolina for the purpose of setting up and administering any statewide plan for the acquisition of armories and armory sites, for the construction and maintenance of armories and for providing facilities which are now or may be necessary in order to comply with any federal law and in order to receive, administer and disburse any funds which may be provided by act of Congress for such purpose;

(2) As such agency of the State of North Carolina, to promulgate statewide plans for the acquisition of armories and armory sites, for the construction and maintenance of armories and such other facilities as may be found desirable or necessary to meet the requirements and receive the benefits of any federal legislation with respect thereto;

(3) To receive and administer any funds which may be appropriated by any act of Congress or otherwise for the acquisition of armories and armory sites; for the construction and maintenance of armories and for providing facilities, which may at any time become available for such purposes;

(4) To receive and administer any other funds which may be available in furtherance of any activity in which the Department of Crime Control and Public Safety is authorized and empowered to engage under the provisions of this Article; and

(5) To adopt such rules and regulations as may be necessary to carry out the intent and purpose of this Article. (1947, c. 1010, s. 5; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-164. Power to acquire land, make contracts, etc.

In furtherance of the duties, power, and authority given herein, the Department of Crime Control and Public Safety is authorized and empowered within the limitations of G.S. 143-341 to accept and hold title to real property in the name of the State of North Carolina, and to enter in contracts and do any and all things necessary to carry out any statewide programs for the acquisition of armories and armory sites, the construction and maintenance of armories, and to provide facilities which may be considered by it as necessary for any unit and which may be authorized by act of Congress or otherwise. (1947, c. 1010, s. 6; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-165. Counties and municipalities may lease, convey or acquire property for use as armory.

Every municipality and county of the State of North Carolina is hereby authorized and empowered to lease or convey by deed to the State of North Carolina:

(1) Any existing armory and the land adjacent thereto;

(2) Any real property suitable for the construction of an armory, warehouse or other facility; and

(3) Any real property suitable for use in the administration, instruction and training of any unit.

Every municipality and county is further authorized and empowered to acquire any real property which may be suitable for use as an armory or for the construction of an armory thereon, or for any other purpose of a unit. The contracting of an indebtedness and the expenditure of public funds by any municipality or county to comply with the provisions of this Article are hereby declared to be a necessary expense and for a public purpose. (1947, c. 1010, s. 7; 1949, c. 1066, s. 1; 1975, c. 604, s. 2.)

§ 127A-166. Prior conveyances validated.

All conveyances of real property made before April 20, 1949, by any municipality or county of the State of North Carolina to the State of North Carolina for armory purposes are hereby validated and ratified in every respect. (1949, c. 1066, s. 2; 1975, c. 604, s. 2.)

§ 127A-167. Appropriations to supplement available funds authorized.

Any city or town and any county in the State, separately or jointly, may make appropriations to supplement available federal or State funds to be used for the construction of armory facilities for the North Carolina national guard. Appropriations made under authority of this Article shall be in such amounts and in such proportions as may be deemed adequate and necessary by the governing body of the county and/or municipality desiring to participate in the armory construction program. (1955, c. 1181, s. 1; 1975, c. 604, s. 2.)

§ 127A-168. Local financial support.

Each county and city in this State is authorized to make appropriations for the purposes of this Article and to fund them by levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1955, c. 1181, s. 2; 1961, c. 1042; 1973, c. 803, s. 12; 1975, c. 604, s. 2.)

§ 127A-169. Unexpended portion of State appropriation.

The unexpended portion of any appropriation from the general fund of the State for the purposes set out in this Article, remaining at the end of any biennium, shall not revert to the general fund of the State, but shall constitute part of a permanent fund to be expended from time to time in the manner and for the purposes set out in this Article. (1949, c. 1202, s. 2; 1975, c. 604, s. 2.)

§§ 127A-170 through 127A-174: Reserved for future codification purposes.

Article 14.

National Guard Mutual Assistance Compact.

§ 127A-175. Purposes.

(a) Provide for mutual aid among the party states in the utilization of the national guard to cope with emergencies.

(b) Permit and encourage a high degree of flexibility in the deployment of national guard forces in the interest of efficiency.

(c) Maximize the effectiveness of the national guard in those situations which call for its utilization under this Compact.

(d) Provide protection for the rights of national guard personnel when serving in other states on emergency duty. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-176. Entry into force and withdrawal.

(a) This Compact shall enter into force when enacted into law by any two states. Thereafter, this Compact shall become effective as to any other state upon its enactment thereof.

(b) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the governor of the withdrawing state has given notice in writing of such withdrawal to the governors of all other party states. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-177. Definitions; mutual aid.

(a) As used in this Article:

(1) "Emergency" means an occurrence or condition, temporary in nature, in which police and other public safety officials and locally available national guard forces are, or may reasonably be expected to be, unable to cope with substantial and imminent danger to the public safety.

(2) "Requesting state" means the state whose governor requests assistance in coping with an emergency.

(3) "Responding state" means the state furnishing aid, or requested to furnish aid.

(b) Upon request of the governor of a party state for assistance in an emergency, the governor of a responding state shall have authority under this Compact to send without the borders of his state and place under the temporary command of the appropriate national guard or other military authorities of the requesting state all or any part of the national guard forces of his state as he may deem necessary, and the exercise of his discretion in this regard shall be conclusive.

(c) The governor of a party state may withhold the national guard forces of his state from such use and recall any forces or part or member thereof previously deployed in a requesting state.

(d) Whenever national guard forces of any party state are engaged in another state in carrying out the purposes of this Compact, the members thereof so engaged shall have the same powers, duties, rights, privileges and immunities as members of national guard forces in such other state. The requesting state shall save members of the national guard forces of responding states harmless from civil liability for acts or omissions in good faith which occur in the performance of their duty while engaged in carrying out the purposes of this Compact, whether the responding forces are serving the requesting state within its borders or are in transit to or from such service.

(e) Subject to the provisions of subsections (f), (g) and (h) of this section, all liability that may arise under the laws of the requesting state, the responding state, or a third state on account of or in connection with a request for aid, shall be assumed and borne by the requesting state.

(f) Any responding state rendering aid pursuant to this Compact shall be reimbursed by the requesting state for any loss or damage to, or expense incurred in the operation of any equipment answering a request for aid, and for the cost of the materials, transportation and maintenance of national guard personnel and equipment incurred in connection with such request: Provided, that nothing herein contained shall prevent any responding state from assuming such loss, damage, expense or other cost.

(g) Each party state shall provide, in the same amounts and manner as if they were on duty within their state, for the pay and allowances of the personnel of its national guard units while engaged without the state pursuant to this Compact and while going to and returning from such duty pursuant to this Compact. Such pay and allowances shall be deemed items of expense reimbursable under subsection (f) by the requesting state.

(h) Each party state providing for the payment of compensation and death benefits to injured members and the representatives of deceased members of its national guard forces in case such members sustain injuries or are killed within their own state, shall provide for the payment of compensation and death benefits in the same manner and on the same terms in case such members sustain injury or are killed while rendering aid pursuant to this Compact. Such compensation and death benefits shall be deemed items of expense reimbursable pursuant to subsection (f) of this section. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-178. Delegation.

Nothing in this Compact shall be construed to prevent the governor of a party state from delegating any of his responsibilities or authority respecting the national guard, provided that such delegation is otherwise in accordance with law. For purposes of this Compact, however, the governor shall not delegate the power to request assistance from another state. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-179. Limitations.

Nothing in this Compact shall:

(1) Expand or add to the functions of the national guard, except with respect to the jurisdictions within [which] such functions may be performed;

(2) Authorize or permit national guard units to be placed under the field command of any person not having the military or national guard rank or status required by law for the field command position in question. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-180. Construction and severability.

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating herein, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-181. Payment of liability to responding state.

Upon presentation of a claim therefor by an appropriate authority of a state whose national guard forces have aided this State pursuant to the Compact, any liability of this State pursuant to G.S. 127A-177(f) of this Compact shall be paid out of the general fund. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-182. Status, rights and benefits of forces engaged pursuant to Compact.

In accordance with G.S. 127A-177(h) of this Compact, members of the national guard forces of this State shall be deemed to be in State service at all times when engaged pursuant to this Compact, and shall be entitled to all rights and benefits provided pursuant to the laws of this State. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-183. Injury or death while going to or returning from duty.

All benefits to be paid under G.S. 127A-177(h) of the foregoing Compact shall include any injury or death sustained while going to or returning from such duty. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§ 127A-184. Authority of responding state required to relieve from assignment or reassign officers.

Nothing in the foregoing Compact shall authorize or permit state officials or military officers of the requesting state to relieve from assignment or reassign officers or noncommissioned officers of national guard units of the responding state without authorization by the appropriate authorities of the responding state. (1969, c. 674, s. 1; 1975, c. 604, s. 2.)

§§ 127A-185 through 127A-189: Reserved for future codification purposes.

Article 15.

North Carolina National Guard Tuition Assistance Act of 1975.

§ 127A-190. Short title.

This Article shall be known and may be cited as the North Carolina National Guard Tuition Assistance Act of 1975. (1975, c. 917, s. 2.)

§ 127A-191. Purpose.

The General Assembly of North Carolina, recognizing that the North Carolina national guard is the only organized, trained and equipped military force subject to the control of the State, hereby establishes a program of tuition assistance for qualifying guard members for the purpose of encouraging voluntary membership in the guard, improving the educational level of its members, and thereby benefiting the State as a whole. (1975, c. 917, s. 3.)

§ 127A-192. Definitions.

(a) "Business or Trade School". — Any school within the State of North Carolina which is licensed by the State Board of Education and listed by that Board as an approved private business school or an approved private trade school.

(b) "Private Educational Institutions". — Any junior college, senior college or university which is operated and governed by private interests not under the control of the federal, State or any local government, which is located within and licensed by the State of North Carolina, which does not operate for profit, whose curriculum is primarily directed toward the awarding of associate, baccalaureate or graduate degrees, which agrees to the applicable administration and funding provisions of this Article.

(c) "Secretary". — The Secretary of Crime Control and Public Safety or his designee.

(d) "State Educational Institutions". — Any of the constituent institutions of the University of North Carolina, or any community college operated under the provisions of Chapter 115D of the General Statutes of North Carolina.

(e) "Academic Year". — Any period of 365 days beginning with the first day of enrollment for a course of instruction. (1975, c. 917, s. 4; 1977, c. 70, s. 2; c. 228, s. 1; 1987, c. 564, s. 24.)

§ 127A-193. Benefit.

The benefit provided under this Article shall consist of a monetary educational assistance grant not to exceed the highest amount charged by a State educational institution per academic year or a lesser amount, as prescribed by the Secretary, to remain within the funds appropriated, to qualifying members of the North Carolina national guard. Benefits shall be payable for a period of one academic year at a time, renewable at the option of the Secretary. (1975, c. 917, s. 5; 1977, c. 228, s. 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 99, 100; 1993 (Reg. Sess., 1994), c. 769, s. 22.3; 2000-67, s. 18; 2005-444, s. 1.)

§ 127A-194. Eligibility.

(a) Active members of the North Carolina national guard who are enrolled or who shall enroll in any business or trade school, private educational institution or State educational institution shall be eligible to apply for this tuition assistance benefit: Provided, that the applicant has a minimum obligation of two years remaining as a member of the national guard from the end of the academic period for which tuition assistance is provided or that the applicant commit himself or herself to extended membership for at least two additional years from the end of said academic period.

(b) This tuition assistance benefit shall be applicable to students in the following categories:

(1) Students seeking to achieve completion of their secondary school education at a community college [or technical institute].
(2) Students seeking trade or vocational training or education.
(3) Students seeking to achieve a two-year associate degree.
(4) Students seeking to achieve a four-year baccalaureate degree.
(5) Students seeking to achieve a graduate degree. (1975, c. 917, s. 6; 1977, c. 228, ss. 3, 4.)

Editor's Note. — Session Laws 1987, c. 564, s. 12, effective July 6, 1987, directed that "community college" be substituted for "community college or technical institute" in subdivision (b)(1) of G.S. 127-194. At the direction of the Revisor of Statutes, the phrase "or technical institute" has been placed in brackets at the end of subdivision (b)(1) of this section, which was apparently the section intended to be amended by the 1987 act.

§ 127A-195. Administration and funding.

(a) The Secretary of Crime Control and Public Safety is charged with the administration of the tuition assistance program under this Article. He may delegate administrative tasks to other persons within the Department of Crime Control and Public Safety as he deems best for the orderly administration of this program.

(b) The Secretary shall determine the eligibility of applicants, select the benefit recipients, establish the effective date of the benefit, and may suspend or revoke the benefit if he finds that the recipient does not maintain an adequate academic status, or if the recipient engages in riots, unlawful demonstrations, the seizure of educational buildings, or otherwise engages in disorderly conduct, breaches of the peace, or unlawful assemblies. The Secretary shall maintain such records and shall promulgate such rules and regulations as he deems necessary for the orderly administration of this program. The Secretary may require of business or trade schools or State or private educational institutions such reports and other information as he may need to carry out the provisions of this Article and he shall disburse benefit payments for recipients upon certification of enrollment by the enrolling institutions.

(c) All tuition benefit disbursements shall be made to the business or trade school or State or private educational institution concerned, for credit to the tuition account of each recipient.

(d) The participation by any business or trade school or private educational institution in this program shall be subject to the applicable provisions of this Article and to examination by the State Auditor of the accounts of the benefit recipients attending or having attended such private schools or institutions. The Secretary may defer making an award or may suspend an award in any business or trade school or private educational institution which does not comply with the provisions of this Article relating to said institutions. The manner of payment to any business or trade school or private educational institution shall be as prescribed by the Secretary.

(e) Irrespective of other provisions of this Article, the Secretary may prescribe special procedures for adjusting the accounts of benefit recipients who, for reasons of illness, physical inability to attend classes or for other valid reason satisfactory to the Secretary, may withdraw from any business or trade school or State or private educational institution prior to the completion of the term, semester, quarter or other academic period being attended at the time of withdrawal.

(f) Any balance of the monetary educational assistance grant up to the maximum for the academic year remaining after tuition is paid pursuant to subsection (c) of this section may be disbursed to the recipient as reimbursement for required course books and materials. The manner of obtaining the reimbursement payment for these required books and materials shall be as prescribed by the Secretary. (1975, c. 917, s. 7; 1977, c. 70, s. 2; 2005-444, ss. 2, 3.)

§§ 127A-196 through 127A-200: Reserved for future codification purposes.

Article 16.

National Guard Reemployment Rights.

§ 127A-201. Entitlement.

Any member of the North Carolina National Guard who, at the direction of the Governor, enters State duty, is entitled, upon honorable release from State duty, to all the reemployment rights provided for in this Article. (1979, c. 155, s. 1.)

§ 127A-202. Rights.

Upon release from State duty, the employee shall make written application to his previous employer for reemployment within five days of his release from duty or from hospitalization continuing after release. If the employee is still qualified for his previous employment, he shall be restored to his previous position or to a position of like seniority, status and salary, unless the employer's circumstances now make the restoration unreasonable. If the employee is no longer qualified for his previous employment, he shall be placed in another position, for which he is qualified, and which will give him appropriate seniority, status and salary, unless the employer's circumstances now make the placement unreasonable. (1979, c. 155, s. 1.)

CASE NOTES

Effect of Statute on Wrongful Termination Claim. — Cause of action asserted by a North Carolina National Guard Service-member for common law wrongful termination was precluded by the statutory scheme set forth in G.S. 127A-202, 127A-202.1, 127A-203, which provided the procedure for recovery and remedies available to a servicemember terminated because of National Guard status, and the employer's motion to dismiss the wrongful termination cause of action was granted. Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003).

Preclusion from Recovery. — G.S. 127A-202 and G.S. 127A-203 only provide a remedy for National Guardsmen who have been denied reinstatement to their employment upon return from active duty. Thus, where an employee, who was a Guardsmen did not claim that he was denied reemployment to his previous position after a period of active service, he had no cause of action under G.S. 127A-202 and G.S. 127A-203. Jones v. Philip Morris USA, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6224 (M.D.N.C. Apr. 8, 2004).

§ 127A-202.1. Discrimination against persons who serve in the North Carolina National Guard and acts of reprisal prohibited.

(a) It is the policy of this State that all individuals shall be afforded the right to perform, apply to perform, or have an obligation to perform service in the North Carolina National Guard without fear of discrimination or retaliatory action from their employer or prospective employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An individual who is a member of the North Carolina National Guard who performs, has performed, applies to perform, or has an obligation to perform service in the North Carolina National Guard shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(c) A person shall be considered to have denied a member of the North Carolina National Guard initial employment, reemployment, retention in employment, promotion, or a benefit of employment in violation of this section if the member's membership, application for membership, performance of service, application for service, or obligation for service in the North Carolina National Guard is a motivating factor in that person's action, unless the person can prove by the greater weight of the evidence that the same unfavorable action would have taken place in the absence of the member's membership, application for membership, performance of service, application for service, or obligation.

(d) Nothing in this section shall be construed to require a person to pay salary or wages to a member of the North Carolina National Guard during the member's period of active service.

(e) The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to that Article.

(f) This section shall also apply when a member of the North Carolina National Guard is called into active duty at the direction of the President, the Governor, or by any other competent authority. (1997-153, s. 1; 2004-130, s. 3.)

CASE NOTES

Effect of Statute on Wrongful Termination Claim. — Cause of action asserted by a North Carolina National Guard Service-member for common law wrongful termination was precluded by the statutory scheme set forth in G.S. 127A-202, 127A-202.1, 127A-203, which provided the procedure for recovery and remedies available to a servicemember terminated because of National Guard status, and the employer's motion to dismiss the wrongful termination cause of action was granted. Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003).

Procedural Requirements for Commencing an Action. — To the extent that remedies under G.S. 127A-202.1 are available to an employee who is a National Guardsmen and is denied reinstatement to his employment upon return from active duty, the employee cannot maintain an action under G.S. 127A-202.1 if he does not meet the procedural requirements of first exhausting the required administrative remedies and acquiring a right-to-sue letter before bringing his action. Jones v. Philip Morris USA, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6224 (M.D.N.C. Apr. 8, 2004).

§ 127A-203. Penalties for denial.

If any employer, public or private, fails or refuses to comply with G.S. 127A-202, the superior court for the district of the employer's place of business may, upon the filing of a motion, petition, or other appropriate pleading by the employee, require the employer to comply with G.S. 127A-202 and to compensate the employee for any loss of wages or benefits suffered by reason of the employer's unlawful failure or refusal. (1979, c. 155, s. 1.)

CASE NOTES

Effect of Statute on Wrongful Termination Claim. — Cause of action asserted by a North Carolina National Guard Service-member for common law wrongful termination was precluded by the statutory scheme set forth in G.S. 127A-202, 127A-202.1, 127A-203, which provided the procedure for recovery and remedies available to a servicemember terminated because of National Guard status, and the employer's motion to dismiss the wrongful termination cause of action was granted. Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003).

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Chapter 127B.

Military Affairs.

Article 1.

Military Property Sales Facilities.

Sec.

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127B-2. Military property defined.
127B-3. License.
127B-4. Local governing authorities to grant and control license; bond.
127B-5. Perjury; punishment.
127B-6. Records to be kept.

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127B-7. Penalties.
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Discrimination Against Military Personnel.

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ARTICLE 1.

Military Property Sales Facilities.

§ 127B-1. Military property sales facility defined.

Any person, partnership, association or corporation who engages in the business of selling, consigning, purchasing, transferring or in any way acquiring military property for resale, is a "military property sales facility". Specifically excluded are facilities operated by the United States Government, the State of North Carolina or any of its agencies and persons, partnerships, associations or corporations selling or purchasing military property pursuant to a contract with the United States Government, the State of North Carolina or any of its agencies. (1985, c. 522, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985, c. 522 provided that all local laws governing military property businesses in counties or towns which were inconsistent with the act were repealed.

CASE NOTES

Constitutionality. — This Article, regulating businesses dealing in military goods, is constitutional under the due process and equal protection provisions of the State and federal Constitutions. Poor Richard's, Inc. v. Stone, 321 N.C. 61, 366 S.E.2d 697 (1988).

This article does not violate N.C. Const., Art. I, §§ 1 and 19. Poor Richard's, Inc. v. Stone, 321 N.C. 61, 366 S.E.2d 697 (1988).

The classification created by this Article is not so arbitrary or unreasonable as to be violative of the equal protection requirement. Poor Richard's, Inc. v. Stone, 321 N.C. 61, 366 S.E.2d 697 (1988).

Businesses involved in buying and selling military property have features which distinguish them from other types of retail sales in a way which justifies their regulation. Poor Richard's, Inc. v. Stone, 321 N.C. 61, 366 S.E.2d 697 (1988).

OPINIONS OF ATTORNEY GENERAL

Purpose of this Article appears to be to discourage theft of property from the State and federal armed forces by the establishment of a record both of all military property sold and of the identity of the persons selling it by means of licensure of military property sales facilities. See opinion of Attorney General to the Honorable William N. Martin, 55 N.C.A.G. 31 (1985).

Direct Purchase from Government Requires No License. — If a person, firm or corporation deals only in military property purchased directly from the United States government or this State pursuant to written contract, then that person, firm or corporation is not required to be licensed by this Article. However, the items purchased, if they are indeed "military property" within the meaning of G.S. 127B-2, would nevertheless be subject to recording and reporting requirements by military property sales facilities which might later purchase them. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

§ 127B-2. Military property defined.

"Military property" means property originally manufactured for the United States or State of North Carolina which is a type and kind issued for use in, or furnished and intended for, the military service of the United States or the militia of the State of North Carolina. (1985, c. 522, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Item manufactured for commercial sale, such as camouflage clothing, is not "military property" within the meaning of this section. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

Property such as a desk, which is of a type and kind issued for use in or furnished and intended for the military service of the United States or the militia of this State, is nonetheless not "military property" within the meaning of this Article if it was not originally manufactured for the United States or this State. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

Article is not intended to cover sales and purchases of obsolete military property. See opinion of Attorney General to the Honorable William N. Martin, 55 N.C.A.G. 31 (1985).

The term "military property," as defined in this Article, does not include property originally manufactured for use by the United States military or the North Carolina militia, but which is of a type and kind no longer issued for use in or furnished to the personnel of such military services. See opinion of Attorney General to the Honorable William N. Martin, 55 N.C.A.G. 31 (1985).

Recording and Reporting Requirements. — If a person, firm or corporation deals only in military property purchased directly from the United States government or this State pursuant to written contract, then that person, firm or corporation is not required to be licensed by this Article. However, the items purchased, if they are indeed "military property" within the meaning of this section, would nevertheless be subject to recording and reporting requirements by military property sales facilities which might later purchase them. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

§ 127B-3. License.

No person, partnership, association or corporation shall engage in the business of selling military property or purchasing military property for resale without first having obtained a license to do so from the local governing body of the city, town, or county in which it is located and by paying the county, State, and municipal tax required by law, and otherwise complying with the requirements made in this and succeeding sections. The license shall be posted in a prominent place, easily visible to the public, on the designated premises. (1985, c. 522, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Sales facility need not get separate license from both county and city. If the facility is in a city or town, it can obtain the license from the city or town government. If it is not in a city or town, then it must obtain the license from the county. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G 42 (1985).

County may charge fee for issuing li-

censes. See opinion of Attorney General to Mr. Garris N. Yarborough, Cumberland County Attorney, 55 N.C.A.G. 41 (1985).

§ 127B-4. Local governing authorities to grant and control license; bond.

(a) The governing body of any city, town, or county in this State may grant to such person, partnership, association or corporation as who shall produce satisfactory evidence of good character, a license authorizing such person, partnership, association or corporation to carry on the business of a military property sales facility. The license shall designate the building in which the person, partnership, association or corporation shall carry on the business, and no person, partnership, association or corporation shall carry on the business of a military property sales facility without being duly licensed, nor in any other building than the one designated in the license.

(b) Any person or the principal officers of any association or corporation or all the partners of any partnership applying for a license shall furnish the governing body the following information:

(1) Full name, and any other names used by the applicant during the preceding five years, or in the case of a partnership, association or corporation, the applicant shall list any partnership, association, or corporate names used during the preceding five years;
(2) Current address, and all addresses used by the applicant during the preceding five years;
(3) Physical description;
(4) Age;
(5) Driver's license number, if any, and state of issuance;
(6) Recent color photograph;
(7) Record of felony convictions; and
(8) Record of other convictions during the preceding five years.

(c) Every person, partnership, association or corporation so licensed to carry on the business of a military property sales facility shall, at the time of receiving a license, file with the governing body of the city, town, or county granting the license, a bond payable to the city, town, or county in the sum of one thousand dollars ($1,000), to be executed by the person licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by the governing body. The bond shall be for the faithful performance of the requirements and obligations pertaining to the business licensed. The governing body, may revoke the license and sue for forfeiture of the bond upon a breach of the licensee's duties under the bond. Any person who may obtain a judgment against a military property sales facility and upon which judgment execution is returned unsatisfied may maintain an action in his own name upon the bond of the military property sales facility, in any court having jurisdiction of the amount demanded to satisfy the judgment. (1985, c. 522, s. 1.)

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Facility May Purchase Property at Another Facility. — Subsection (a) does not prohibit a military property sales facility from purchasing military property at the place of business of another military property sales facility. However, the purchasing facility would have to make a record of the transaction in compliance with G.S. 127B-6(a). See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

§ 127B-5. Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit pursuant to this Article shall be guilty of a Class 1 misdemeanor. (1985, c. 522, s. 1; 1993, c. 539, s. 939; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 127B-6. Records to be kept.

(a) Every military property sales facility owner shall keep a book in which shall be legibly written, at the time of each transaction involving the acquisition by any means of used or new military property by the military property sales facility owner, his employee or agent, from any person, partnership, association or corporation, the following information:

(1) An account and description of the used or new military property including if applicable, the manufacturer's name, the model, the model number, the serial number of the property, and any engraved numbers or initials found on the property. Property lacking any identifying mark or characteristic shall be marked by the military property sales facility owner in such a way as to allow clear identification of the property.

(2) The amount of money paid;

(3) The date of the transaction; and

(4) The name and residence of the person selling, consigning or transferring the used or new military property.

(b) The military property sales facility owner, or his employee or agent shall require that the person selling the new or used military property, to present two forms of positive identification to him before the military property sales facility personnel may complete any transaction regarding the buying, consigning or acquiring of new or used military property. The presentation of any one state or federal government issued identification containing a photographic representation imprinted on it shall constitute compliance with the identification requirements of this paragraph. The military property sales facility owner or his employee or agent shall legibly record this identification information next to the person's name and residence in the book required to be kept. Both the military property sales facility owner, his employee or agent and the seller, consignor or transferor of the military property shall sign the record entry.

(c) The book shall be a permanent record to be kept at all times on the premises of the place of business of the military property sales facility and shall be made available, during regular business hours, to any law enforcement officer who requests to inspect the book. A copy of the records required to be kept by this section shall be filed within 48 hours of the transaction in the office of the local law enforcement agency serving the city, town, or county which issued the license to the military. Mailing the required copy to the local law enforcement agency within 48 hours shall constitute compliance with this section. (1985, c. 522, s. 1.)

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Orders shipped to facility from out of state must be recorded and reported in compliance with paragraphs (a) and (c), just as other transactions by mail must be. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

Purchase at Another Facility Recorded. — G.S. 127B-4(a) does not prohibit a military property sales facility from purchasing military property at the place of business of another military property sales facility. However, the purchasing facility would have to make a record of the transaction in compliance with paragraph (a). See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

If military property sales facility purchases items by lot, for example 100 pounds of wool scrap, each scrap need not be listed separately. However, each of the items of scrap should be tagged so that their origin in that lot is discernable. Moreover, where the property has a model number, serial number and/or manufacturer's name, that information must be recorded. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

Record-keeping book called for by paragraph (a) may be loose-leaf. See opinion of Attorney General to Mr. Paul M. Starzynski, Member, Onslow County Board of Commissioners, 55 N.C.A.G. 42 (1985).

§ 127B-7. Penalties.

Any dealer who violates the provisions of this Article shall be guilty of a Class 2 misdemeanor. In addition, any dealer convicted of violating this Article shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each violation shall constitute a separate and distinct offense. (1985, c. 522, s. 1; 1993, c. 539, s. 940; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 127B-8, 127B-9: Reserved for future codification purposes.

Article 2.

Discrimination Against Military Personnel.

§ 127B-10. Purpose.

The General Assembly finds and declares that military personnel in North Carolina vitally affect the general economy of this State and that it is in the public interest and public welfare to ensure that no discrimination against military personnel is practiced by any business. (1985, c. 522, s. 1.)

§ 127B-11. Private discrimination prohibited.

No person shall discriminate against any officer, warrant officer or enlisted person of the military or naval forces of the State or of the United States because of their membership therein. No member of these military forces shall be prejudiced or injured by any person, employer, officer or agent of any corporation, company or firm with respect to their employment, position or status or denied or disqualified for employment by virtue of their membership or service in the military forces of this State or of the United States. (1985, c. 522, s. 1.)

CASE NOTES

Violation of Statute Provides No Private Right of Action. — An employee's employment discrimination claim seeking redress pursuant to G.S. 127B-11 against his employer for allegedly terminating the employee as a result of his service as a National Guardsman was dismissed because G.S. 127B-11 did not provide for a private right of action, and penalty for violating it was a misdemeanor under G.S. 127B-15. Jones v. Philip Morris USA, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6224 (M.D.N.C. Apr. 8, 2004).

§ 127B-12. Public discrimination prohibited.

No officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district shall discriminate against any officer, warrant officer or enlisted person of the military or naval forces of the State or of the United States because of their membership therein. No member of the military forces shall be prejudiced or injured by any officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district with respect to their employment, appointment, position or status or denied or disqualified for or discharged from their employment or position by virtue of their membership or service in the military forces of this State or of the United States. (1985, c. 522, s. 1.)

§ 127B-13. Refusing entrance prohibited.

No person shall prohibit or refuse entrance to any officer, warrant officer or enlisted person of the military or naval forces of this State or of the United States into any public place of entertainment, of amusement, or accommodation because the officer or enlisted person is wearing the uniform of the organization to which they belong or because of their membership or service in the military forces of this State or of the United States. (1985, c. 522, s. 1.)

§ 127B-14. Employer discrimination prohibited.

No employer or officer or agent of any corporation, company, or firm, or other person shall discharge any person from employment because of the performance of any emergency military duty by reason of being an officer, warrant officer or enlisted person of the military or naval forces of this State or the United States. (1985, c. 522, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

§ 127B-15. Penalties.

Any person who violates the provisions of this Article shall be deemed guilty of a Class 2 misdemeanor. Each violation shall constitute a separate and distinct offense. (1985, c. 522, s. 1; 1993, c. 539, s. 941; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

CASE NOTES

Violation of Statute Provides No Private Right of Action. — An employee's employment discrimination claim seeking redress pursuant to G.S. 127B-11 against his employer for allegedly terminating the employee as a result of his service as a National Guardsman was dismissed because G.S. 127B-11 did not provide for a private right of action, and penalty for violating it was a misdemeanor under G.S. 127B-15. Jones v. Philip Morris USA, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6224 (M.D.N.C. Apr. 8, 2004).

Chapter 127C.

Advisory Commission on Military Affairs.

Sec.

127C-1. Creation of the North Carolina Advisory Commission on Military Affairs.
127C-2. Membership.
127C-3. Military Advisor.
127C-4. Purposes.

§ 127C-1. Creation of the North Carolina Advisory Commission on Military Affairs.

There is created in the Office of the Governor the North Carolina Advisory Commission on Military Affairs to advise the Governor and the Secretary of Commerce on protecting the existing military infrastructure in this State and to promote new military missions and economic opportunities for the State and its citizens. (2001-424, s. 12.1.)

Editor's Note. — Session Laws 2005-445, ss. 1.1 to 1A.2, effective July 1, 2006, provide:

"PART I. Findings.

"SECTION 1.1. The General Assembly expresses its appreciation to the Department of Defense for the military bases and installations that are located in the State of North Carolina and that are vital parts of the national defense of the United States.

"SECTION 1.2. The General Assembly declares its full support for its military installations and acknowledges the important role of the military in North Carolina's economy.

"SECTION 1.3. The General Assembly has enacted several recent acts to accommodate the military and intends to continue:

"(1) S.L. 2004-203, Section 80 (deployed personnel get extension to renew occupational licenses).

"(2) S.L. 2004-130 (active duty personnel get in-State tuition rate at universities and community colleges; dependent relative continues to receive in-State rate if member reassigned; nonresident North Carolina National Guard members get in-State rate).

"(3) S.L. 2003-152 (DMV to have a military designation for drivers licenses; allow renewal by mail).

"(4) S.L. 2003-248 (allow redaction of personal identifying information from military discharges filed with register of deeds).

"(5) S.L. 2003-300 (extend drivers license to 90 days following end of deployment; waive civil penalties and fees for lapsed motor vehicle liability insurance; extend property tax filing deadline; extend property listing deadline; grant full refund of tuition and fees from UNC system and community colleges if deployed; waive repayment of North Carolina Legislative Tuition Grants if student called to active duty).

"PART IA. MILITARY MORALE, RECREATION AND WELFARE FUNDS, CONSERVATION GRANT FUNDS.

"SECTION 1A.1.(a) There is appropriated from the General Fund to a Reserve for the Military Morale, Recreation, and Welfare Fund in the Office of State Budget and Management for the 2006-2007 fiscal year the sum of one million dollars ($1,000,000).

"SECTION 1A.1.(b) The Office of State Budget and Management shall distribute for the purposes described in this section the amount appropriated by subsection (a) of this section. That amount shall be distributed to each military installation on a per capita basis.

"SECTION 1A.1.(c) Funds distributed to a military installation exchange under this section must be deposited in the Military Morale, Recreation, and Welfare Fund for that installation and used only for community services and other expenditures to improve quality of life programs for military members and their families in North Carolina.

"SECTION 1A.2. There is appropriated from the General Fund to the Conservation Grant Fund established under G.S. 113A-232 for the 2006-2007 fiscal year the sum of one million dollars ($1,000,000). Funds distributed to the Conservation Grant Fund under this section must be used for compatible land use and conservation easement type acquisitions of land adjacent to military bases and flyways."

§ 127C-2. Membership.

(a) The North Carolina Advisory Commission on Military Affairs shall consist of 21 voting members, who shall serve on the Executive Committee, and 15 nonvoting, ex officio members who shall serve by reason of their positions.

(b) The Executive Committee shall be appointed as follows:

- (1) Three members appointed by the Speaker of the House of Representatives, one of whom shall be a member of a recognized veterans' organization.
- (2) Three members appointed by the President Pro Tempore of the Senate, one of whom shall be a member of a recognized veterans' organization.
- (3) Fifteen members appointed by the Governor, consisting of:
  - a. Three representatives from the Jacksonville community.
  - b. Three representatives from the Havelock community.
  - c. Three representatives from the Goldsboro community.
  - d. Three representatives from the Fayetteville community.
  - e. Three public members from across the State.

(c) The following members, or their designee, shall serve ex officio:

- (1) The Lieutenant Governor.
- (1a) Secretary of Crime Control and Public Safety.
- (2) Secretary of Commerce.
- (2a) The Secretary of Transportation.
- (2b) The Secretary of the Department of Environment and Natural Resources.
- (3) Commanding General 18th Airborne Corps, Fort Bragg.
- (4) Commanding General Marine Corps Base, Camp Lejeune.
- (5) Commanding General Marine Corps Air Station, Cherry Point.
- (6) Commander 4th FW, Seymour Johnson Air Force Base.
- (7) Commander 43rd Airlift Wing, Pope Air Force Base.
- (8) Commander of the U.S. Coast Guard Support Center, Elizabeth City.
- (9) Adjutant General of the North Carolina National Guard.
- (10) The Executive Director of the North Carolina League of Municipalities.
- (11) The Executive Director of the North Carolina Association of County Commissioners.
- (12) The Assistant Secretary for Veterans Affairs, Department of Administration.

(d) The Governor shall designate one member of the Executive Committee appointed pursuant to subsection (b) of this section to serve as chair. The Executive Committee shall elect four persons from amongst its membership to serve as vice-chairs.

(e) The terms of the members of the Executive Committee shall be as follows:

- (1) The members initially appointed by the Speaker of the House of Representatives and the President Pro Tempore of the Senate shall serve terms ending on December 31, 2003.
- (2) Seven of the members appointed by the Governor shall serve initial terms ending on December 31, 2002.
- (3) Eight of the members appointed by the Governor shall serve initial terms ending on December 31, 2003.

Thereafter, all members shall serve two-year terms. (2001-424, s. 12.1; 2001-486, s. 2.9(a), (b); 2004-49, s. 1.)

§ 127C-3. Military Advisor.

The Military Advisor within the Office of the Governor shall serve as the administrative head of the Commission and be responsible for the operations and normal business activities of the Commission, with oversight by the Executive Committee. (2001-424, s. 12.1.)

§ 127C-4. Purposes.

The Commission shall have the following responsibilities and duties:

(1) Advise the Governor and Secretary of Commerce on how to strengthen the State's relationship with the military to protect the installations of this State from the results of any future defense budget cuts or military downsizing by providing a sound infrastructure, affordable housing, and affordable education for military members and their families, working to be viewed by national military leaders as the most military-friendly State in the nation.

(2) Develop a strategic plan to provide initiatives to support the long-term viability and prosperity of the military of this State that shall include, at least:

  a. A comprehensive Economic Impact Study of Military Activities in North Carolina to be conducted by the North Carolina State University Department of Economics and the East Carolina University Office of Regional Development.

  b. A Strengths/Weaknesses/Opportunities/Threats (SWOT) Analysis conducted by a professional strategic planning group on the current status of the military in North Carolina.

(3) Study ways to improve educational opportunities for military personnel in North Carolina.

(4) Assist in coordinating the State's interests in future activities of the Department of Defense.

(5) Promote initiatives to improve the quality of life for military personnel in this State. (2001-424, s. 12.1.)

Chapter 128.

Offices and Public Officers.

Article 1.

General Provisions.

Sec.

128-1. No person shall hold more than one office; exception.

128-1.1. Dual-office holding allowed.

128-1.2. Ex officio service by county and city representatives and officials.

128-2. Holding office contrary to the Constitution; penalty.

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128-14. Identification cards for field agents or deputies of State departments.

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128-15.1. [Repealed.]

128-15.2. Appointment of acting heads of certain agencies.

128-15.3. Discrimination against handicapped prohibited in hiring; recruitment, etc., of handicapped persons.

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128-29. Management of funds.

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128-34. Transfer of members.

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128-36.1. [Repealed.]

128-37. Membership of employees of district health departments or public health authorities.

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128-38. Reservation of power to change.

128-38.1. Termination or partial termination; discontinuance of contributions.

128-38.2. Internal Revenue Code compliance.

128-38.3. Deduction for payment to certain employees' associations allowed.

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Article 4.

Leaves of Absence.

128-39. Leaves of absence for State officials for protracted illness or other reason.

128-39.1. Leaves of absence for State officials for military or naval service.

128-40. Leaves of absence for county officials for protracted illness or other reason.

128-41. Leaves of absence for municipal officials for protracted illness or other reason.

128-42. Leaves of absence for county or municipal officials for military or naval service.

ARTICLE 1.

General Provisions.

§ 128-1. No person shall hold more than one office; exception.

No person who shall hold any office or place of trust or profit under the United States, or any department thereof or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly except as provided in G.S. 128-1.1, or by other General Statute. (Const., art. 14, s. 7; Rev., s. 2364; C.S., s. 3200; 1967, c. 24, s. 24; 1969, c. 1070; 1971, c. 697, s. 1; 1983, c. 609, s. 9.)

Cross References. — As to constitutional prohibition against double office holding, see N.C. Const., Art. VI, § 9, and the note thereto.

As to right of citizens and taxpayers of county to bring action to try right of person to hold two offices at the same time, see note to G.S. 1-515.

CASE NOTES

I. General Consideration.
II. Distinguishing Characteristics.
III. Illustrative Cases.

I. GENERAL CONSIDERATION.

At common law there was no limit on the right of a citizen to hold several offices, except the incompatibility of the duties of the several officers. State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).

Necessity of Taking Oath. — The taking of an oath of office is not an indispensable criterion, for the office may exist without it. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872); State ex rel. Bryan v. Patrick, 124 N.C. 651, 33 S.E. 151 (1899).

An officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the legislature cannot deprive him. Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

And Legislature May Change Duties and Emoluments. — Although an office is a constitutional one, the legislature may, within reasonable limits, change the statutory duties and diminish the emoluments of such office, if the public welfare requires it. Fortune v. Buncombe County Comm'rs, 140 N.C. 322, 52 S.E. 950 (1905); Commissioners v. Stedman, 141 N.C. 448, 54 S.E. 269 (1906).

The legislature may attach additional duties to an existing office, and it may afterwards lop off those duties and assign them to a new office, leaving the original office as it was before the additional duties were attached to it. State ex rel. Dowtin v. Beardsley, 126 N.C. 119, 35 S.E. 241 (1900).

In respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties or emoluments, or abolish them; while in respect to legislative offices, it is entirely within the power of the legislature to deal with them as public policy may suggest and public interest may demand. Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

Unless the Constitution otherwise expressly provides, the legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges before the end of the term, or to alter or abridge the term, or to abolish the office itself. State ex rel. Caldwell v. Wilson, 121 N.C. 425, 28 S.E. 554 (1897), appeal dismissed, 169 U.S. 586, 18 S. Ct. 435, 42 L. Ed. 865 (1898); Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

The legislature may reduce or increase the salaries of such officers as are not protected by the Constitution during their term of office, but cannot deprive them of the whole. Cotten v. Ellis, 52 N.C. 545 (1860).

Manner of Appointment. — Where officers have to be appointed to fill a regular term, the Governor nominates to the Senate, unless it be an officer who is elected by the people, and then he fills the vacancy or term until the people can elect his successor. People ex rel. Battle v. McIver, 68 N.C. 467 (1873). See also, People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); People ex rel. Welker v. Bledsoe, 68 N.C. 457 (1873).

The power to create vacancies in a public office, the incumbents of which are charged with continuing duties and responsibilities, rests, in the absence of provisions to the contrary, in the body possessing the original power of appointment. State ex rel. Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899).

Offices whose duties are congruous may be consolidated; but it is just, in cases of consolidation of offices, to postpone the operation of the law until a vacancy appears in the office whose duties are to be transferred. Troy v. Wooten, 32 N.C. 377 (1849).

II. DISTINGUISHING CHARACTERISTICS.

In General. — Public office is tenure by virtue of an appointment, conferred by public authority. Willis v. Melvin, 53 N.C. 62 (1860).

The term embraces the ideas of tenure, duration, emolument and duties. State ex rel. Bryan v. Patrick, 124 N.C. 651, 33 S.E. 151 (1899).

A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. State ex rel. Clark v. Stanley, 66 N.C. 59, 8 Am. R. 488 (1872); State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898); State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899).

This is considered to be the true definition of a public officer in its original, broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

And a Parcel of the Administration of Government. — The true test of a public office is that it is a parcel of the administration of government, or is itself directly created by the lawmaking power. Eliason v. Coleman, 86 N.C. 235 (1882).

Portion of Sovereignty Attaches. — An office or place of trust requiring a proceeding by quo warranto for the removal of the incumbent is defined as a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public. State ex rel. Wooten v. Smith, 145 N.C. 476, 59 S.E. 649 (1907).

Combination of Duty and Agency. — The word "office" in its primary signification implies a duty or duties — the agency from the State to perform the duties. The duties of the office are of first consequence, and the agency from the State to perform those duties is the next step in the creation of an office. It is the union of the two factors, duty and agency, which makes the office. State Prison v. Day, 124 N.C. 362, 32 S.E. 748, 46 L.R.A. 295 (1899).

Public Office Distinguished from Public Agency. — The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect the terms "office" and "place of trust" as used in our Constitution are synonymous. Doyle v. Aldermen of Raleigh, 89 N.C. 133, 45 Am. R. 677 (1883); State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898); State ex rel. Wooten v. Smith, 145 N.C. 476, 59 S.E. 649 (1907).

Addition of Duties to Existing Office. — An act which merely attaches new duties to existing offices does not create a new office. McCullers v. Board of Comm'rs, 158 N.C. 75, 73 S.E. 816 (1911).

Authority to Appoint to Office. — If a person is authorized to appoint to an office, this duty of itself constitutes him a public officer. State ex rel. Clark v. Stanley, 66 N.C. 59, 8 Am. R. 488 (1872); State ex rel. Howerton v. Tate, 68 N.C. 546 (1873).

Office Distinguished from Employment and Contract. — An "office" is defined by good authority as involving a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is distinguished from "employment" or "contract." Eliason v. Coleman, 86 N.C. 235 (1882); State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).

A public office is an administrative agency or public employment, and although an office is an employment, it does not follow that every employment is an office. State ex rel. Wooten v. Smith, 145 N.C. 476, 59 S.E. 649 (1907).

Officers Distinguished from Placemen. — The distinction between officers and placemen is that the former are required to take an oath to support the Constitutions of the State and of the United States, while the latter are not. Worthy v. Barrett, 63 N.C. 199 (1869), appeal dismissed, 76 U.S. 611, 19 L. Ed. 565 (1870).

III. ILLUSTRATIVE CASES.

Governor and Others in Executive Department. — The executive department is an agency for the State, and the Governor and others, whose duty it is to discharge this agency, are public officers. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

Judges. — The judicial department is an agency for the State, and the judges are public officers. State ex rel. Clark v. Stanley, 66 N.C. 59, 8 Am. R. 488 (1872).

A clerk of the court is a public officer. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

A recorder is a public officer. Rhodes v.

Love, 153 N.C. 468, 69 S.E. 436 (1910). See State v. Lord, 145 N.C. 479, 59 S.E. 656 (1907).

Members of Legislature. — The legislative department is an agency for the State, and the members of the Senate and of the House of Representatives are public officers in the broad sense in which the term is used in the Constitution of this State. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

In Worthy v. Barrett, 63 N.C. 199 (1869), appeal dismissed, 76 U.S. 611, 19 L. Ed. 565 (1870), it is said that "members of the legislature are not officers. Theirs are places of trust and profit, but not offices of trust and profit." Doyle v. Aldermen of Raleigh, 89 N.C. 133 (1883). In this instance the court was using the terms in the restricted sense in which they are used in U.S. Const., Amend. XIV. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

The members of the county board of education are public officers. State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898); State ex rel. Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899).

State Printer. — Under the acts abolishing the office of State printer and providing for letting of State printing by contract, the position of State printer was not a public office. Brown v. Turner, 70 N.C. 93 (1874).

University Trustees and Directors of State Institutions. — The trustees of The University of North Carolina and the directors of the penitentiary, of the lunatic asylum and of the institution for the deaf, dumb and blind were public officers. People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); People ex rel. Welker v. Bledsoe, 68 N.C. 457 (1873); People ex rel. Badger v. Johnson, 68 N.C. 471 (1873); People ex rel. Rogers v. McGowan, 68 N.C. 520 (1873).

The office of the superintendent of the State Prison, with its attendant duties, is a public office. State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899).

A constable is a public officer. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Chief Inspector of Shellfish Commission. — The office of chief inspector of the Shellfish Commission is a public office. White v. Hill, 125 N.C. 194, 34 S.E. 432 (1899).

A town clerk is a public officer. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Clerk of the Peace. — See Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Parish Clerk. — See Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Clerk of City Works. — It has even been held that a clerk of the city works is a public officer. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

The position of public administrator is a mere administrative agency, and not an office or place of trust, within former N.C. Const., Art. XIV, § 7 (now N.C. Const., Art. VI, § 9). State ex rel. Wooten v. Smith, 145 N.C. 476, 59 S.E. 649 (1907).

Sexton. — It has been held that a sexton is a public officer. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

The chief engineer of the Western North Carolina Railroad is not a public officer. Eliason v. Coleman, 86 N.C. 235 (1882).

OPINIONS OF ATTORNEY GENERAL

Tribal Chairman. — The position of Tribal Chairman is neither an elective nor an appointive office subject to the dual office holding prohibitions of the North Carolina Constitution and related statutes. See opinion of Attorney General to The Honorable Ronnie Sutton, N.C. House of Representatives, 2000 N.C. AG LEXIS 6 (11/17/2000).

§ 128-1.1. Dual-office holding allowed.

(a) Any person who holds an appointive office, place of trust or profit in State or local government is hereby authorized by the General Assembly, pursuant to Article VI, Sec. 9 of the North Carolina Constitution, to hold concurrently one other appointive office, place of trust or profit, or an elective office in either State or local government.

(b) Any person who holds an elective office in State or local government is hereby authorized by the General Assembly, pursuant to Article VI, Sec. 9 of the North Carolina Constitution to hold concurrently one other appointive office, place of trust or profit, in either State or local government.

(c) Any person who holds an office or position in the federal postal system or is commissioned as a special officer or deputy special officer of the United States Bureau of Indian Affairs is hereby authorized to hold concurrently therewith one position in State or local government.

(c1) Where authorized by federal law, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency. State and local law enforcement officers authorized under this provision are authorized to hold any office or position with the applicable federal agency required to perform the described functions.

(d) The term "elective office," as used herein, shall mean any office filled by election by the people when the election is conducted by a county or municipal board of elections under the supervision of the State Board of Elections. (1971, c. 697, s. 2; 1975, c. 174; 1987, c. 427, s. 10; 2006-259, s. 24(a).)

Editor's Note. — Session Laws 2006-259, s. 24(b), provides: "This section becomes effective January 1, 2006, and any actions taken between that date and the date this section becomes law that would have been proper if this section had been then in effect are in all respects validated and confirmed, and no office shall be considered to have been vacated."

Effect of Amendments. — Session Laws 2006-259, s. 24(a), effective January 1, 2006, added subsection (c1). See Editor's note.

CASE NOTES

Local Ordinance Conflicted with Section. — Local ordinance prohibiting concurrent service as an elected town official and as a member of the board of adjustment, an appointed position, conflicted with this section. Board of Adjustment v. Town of Swansboro, 108 N.C. App. 198, 423 S.E.2d 498 (1992), aff'd, 334 N.C. 421, 432 S.E.2d 310, reh'g denied, 335 N.C. 182, 436 S.E.2d 369 (1993).

Applied in Ratcliff v. County of Buncombe, 663 F. Supp. 1003 (W.D.N.C. 1987).

Cited in Ratcliff v. County of Buncombe, 759 F.2d 1183 (4th Cir. 1985).

OPINIONS OF ATTORNEY GENERAL

Federal Postal System Employee May Hold Appointive But Not Elective Office in State or Local Government. — See opinion of Attorney General to Mr. Leo Mercer, Postmaster, 41 N.C.A.G. 633 (1971).

Serving as President of the board of directors of a telephone membership corporation and on the Board of the Rural Electrification Authority is not prohibited dual-office holding. See opinion of Attorney General to Mr. Aaron A. Hathcock, Administrator, Rural Electrification Authority, 52 N.C.A.G. 107 (1983).

Person holding appointive office as police officer can hold position as elected officer in either State or local government, including as a school board member. See opinion of Attorney General to Captain Bobby Kilgore, Monroe Public Safety Department, 55 N.C.A.G. 34 (1985).

Tribal Chairman. — The position of Tribal Chairman is neither an elective nor an appointive office subject to the dual office holding prohibitions of the North Carolina Constitution and related statutes. See opinion of Attorney General to The Honorable Ronnie Sutton, N.C. House of Representatives, 2000 N.C. AG LEXIS 6 (11/17/2000).

Member of the Parks and Recreation Authority who holds an appointment as trustee of a community college may also hold an elective office in the local government of the town. See opinion of Attorney General to Mr. Daniel C. Oakley, General Counsel, Department of Environment and Natural Resources, 2003 N.C.A.G. 6 (8/19/03).

§ 128-1.2. Ex officio service by county and city representatives and officials.

Except when the resolution of appointment provides otherwise, whenever the governing body of a county or city appoints one of its own members or officials to another board or commission, the individual so appointed is considered to be serving on the other board or commission as a part of the individual's duties of office and shall not be considered to be serving in a separate office.

As used in this section, the term "official" means (i) in the case of a county, the county manager, acting county manager, interim county manager, county attorney, finance officer, or clerk to the board and (ii) in the case of a city, the city manager, acting city manager, interim city manager, city attorney, finance officer, city clerk, or deputy clerk. As used in this section, the term "city" has the meaning provided in G.S. 160A-1. (1983, c. 651, s. 1; 1991, c. 508, s. 5.)

OPINIONS OF ATTORNEY GENERAL

Tribal Chairman. — The position of Tribal Chairman is neither an elective nor an appointive office subject to the dual office holding prohibitions of the North Carolina Constitution and related statutes. See opinion of Attorney General to The Honorable Ronnie Sutton, N.C. House of Representatives, 2000 N.C. AG LEXIS 6 (11/17/2000).

§ 128-2. Holding office contrary to the Constitution; penalty.

If any person presumes to hold any office, or place of trust or profit, or is elected to a seat in either house of the General Assembly, contrary to Article VI, Sec. 9 of the North Carolina Constitution, he shall forfeit all rights and emoluments incident thereto. (1790, c. 319, P.R.; 1792, c. 366, P.R.; 1793, c. 393, P.R.; 1796, c. 450, P.R.; 1811, c. 811, P.R.; R.C., c. 77, s. 1; Code, s. 1870; Rev., s. 2365; C.S., s. 3201; Ex. Sess., 1924, c. 110; 1971, c. 697, s. 3.)

Cross References. — As to parties to suits for penalties, see G.S. 1-58.

§ 128-3. Bargains for office void.

All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void. (5 and 6 Edw. VI, c. 16, s. 3; R.C., c. 77, s. 2; Code, s. 1871; Rev., s. 2366; C.S., s. 3202.)

CASE NOTES

Theory of Appointments. — By the theory of our government, appointments to office are presumed to be made solely upon the principle detur digniori, and any practice whereby the bare consideration of money is brought to bear in any form upon such appointments to or resignation of office conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment and tempts to speculation, overcharges and frauds in the effort to restore the balance thus disturbed. Basket v. Moss, 115 N.C. 448, 20 S.E. 733 (1894).

The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. Basket v. Moss, 115 N.C. 448, 20 S.E. 733 (1894).

Agreements Void. — Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the public. Hence, such agreements, of whatever nature, have always been held void as being against public policy. Basket v. Moss, 115 N.C. 448, 20 S.E. 733 (1894).

Contracts to procure appointments to an office or to resign an office in another's favor are void at common law, as well as by statute. Basket v. Moss, 115 N.C. 448, 20 S.E. 733 (1894).

Same—Federal Offices. — Notwithstanding that the office is under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Basket v. Moss, 115 N.C. 448, 20 S.E. 733 (1894).

§ 128-4. Receiving compensation of subordinates for appointment or retention; removal.

Any official or employee of this State or any political subdivision thereof, in whose office or under whose supervision are employed one or more subordinate officials or employees who shall, directly or indirectly, receive or demand, for himself or another, any part of the compensation of any such subordinate, as the price of appointment or retention of such subordinate, shall be guilty of a Class 1 misdemeanor: Provided, that this section shall not apply in cases in which an official or employee is given an allowance for the conduct of his office from which he is to compensate himself and his subordinates in such manner as he sees fit. Any person convicted of violating this section, in addition to the criminal penalties, shall be subject to removal from office. The procedure for removal shall be the same as that provided for removal of certain local officials from office by G.S. 128-16 to 128-20, inclusive. (1937, c. 32, ss. 1, 2; 1993, c. 539, s. 942; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 128-5. Oath required before acting; penalty.

Every officer and other person required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the State, shall take all said oaths before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars ($500.00) to the use of the poor of the county in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose. (R.C., c. 77, s. 4; Code, s. 1873; Rev., s. 2367; C.S., s. 3203.)

CASE NOTES

The taking of the oath of office is not an indispensable criterion, for the office may exist without it. It is a mere incident, and constitutes no part of the office. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872); State ex rel. Bryan v. Patrick, 124 N.C. 651, 33 S.E. 151 (1899).

And Acts of Officer May Be Valid Though Oath Not Taken. — Failure to take an oath of office, while it might subject one exercising the duties of the office to a penalty under this section, would not deprive his acts of the validity given those of de facto officers performing the duties of a de jure office. Vance S. Harrington & Co. v. Renner, 236 N.C. 321, 72 S.E.2d 838 (1952).

§ 128-6. Persons admitted to office deemed to hold lawfully.

Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void. (Const., art. 4, s. 25; 1844, c. 38, s. 2; 1848, c. 64, s. 1; R.C., c. 77, s. 3; Code, s. 1872; Rev., s. 2368; C.S., s. 3204.)

CASE NOTES

I. General Consideration.
II. Proceedings to Try Title to Office.

I. GENERAL CONSIDERATION.

The General Assembly has conferred express approval on the judicial doctrine of de facto office by enacting this section. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

The acts of a de facto officer are valid as to the public and third persons. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

Acts of de facto officers, who exercise their office for a considerable length of time, are as effectual when they concern the rights of third persons or the public as if they were officers de jure. Hughes v. Long, 119 N.C. 52, 25 S.E. 743 (1896).

The acts of one purporting to be an officer are evidence of his authority; and such acts, as to third persons, are to be taken as valid while the incumbent is thus acting. Swindell v. Warden, 52 N.C. 575 (1860).

The official acts of persons entering into office under color of an irregular election are of full force until such officers are removed by a proper proceeding. Commissioners of Trenton v. McDaniel, 52 N.C. 107 (1859).

Usurping, De Facto and De Jure Officers Distinguished. — A usurper is one who takes possession without any authority. His acts are utterly void, unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defense in a direct proceeding against himself. A de facto officer is one who goes in under color of authority or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right, in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding. A de jure officer is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid, and he cannot be ousted. The only difference between an officer de facto and an officer de jure is that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other. People ex rel. Norfleet v. Staton, 73 N.C. 546 (1875).

A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when without color of authority he simply assumes to act, to exercise authority as an officer, and the public knows the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency. Burke v. Elliott, 26 N.C. 355 (1844); People ex rel. Norfleet v. Staton, 73 N.C. 546 (1875); State ex rel. Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202 (1891); Whitehead v. Pittman, 165 N.C. 89, 80 S.E. 976 (1914).

A usurper in office is distinguished from a de facto officer in that a usurper takes possession of office and undertakes to act officially without any authority, either actual or apparent. Since he is not an officer at all or for any purpose, his acts are absolutely void, and they can be impeached at any time in any proceeding. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

This section applies to a person who, having duly qualified, is performing the duties of the office under color of right, and not to a case where the appointee of the Governor, requiring the concurrence of the Senate in order to hold his office for the full unexpired term of his predecessor, is holding over after the Senate has met and concurred in the appointment of another. State ex rel. Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914).

Who Is Officer De Facto. — An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or revoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, such as taking an oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such. State v. Lewis, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247 (1890); State ex rel. Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1005 (1891). See State v. Speaks, 95 N.C. 689 (1886); Whitehead v. Pittman, 165 N.C. 89, 80 S.E. 976 (1914).

To constitute an officer de facto it is requisite that there be some colorable election or appointment to and induction into the office. Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1005, 23 Am. St. R. 51, 12 L.R.A. 202 (1891).

To constitute one an officer de facto there must be an actual exercise of the office and acquiescence of the public authorities long enough to cause, in the mind of the citizen, a strong presumption that the officer was duly appointed. Hughes v. Long, 119 N.C. 52, 25 S.E. 743 (1896).

The indispensable basis of being a de facto officer is that there is such an office. State v. Shuford, 128 N.C. 588, 38 S.E. 808 (1901).

Persons who have been regarded as public officers for the greater part of the time during which the office existed, and whose acts are recognized by other public functionaries, must be taken to be officers de facto. Burton ex rel. Reeves v. Patton, 47 N.C. 124, 62 Am. Dec. 194 (1854).

A judge de facto is defined as one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact. In order for one to be deemed a judge de facto, he must have satisfied the following four conditions: (1) He assumes to be the judge of a court which is established by law; (2) he is in possession of the judicial office in question, and is discharging its duties; (3) his incumbency of the judicial office is illegal in some respects; and (4) he has at least a fair color of right or title to the judicial office, or has acted as its occupant for so long a time and under such circumstances of reputation or acquiescence by the public generally as are calculated to afford a presumption of his right to act and to induce people, without inquiry, to submit to or invoke official action on his part on the supposition that he is the judge he assumes to be. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

So far as the public and third persons are concerned, a judge de facto is competent to do whatever may be done by a judge de jure. In consequence, acts done by a judge de facto in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge de jure. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

A Judge De Jure. — A judge de jure exercises the office of judge as a matter of right. In order to become a judge de jure one must satisfy three requirements: (1) He must possess the legal qualifications for the judicial office in question; (2) he must be lawfully chosen to such office; and (3) he must have qualified himself to perform the duties of such office according to the mode prescribed by law. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

Elected and Qualifying City Councilman Is De Facto Officer Until Removed. — Upon his election, and after having been sworn in as a member of a city council, a person is a de facto councilman until he is removed from such office in a quo warranto proceeding or otherwise removed therefrom as provided by law. Armstrong v. McInnis, 264 N.C. 616, 142 S.E.2d 670 (1965).

Tabulation of Election Result by Clerk Is Prima Facie Correct. — A tabulation of the result of an election by the clerk, in the manner required by law, is prima facie correct, and can only be questioned in a quo warranto proceeding. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Cited in In re Wingler, 231 N.C. 560, 58 S.E.2d 372 (1950).

II. PROCEEDINGS TO TRY TITLE TO OFFICE.

Injunction is not the proper method of trying title to an office, and it will not lie at the suit of the incumbent of a public office to restrain a claimant of the office from claiming and exercising its powers and duties. Patterson v. Hubbs, 65 N.C. 119 (1871); Jones v. Commissioners of Granville, 77 N.C. 280 (1877).

The erroneous action of the county commissioners in declaring an office vacant because of an apparent tie vote, and ordering a new election, does not warrant the granting of an injunction to one of the candidates, since the title to the office can be inquired into by quo warranto even after such a new election. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Injunction does not lie to restrain county commissioners from declaring a public office vacant because of an apparent tie vote where it is an attempt, in effect, to try the title to the office by injunction, which is not permissible. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Proceeding Is in Nature of Quo Warranto. — Title to a public office cannot be tried by motion, but must be determined by a proceeding in the nature of quo warranto. Sneed v. Bullock, 77 N.C. 282 (1877).

Who May Bring Action. — An action to try the right of an incumbent to any public office may be brought by the Attorney General upon his own information, or upon the complaint of any private party. People ex rel. Cloud v. Wilson, 72 N.C. 155 (1875); People ex rel. Hargrove v. Hilliard, 72 N.C. 169 (1875).

Any person having a right to an office can, in his own name, bring an action for the purpose of testing his right as against one claiming adversely. Brown v. Turner, 70 N.C. 93 (1874).

Maxim "De Minimis" Not Applicable. — Notwithstanding the maxim "De minimis non curat lex," a suit will be entertained to determine rights to an office paying only eight dollars a month in addition to board. State ex rel. Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899).

No demand is necessary before suing to try the right to an office. State ex rel. Shennonhouse v. Withers, 121 N.C. 376, 28 S.E. 522 (1897).

Allegation of Citizenship in Complaint. — Where persons who have been elected and qualified as county commissioners bring an action against persons appointed by the judge of the district, under the provisions of Chapter 135, Laws 1895, to try the defendants' title to office, the complaint must allege that the plaintiffs are citizens and taxpayers of the county. State ex rel. Houghtalling v. Taylor, 122 N.C. 141, 122 N.C. 171, 29 S.E. 101, 29 S.E. 101 (1898).

A relator in quo warranto proceedings to try title to office accepts the position that he has been displaced in the office, by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under this section he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc. State ex rel. Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914).

Estoppel to Deny Acceptance of Office and Vacating of Prior Office. — A person who held himself out and who acted as an officer and who signed his name as such, and who in writing resigned the office, is estopped from denying that he accepted the office, and thus vacated a prior office filled by him. State ex rel. Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912).

A person who held himself out and who acted as an officer was estopped to deny his qualification when the acceptance of such office was relied on to vacate a prior office filled by him, despite the fact that he was not sworn on the Bible when he qualified for the second office. State ex rel. Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912). See State v. Cansler, 75 N.C. 442 (1876); State v. Long, 76 N.C. 254 (1877).

Conduct Amounting to Surrender of Office. — Where a person had been elected clerk of the superior court, and at the proper time had tendered his bonds, which had been accepted by the court, and he was inducted into office, while the former clerk was present in court, cognizant of what was going on, and did not object thereto, but surrendered up the office and records to the new clerk and retired from the performance of the duties of the office for 12 months thereafter, it was held, in an action in the nature of quo warranto, that such conduct in the old clerk amounted to a surrender of his office to the court, and justified the reception and induction into office of the newly elected clerk. Williams v. Sommers, 18 N.C. 61 (1834).

§ 128-7. Officer to hold until successor qualified.

All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified. (1848, c. 64, s. 2; R.C., c. 77, s. 3; Code, s. 1872; Rev., s. 2368; C.S., s. 3205.)

Editor's Note. — Session Laws 2005-425, s. 4, provides, in part: "Judges elected in 2006 and thereafter take office accordingly, and as provided by Section 10 of Article VI of the North Carolina Constitution and G.S. 128-7, those in office on the first Monday in December of 2006 or 2008 shall continue until their successors' terms begin and are duly qualified."

CASE NOTES

Holding Over After Expiration of Term. — An officer elected by the people, holding over after his regular term on failure of his successor to qualify, holds over until the place is filled at the next general election, under former N.C. Const., Art. 3, §§ 1 and 13 (now N.C. Const., Art. III, § 7 and Art. VI, § 10). People ex rel. Battle v. McIver, 68 N.C. 467 (1873).

Where an officer has been inducted into his office before the beginning of the term for which he was reelected, one who is appointed to fill the vacancy caused by his death before that term begins, holds only until the expiration of the first term. People ex rel. Worley v. Smith, 81 N.C. 304 (1879).

Term of Appointee of Judge. — In case of a vacancy in the office of the clerk of the superior court, the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N.C. 617, 50 S.E. 319 (1905).

Status of Officer Holding Over — De Jure. — Whether regarded as a part of an original term or a new and conditional one by virtue of the statute, the holders are regarded as officers de jure until their successors have been lawfully elected or appointed and have properly qualified. State ex rel. Markham v. Simpson, 175 N.C. 135, 95 S.E. 106 (1918).

Same — De Facto. — Where a clerk of the superior court held over in office until his successor qualified, he was at least clerk de facto; his acts cannot be collaterally impeached, and are valid as to third parties. Threadgill v. Carolina Cent. Ry., 73 N.C. 178 (1875).

The mayor of a municipality was constituted a special court for the municipality by valid act (Chapter 144, Private Laws of 1913). A duly elected and qualified mayor assumed the duties as judge of the special court under claim of authority. By Chapter 1142, Session Laws of 1949, it was provided that said judge should be appointed by the commissioners of the town, and that he should hold no other office. The town commissioners failed to appoint a judge under the provisions of this act. It was held that a sentence imposed by the mayor acting as judge of the special court cannot be collaterally attacked in habeas corpus since he was at least a judge de facto if not de jure. In re Wingler, 231 N.C. 560, 58 S.E.2d 372 (1950).

When Legislature Presumed to Acquiesce in Continuation in Office. — The General Assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison County, who were appointed for a four- or six-year term by Chapter 341, Public-Local Laws of 1931, the General Assembly having power to terminate their continuance in office, and the General Assembly having power to terminate, change or continue the appointments, it will not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of former N.C. Const., Art. I (now N.C. Const., Art. VI), and said commissioners continue to hold office with power to discharge the duties thereof. Freeman v. Board of County Comm'rs, 217 N.C. 209, 7 S.E.2d 354 (1940).

Vacancy Created by Resignation. — Where a district court judge resigned upon the discovery of his legal infirmity under G.S. 7A-4.20, his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under this section was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under N.C. Const., Art. IV, § 19. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

Cited in State ex rel. Hedgpeth v. Allen, 220 N.C. 528, 17 S.E.2d 781 (1941); State ex rel. Hill v. Ponder, 221 N.C. 58, 19 S.E.2d 5 (1942).

OPINIONS OF ATTORNEY GENERAL

Members of the Environmental Management Commission continue to hold their positions until other appointments are made. See opinion of Attorney General to Mr. William Holman, Secretary, North Carolina Department of Environment and Natural Resources, 2000 N.C. AG LEXIS 5 (5/9/2000).

§ 128-7.1. Failure to qualify creates vacancy.

If any person who has been elected to public office (i) dies or becomes disqualified for the office before qualifying for the office, or (ii) for any reason refuses to qualify for the office, the office shall be declared vacant. Unless otherwise provided by law, such vacancy shall be filled by appointment by the authority having the power to fill vacancies as prescribed by law. (1971, c. 183.)

§ 128-7.2. Qualifications for appointment to fill vacancy in elective office.

No person is eligible for appointment to fill a vacancy in any elective office, whether State or local, unless that person would have been qualified to vote as an elector for that office if an election were to be held on the date of appointment. This section is intended to implement the provisions of Section 8 of Article VI of the Constitution. (2007-391, s. 27(a).)

Cross References. — As to disqualifications for public office, generally, see N.C. Const., Art. VI, § 8.

Editor's Note. — Session Laws 2007-391, s. 27.(c), made this section effective August 19, 2007, and applicable only to appointments made on or after that date.

§ 128-8: Repealed by Session Laws 1981, c. 884, s. 13.

§ 128-9: Repealed by Session Laws 1979, c. 650.

§ 128-10. Citizen to recover funds of county or town retained by delinquent official.

When an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof, to which the county, city or town is entitled, any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from the delinquent official the fund so retained. Any county commissioners, aldermen, councilmen or governing board who fraudulently, wrongfully and unlawfully permit an official so to retain funds shall be personally liable therefor; any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from such county commissioners, aldermen, councilmen, or governing board, the fund so retained. Before instituting suit under this section, the citizen and taxpayer shall file a statement before the county commissioners, treasurer, or other officers authorized by law to institute the suit, setting forth the fund alleged to be retained or permitted to be retained, and demanding that suit be instituted by the authorities authorized to sue within 60 days. The citizen and taxpayer so suing shall receive one-third part, up to the sum of five hundred dollars ($500.00), of the amount recovered, to indemnify him for his services, but the amount received by the taxpayer and citizen as indemnity shall in no case exceed five hundred dollars ($500.00). (1913, c. 80; C.S., s. 3206.)

Legal Periodicals. — For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

CASE NOTES

Citizens and taxpayers of a county may maintain an action against the commissioners of the county and its defaulting sheriff to enforce collection of the amount of the default upon allegations that the county commissioners have corruptly refused to perform their duties in this respect. Weaver v. Hampton, 201 N.C. 798, 161 S.E. 480 (1931).

This section applies to money collected before its passage, and a citizen and taxpayer, on sufficient and proper averment of default on the part of the county officials, has a right to maintain an action of this character without resort to the provisions of the statute. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

An action by citizens and taxpayers to recover monetary damages from a State officer for misuse of State property while in office is not recognized and may not be maintained. Flaherty v. Hunt, 82 N.C. App. 112, 345 S.E.2d 426, cert. denied, 318 N.C. 505, 349 S.E.2d 859 (1986).

Judge Held Without Authority to Indemnify Plaintiffs. — In an action by taxpayers under this section to recover of county commissioners on account of public funds unlawfully expended, etc., plaintiffs disclaiming any right personally to participate in the recovery, it was held that after a recovery by plaintiffs and the entry of a consent judgment dismissing the appeals, wherein no mention was made of indemnifying plaintiffs for their services, the resident judge was without authority to entertain a petition of one of the original taxpayer plaintiffs for such reimbursement. Hill v. Stansbury, 224 N.C. 356, 30 S.E.2d 150 (1944).

Authority of Commissioners to Allow County Treasurer Additional Salary. — In a civil action by taxpayers against county commissioners and against the treasurer of the county to recover moneys paid to such treasurer in excess of his annual salary as fixed by law, where the evidence tended to show that the county treasurer's salary was fixed at $1,800 a year in 1927, and that in 1931, agreeable to the Machinery Act of that year, the commissioners designated the county treasurer to receive tax prepayments and for this extra service allowed him $1,200 per year additional, and again in 1939 allowed him $240 more per year, both without legislative authority, judgment of nonsuit as to the commissioners was properly allowed under the express provisions of this section, there being no evidence of bad faith, etc., while such judgment as to the county treasurer was reversed. Hill v. Stansbury, 223 N.C. 193, 25 S.E.2d 604 (1943).

Statutory Factors Not Present. — This section does not create an initial cause of action against commissioners, but rather establishes a derivative remedy, requiring both retained funds by a bonded officer and refusal to act by commissioners. The allegations and the pleadings indicate that neither of these factors were present in action wherein county commissioners expended county funds to produce and distribute information concerning referenda regarding redistricting and merger or nonmerger of county public schools. Bardolph v. Arnold, 112 N.C. App. 190, 435 S.E.2d 109 (1993), cert. denied, 335 N.C. 552, 439 S.E.2d 141 (1993).

When taxpayers sued county commissioners for entering into a contract which benefitted one of the commissioners, they did not have a claim under G.S. 128-10 because they did not show a public official who was liable on his bond or commissioners who refused to take action against such official, and the existence of insurance coverage issued by the North Carolina Counties Liability and Property Insurance Pool Fund did not provide a bond, as insurance and suretyship were not synonymous terms. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

§ 128-11. Trust funds to be kept separate.

Any sheriff, treasurer or other officer of any county, city, town or other political subdivision of the State, receiving, by virtue of his office, public money or money to be held by him in trust shall keep or deposit such money or the credits or other evidence thereof separate and apart from his own funds and shall not, at any time, apply such money to his own use or benefit or intermingle the same in any manner with credits or funds of his own. (1931, c. 77, s. 1.)

CASE NOTES

Cited in Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938).

§ 128-12. Violations to be reported; misdemeanors.

It shall be the duty of the director of the Local Government Commission to report to the district attorney of the district any violation of G.S. 128-11 of which he may have knowledge, and any violation of such section shall be unlawful and shall constitute a Class 1 misdemeanor. (1931, c. 60, s. 3; 1931, c. 77, s. 2; 1973, c. 47, s. 2; 1993, c. 539, s. 943; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938).

§ 128-13. Officers compensated from fees in certain counties to render statement; penalty; proceeds to school fund.

Every clerk of the superior court, register of deeds, sheriff, coroner, surveyor, or other county officer, whose compensation or services performed shall be derived from fees, shall render to the board of county commissioners of their respective counties, on the first Monday in December of each year, a statement, verified under oath, showing: first, the total gross amount of all fees collected during the preceding fiscal year; second, the total amount paid out during the preceding fiscal year for clerical or office assistance. Any county officer, subject to this section, who refuses or fails to file such report as above provided, on or before the first Monday in December, shall be subject to a fine of twenty-five dollars ($25.00) and ten dollars ($10.00) additional for each day or fraction of a day such failure shall continue. The board of county commissioners shall assess and collect the penalty above provided for, and supply same to the general school fund of the county. The first report under this section shall be for the fiscal year beginning December 12, 1913.

This section applies only to the Counties of Anson, Bertie, Bladen, Cabarrus, Carteret, Chowan, Currituck, Duplin, Halifax, Harnett, Haywood, Hertford, Johnston, Jones, Moore, Pender, Perquimans, Pitt, Randolph, Richmond, Rowan, Scotland, Union, Vance, Warren, Washington, Wayne, Wilson. (1913, c. 97; Ex. Sess., 1913, c. 10; 1935, c. 390.)

CASE NOTES

Power of Legislature to Regulate Pay. — One who accepts a public office does so, with well defined exceptions as to certain constitutional officers, under the authority of the legislature to change the emoluments he is to receive for the performance of his duties, at any time, and while the office of sheriff is a constitutional one, the regulation of his fees is within the control of the legislature, and the same may be reduced during the term of the incumbent or he may therein be compensated by a salary instead of on a fee basis. Mills v. Deaton, 170 N.C. 386, 87 S.E. 123 (1915).

Construction of Act Changing Pay from Salary to Fee Basis. — An act changing the pay of county officials from a salary to a fee basis, taking prospective effect from the expiration of the terms of the present incumbents, will be presumed to have a sensible and just intent, with knowledge of existing conditions and will not be construed as to apply to deprive the incumbent sheriff of the emoluments of his term by requiring that he deliver the tax lists to his successor. Commissioners of Orange County v. Bain, 173 N.C. 377, 92 S.E. 176 (1917).

§ 128-14. Identification cards for field agents or deputies of State departments.

Every field agent or deputy of the various State departments who is authorized to collect money, audit books, inspect premises of individual or business firms and/or any other field work pertaining to the department which he represents, shall be furnished with an identification card signed by the head of the department represented by him, certifying that the said field agent or deputy has authority to represent the department, and such identification card shall carry a photographic likeness of said representative. (1937, c. 236.)

§ 128-15. Employment preference for veterans and their spouses or surviving spouses.

(a) It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment with every State department, agency, and institution.

(b) As used in this section:

(1) "A period of war" includes World War I (April 16, 1917, through November 11, 1918), World War II (December 7, 1941, through December 31, 1946), the Korean Conflict (June 27, 1950, through January 31, 1955), the period of time between January 31, 1955, and the end of the hostilities in Vietnam (May 7, 1975), or any other campaign, expedition, or engagement for which a campaign badge or medal is authorized by the United States Department of Defense.

(2) "Veteran" means a person who served in the Armed Forces of the United States on active duty, for reasons other than training, and has been discharged under other than dishonorable conditions.

(3) "Eligible veteran" means:
   a. A veteran who served during a period of war; or
   b. The spouse of a disabled veteran; or
   c. The surviving spouse or dependent of a veteran who dies on active duty during a period of war either directly or indirectly as the result of such service; or
   d. A veteran who suffered a disabling injury for service-related reasons during peacetime; or
   e. The spouse of a veteran described in subdivision d. of this subsection; or
   f. The surviving spouse or dependent of a person who served in the Armed Forces of the United States on active duty, for reasons other than training, who dies for service-related reasons during peacetime.

(c) Hereafter, in all evaluations of applicants for positions with this State or any of its departments, institutions or agencies, a preference shall be awarded to all eligible veterans who are citizens of the State and who served the State or the United States honorably in either the army, navy, marine corps, nurses' corps, air corps, air force, coast guard, or any of the armed services during a period of war. This preference applies to initial employment with the State and extends to other employment events including subsequent hirings, promotions, reassignments, and horizontal transfers.

(d) The provisions of this section shall be subject to the provisions of Article 1 of Chapter 165 of the General Statutes, and Parts 13 and 19 of Article 9 of Chapter 143B of the General Statutes. (1939, c. 8; 1953, c. 1332; 1967, c. 536; 1987 (Reg. Sess., 1988), c. 1064, s. 2; 2007-286, s. 1.)

Editor's Note. — Session Laws 2007-286, s. 3, provides: "The State Personnel Commission and State agencies, departments, and institutions shall adopt rules to implement this act."

Effect of Amendments. — Session Laws 2007-286, s. 1, effective July 27, 2007, added the last sentence in subsection (c).

CASE NOTES

Construction with Other Sections. — Pursuant to G.S. 126-83, employees of the System designated in G.S. 126-5(a)(2) are expressly excluded from the preference afforded by G.S. 126-80 but, if qualified under this section, are entitled to the veterans preference thereunder applicable to all employees of State departments, agencies and institutions. Wright v. Blue Ridge Area Auth., 134 N.C. App. 668, 518 S.E.2d 772, 1999 N.C. App. LEXIS 899 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999).

Minimum Requirements for Position Must Be Met. — Although this section awards a preference rating of 10 points to veterans who apply for employment with the state or any of its departments, it does not state that the minimum requirements specified for a position may be ignored. Davis v. Vance County Dep't of Social Servs., 91 N.C. App. 428, 372 S.E.2d 88 (1988).

Refusal to Allow Education Equivalencies to Fulfill Requirements Not Error. — The State Personnel Commission's refusal to allow education equivalencies to fulfill the minimum education requirement of graduation from a four-year college for a position opening in the Department of Social Services, was not arbitrary and capricious where petitioning employee's history, including 20 years of clerical/administrative experience and service during the Vietnam conflict, although noteworthy and commendable, failed to meet the requirements under the department's prescribed and published basis. Davis v. Vance County Dep't of Social Servs., 91 N.C. App. 428, 372 S.E.2d 88 (1988).

§ 128-15.1: Repealed by Session Laws 1987 (Regular Session, 1988), c. 1064, s. 4.

§ 128-15.2. Appointment of acting heads of certain agencies.

In every case where a State board or commission is authorized by statute to appoint the executive head of a State agency or institution, that board or commission may appoint an acting executive head of that agency or institution to serve

(1) During the physical or mental incapacity of the regular holder of the office to discharge the duties of his office,
(2) During the continued absence of the regular holder of the office, or
(3) During a vacancy in the office and pending the selection and qualification of a person to serve for the unexpired term.

An acting executive head of a State agency or institution appointed in accordance with this section may perform any act and exercise any power which a regularly selected holder of such office could lawfully perform and exercise. All powers granted to an acting executive head of a State agency or institution under this section shall expire immediately

(1) Upon the termination of the incapacity of the officer in whose stead he acts,
(2) Upon the return of the officer in whose stead he acts, or
(3) Upon the selection and qualification of a person to serve for the unexpired term.

Each State board or commission may determine (after such inquiry as it deems appropriate) that the executive head of a State agency or institution whom it is authorized by statute to appoint is physically or mentally incapable of performing the duties of his office. Each such board or commission may also determine that such incapacity has terminated. (1959, c. 284, s. 1.)

§ 128-15.3. Discrimination against handicapped prohibited in hiring; recruitment, etc., of handicapped persons.

There shall be no discrimination in the hiring policies of the State Personnel System against any applicant for employment based upon any physical defect or impairment of the applicant unless the defect or impairment to some degree prevents the applicant from performing the duties required by the employment sought.

It shall be the policy of this State to give positive emphasis to the recruitment, evaluation, and employment of physically handicapped persons in State government. To carry out the provisions of this section, the Office of State Personnel shall develop methods and programs to assist and encourage the departments, institutions, and agencies of State government in carrying out this policy and to provide for appropriate study and review of the employment of handicapped persons. (1971, c. 748; 1973, c. 1299.)

Article 2.

Removal of Unfit Officers.

§ 128-16. Officers subject to removal; for what offenses.

Any sheriff or police officer shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes:

(1) For willful or habitual neglect or refusal to perform the duties of his office.
(2) For willful misconduct or maladministration in office.
(3) For corruption.
(4) For extortion.
(5) Upon conviction of a felony.
(6) For intoxication, or upon conviction of being intoxicated. (P.L. 1913, c. 761, s. 20; 1919, c. 288; C.S., s. 3208; 1959, c. 1286; 1961, c. 991; 1973, c. 108, s. 82.)

Local Modification. — Onslow: 1965, c. 753.

Cross References. — As to appropriate manner of action by which to try the title to an office, see G.S. 1-515. As to removal for receiving compensation of subordinates, see G.S. 128-4.

CASE NOTES

Purpose of Statute. — Officer may be removed for misconduct or failure to perform the duties of his office, whether such failures were willful or habitually negligent; the statute was evidently enacted for the protection of the public, and not for the punishment of the delinquent officer. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920); State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

This section does not purport to create a criminal offense, nor does any provision of this Article provide for prosecution by indictment or otherwise for any criminal offense. State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

And a proceeding under this section is not a criminal prosecution for punishment but is a civil proceeding. State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

Actions under this Article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

A proceeding under this Article is neither a civil nor criminal action. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

The North Carolina Rules of Civil Procedure, G.S. 1A-1, do not apply to actions brought pursuant to this Article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Attorney General Is Not Authorized to Bring An Action Under This Article. — Neither G.S. 114-2(1), 114-11.6 nor 128-17 gives the Attorney General or his designee the authority to file an action pursuant to this Article. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

But Is Limited to Advising District Attorney. — Neither the Attorney General nor his designee is given specific authority to file an action under this Article in place of the district authority or the county attorney. Absent this statutory authorization, the Attorney General is limited to consulting with and advising the district attorney in carrying out his statutory duty to initiate a petition for removal from office of a sheriff or police officer. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986), expressing no opinion on whether the Attorney General could have brought a similar action under his common law powers.

Failure to Take Oath Does Not Exempt from Liability. — There can be no doubt that if one elected to an office takes possession of it, engages in the exercise of its duties, and misbehaves by taking unlawful and extortionate fees, that he will be liable for such misbehavior, notwithstanding the fact that he failed to take the oath of office. State v. Cansler, 75 N.C. 442 (1876).

Sufficiency of Evidence. — Under this section as it stood before the 1973 amendment, it was held that the evidence in proceedings to remove a prosecuting attorney from office under this section was sufficient to sustain an order removing him when he admitted that he attempted to induce, and did induce, a person to violate the statutes of the State in participating in acts made an offense for immorality, etc., whatever his intent may have been therein. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920), wherein it was also held that defendant could not complain because he was removed not in accordance with the specifications alleged in the petition, but upon his own evidence.

Hearing Required. — Because of the severe adverse consequences possible for the office holder in an action under this Article, fundamental fairness entitles such office holder to a hearing which meets the basic requirements of due process, requirements which must include adequate time and opportunity to prepare to respond to the accusations against him. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Jury Not Required. — The proceedings under this section do not require an issue to be submitted to the jury. A public office is not a property right under former N.C. Const., Art. I, § 19 (now N.C. Const., Art. I, § 25). State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920).

Time of Trial. — Although this Article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Appeal from Superior Court. — An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inferences, if justified by the findings of facts supported by evidence, N.C. Const., Art. VI, § 8; and the appeal is allowed by G.S. 1-277. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920), decided under this section as it stood before the 1973 amendment.

Enjoining Vacating of Office by Commissioners Before They Have Qualified. — An action to enjoin newly elected county commissioners, who had not yet qualified, from declaring a public office vacant, and electing a successor, is properly dismissed as premature. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Former G.S. 7-115 and this Article were not in pari materia. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Cited in State ex rel. Swain v. Creasman, 255 N.C. 546, 122 S.E.2d 358 (1961); Jones v. Buchanan, 164 F. Supp. 2d 734, 2001 U.S. Dist. LEXIS 14951 (W.D.N.C. 2001); Harmon v. Buchanan, 164 F. Supp. 2d 649, 2001 U.S. Dist. LEXIS 14956 (W.D.N.C. 2001).

§ 128-17. Petition for removal; county attorney to prosecute.

The complaint or petition shall be entitled in the name of the State of North Carolina, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding. (P.L. 1913, c. 761, s. 21; 1919, c. 288; C.S., s. 3209; 1973, c. 47, s. 2.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2281 (1997).

CASE NOTES

Actions under this Article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

The North Carolina Rules of Civil Procedure, G.S. 1A-1, do not apply to actions brought pursuant to this Article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Who May File Petition for Removal. — The clear language of this section specifies that only three classes of persons may file a petition for removal: (1) Five qualified electors, upon the approval of the county attorney or district attorney; (2) the county attorney; or (3) the district attorney. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

Attorney General Is Not Authorized to Bring An Action Under This Article. — This section does not give the Attorney General or his designee the authority to file an action pursuant to this Article. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986), expressing no opinion on whether the Attorney General could have brought a similar action under his common law powers.

Neither G.S. 114-2(1) nor G.S. 114-11.6 authorizes the Attorney General or his designee to bring a proceeding under this Article for removal of a sheriff or police officer. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

Nor May He Be Delegated Such Authority. — There is no provision in this Article authorizing the district attorney or the county attorney to delegate to the Attorney General his duty to file the petition. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

Time of Trial. — Although this Article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Cited in State ex rel. Swain v. Creasman, 255 N.C. 546, 122 S.E.2d 358 (1961); State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963); Jones v. Buchanan, 164 F. Supp. 2d 734, 2001 U.S. Dist. LEXIS 14951 (W.D.N.C. 2001); Harmon v. Buchanan, 164 F. Supp. 2d 649, 2001 U.S. Dist. LEXIS 14956 (W.D.N.C. 2001).

§ 128-18. Petition filed with clerk; what it shall contain; answer.

The accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer. The petition shall state the charges against the accused, and may be amended, and shall be filed in the office of the clerk of the superior court of the county in which the person charged is an officer. The accused may at any time prior to the time fixed for hearing file in the office of the clerk of the superior court his answer, which shall be verified. (P.L. 1913, c. 761, s. 22; 1919, c. 288; C.S., s. 3210.)

CASE NOTES

Actions under this Article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

The North Carolina Rules of Civil Procedure, G.S. 1A-1, do not apply to actions brought pursuant to this Article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Time of Trial. — Although this Article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Cited in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 128-19. Suspension pending hearing; how vacancy filled.

Upon the filing of the petition in the office of the clerk of the superior court, and the presentation of the same to the judge, the judge may suspend the accused from office if in his judgment sufficient cause appear from the petition and affidavit, or affidavits, which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the temporary vacancy shall be filled in the manner provided by law for filling of the vacancies in such office. (P.L. 1913, c. 761, s. 23; 1919, c. 288; C.S., s. 3211.)

CASE NOTES

Actions under this Article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

The North Carolina Rules of Civil Procedure, G.S. 1A-1, do not apply to actions brought pursuant to this Article. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Hearing Required. — Because of the severe adverse consequences possible for the office holder in an action under this Article, fundamental fairness entitles such office holder to a hearing which meets the basic requirements of due process, requirements which must include adequate time and opportunity to prepare to respond to the accusations against him. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Time of Trial. — Although this Article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

§ 128-20. Precedence on calendar; costs.

In the trial of the cause in the superior court the cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next session after the petition is filed, provided the proceedings are filed in said court in time for said action to be heard. The superior court shall fix the time of hearing. If the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee, to be fixed by the judge, he has incurred in making his defense, by the county, if he be a county officer, or by the city or town in which he holds office, if he be a city officer. If the action is instituted upon the complaint of citizens as herein provided, and it appears to the court that there was no reasonable cause for filing the complaint, the costs may be taxed against the complaining parties. (P.L. 1913, c. 761, s. 24; 1919, c. 288; C.S., s. 3212; 1973, c. 108, s. 83.)

CASE NOTES

The purpose of this section is to ensure that charges of misconduct will be resolved as quickly as possible, minimizing the risk of loss of public confidence in law enforcement. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Actions under this Article are neither civil nor criminal, but are merely an inquiry into the conduct of the office holder to determine whether he is unfit to continue in office. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

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Time of Trial. — Although this Article requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Applied in State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Article 3.

Retirement System for Counties, Cities and Towns.

§ 128-21. Definitions.

The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Accumulated contribution" shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the annuity savings fund, together with regular interest thereon, as provided in G.S. 128-30, subsection (b).

(2) "Actuarial equivalent" shall mean a benefit of equal value when computed at regular interest upon the basis of such mortality tables as shall be adopted by the Board of Trustees.

(3) "Annuity" shall mean payments for life derived from the accumulated contribution of a member. All annuities shall be payable in equal monthly installments.

(4) "Annuity reserve" shall mean the present value of all payments to be made on account of any annuity or benefit in lieu of any annuity

computed at regular interest upon the basis of such mortality tables as shall be adopted by the Board of Trustees.

(5) "Average final compensation" shall mean the average annual compensation, not including any terminal payments for unused sick leave, of a member during the four consecutive calendar years of creditable service producing the highest such average; but shall not include any compensation, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages.

(6) "Beneficiary" shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Article.

(7) "Board of Trustees" shall mean the Board provided for in G.S. 128-28 to administer the Retirement System.

(7a) a. "Compensation" shall mean all salaries and wages prior to any reduction pursuant to sections 125, 401(k), 403(b), 414(h)(2), and 457 of the Internal Revenue Code, not including any terminal payments for unused sick leave, derived from public funds which are earned by a member of the Retirement System for service as an employee in the unit of the Retirement System for which he is performing full-time work. In addition to the foregoing, "compensation" shall include:

1. Performance-based compensation (regardless of whether paid in a lump sum, periodic installments, or on a monthly basis);
2. Conversion of additional benefits to salary (additional benefits such as health, life, or disability plans), so long as the benefits are other than mandated by State law or regulation;
3. Payment of tax consequences for benefits provided by the employer so long as they constitute an adjustment or increase in salary and not a "reimbursement of expenses";
4. Payout of vacation leave so long as such payouts are permitted by applicable law and regulation; and
5. Employee contributions to eligible deferred compensation plans.

b. "Compensation" shall not include any payment, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages. Notwithstanding any other provision of this Chapter, "compensation" shall not include:

1. Supplement/allowance provided to employee to purchase additional benefits such as health, life, or disability plans;
2. Travel supplement/allowance (nonaccountable allowance plans);
3. Employer contributions to eligible deferred compensation plans;
4. Employer-provided fringe benefits (additional benefits such as health, life, or disability plans);
5. Reimbursement of uninsured medical expenses;
6. Reimbursement of business expenses;
7. Reimbursement of moving expenses;
8. Reimbursement/payment of personal expenses;
9. Incentive payments for early retirement;
10. Bonuses paid incident to retirement;
11. Contract buyout/severance payments; and
12. Payouts for unused sick leave.

c. In the event an employer reports as "compensation" payments not specifically included or excluded as "compensation", such payments shall be "compensation" for retirement purposes only if the employer pays the Retirement System the additional actuarial liability created by such payments.

(8) "Creditable service" shall mean the total of "prior service" plus "membership service" plus service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 128-26. In no event, however, shall "creditable service" be deemed "membership service" for the purpose of determining eligibility for benefits accruing under this Chapter.

(9) "Earnable compensation" shall mean the full rate of the compensation that would be payable to an employee if he worked the full normal working time, including any allowance of maintenance or in lieu thereof received by the member.

(10) "Employee" shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section, whether employed or appointed for stated terms or otherwise, except teachers in the public schools and except such employees who hold office by popular election as are not required to devote a major portion of their time to the duties of their office. "Employee" also means all full-time, paid firemen who are employed by any fire department that serves a city or county or any part of a city or county and that is supported in whole or in part by municipal or county funds. In all cases of doubt the Board of Trustees shall decide who is an employee. On and after August 1, 2001, a person who is a nonimmigrant alien and who otherwise meets the requirements of this subdivision shall not be excluded from the definition of "employee" solely because the person holds a temporary or time-limited visa.

(11) "Employer" shall mean any county, incorporated city or town, the board of alcoholic control of any county or incorporated city or town, the North Carolina League of Municipalities, and the State Association of County Commissioners. "Employer" shall also mean any separate, juristic political subdivision of the State as may be approved by the Board of Trustees upon the advice of the Attorney General. "Employer" also means any fire department that serves a city or county or any part of a city or county and that is supported in whole or in part by municipal or county funds.

(11a) "Filing" when used in reference to an application for retirement shall mean the receipt of an acceptable application on a form provided by the Retirement System.

(11b) "Law Enforcement Officer" means a full-time paid employee of an employer, who possesses the power of arrest, who has taken the law enforcement oath administered under the authority of the State as prescribed by G.S. 11-11, and who is certified as a law enforcement officer under the provisions of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes. "Law enforcement officer" also means the sheriff of the county. The number of paid personnel employed as law enforcement officers by a law enforcement agency may not exceed the number of law enforcement positions approved by the applicable local governing board.

(12) "Medical board" shall mean the board of physicians provided for in G.S. 128-28, subsection (*l*).

(13) "Member" shall mean any person included in the membership of the Retirement System as provided in G.S. 128-24.

(14) "Membership service" shall mean service as an employee rendered while a member of the Retirement System.

(15) "Pension" shall mean payments for life derived from money provided by the employer. All pensions shall be payable in equal monthly installments.

(16) "Pension reserve" shall mean the present value of all payments to be made on account of any pension or benefit in lieu of any pension computed at regular interest upon the basis of such mortality tables as shall be adopted by the Board of Trustees.

(17) "Prior service" shall mean the service of a member rendered before the date he becomes a member of the System, certified on his prior service certificate and allowable as provided by G.S. 128-26.

(18) "Regular interest" shall mean interest compounded annually at such rate as shall be determined by the Board of Trustees in accordance with G.S. 128-29, subsection (b).

(19) "Retirement" shall mean withdrawal from active service with a retirement allowance granted under the provisions of this Article. In order for a member's retirement to become effective in any month, the member must render no service at any time during that month.

(20) "Retirement allowance" shall mean the sum of the annuity and the pension, or any optional benefit payable in lieu thereof.

(21) "Retirement System" shall mean the North Carolina Local Governmental Employees' Retirement System as defined in this Article.

(22) "Service" shall mean service as an employee as described in subdivision (10) of this section and paid for by the employer as described in subdivision (11) of this section.

(23) "Year" shall mean the regular fiscal year beginning July 1, and ending June 30; in the following calendar year unless otherwise defined by regulation of the Board of Trustees. (1939, c. 390, s. 1; 1941, c. 357, s. 1; 1943, c. 535; 1945, c. 526, s. 1; 1947, c. 833, ss. 1, 2; 1949, c. 231, ss. 1, 2; 1949, c. 1015; 1959, c. 491, ss. 1, 2; 1961, c. 515, s. 5; 1965, c. 781; 1971, c. 325, ss. 1-4; 1975, 2nd Sess., c. 983, s. 125; 1977, c. 316, ss. 1, 2; 1981, c. 557, ss. 1, 2; 1985, c. 479, s. 196(b); c. 649, s. 3; 1991, c. 51, s. 1; 1991 (Reg. Sess., 1992), c. 762, ss. 1, 2; 1997-144, s. 1; 1999-167, ss. 1, 2; 1999-456, s. 37; 2001-426, s. 1; 2003-359, ss. 13, 14.)

Local Modification. — Catawba: 1995, c. 306, s. 1; 1995 (Reg. Sess., 1996), c. 693, s. 2; Mecklenburg: 1995, c. 532, s. 1; 1995 (Reg. Sess., 1996), c. 693, s. 1; city of Asheville: 1981, c. 737; city of Charlotte: 1947, c. 926, amended by Session Laws 1949, c. 734; 1951, c. 387; 1965, c. 575; 1969, c. 132; 1971, c. 860; c. 903, s. 2; 1973, c. 267; 1983, c. 506; (as to Art. 3) 1985, c. 185; 1987, c. 506; 1987 (Reg. Sess., 1988), c. 1033; 1989, c. 248; c. 770, s. 45; 1991 (Reg. Sess., 1992), c. 830; c. 1030, s. 51.6; 1993 (Reg. Sess., 1994), c. 640, s.1; 1995, c. 171, s. 1; 1999-100, s. 1; 2001-22, 2002-43, ss. 1-5; 2006-117, s. 1, 2; (as to Article 3) city of Fayetteville: 1998-61; city of High Point: 1987, c. 327.

Open Enrollment — Contributory Death Benefit. — Session Laws 2007-388, s. 1, provides: "Notwithstanding any section of law or any rules and regulations adopted by the Boards of Trustees to the contrary, the Retirement Systems Division of the Department of State Treasurer shall allow for an open enrollment period in the Contributory Death Benefit for Retired Members of the Teachers' and State Employees' Retirement System, the Local Governmental Employees' Retirement System, the Consolidated Judicial Retirement System, and the Legislative Retirement System. This open enrollment period shall begin February 1, 2008, and end May 31, 2008. The Retirement Systems Division shall send notice by U.S. mail of the open enrollment period to all retirees who elected not to be covered under this benefit or who failed to make any election at the time of their retirement and shall send a second notice by U.S. mail to any such retiree who fails to make an election within 60 days of the notification of the open enrollment period. Notice, at minimum, shall consist of notification of the open enrollment period and the consequences of failure to respond within the specified time frames, informational materials explaining the benefit program and the associated costs, and a preprinted personalized enrollment application to facilitate the enrollment process indicating each individual retiree's contribution rate. The contribution rate for retirees electing coverage during the open enrollment period shall be increased by eleven and one-tenth percent (11.1%) the rate established for retirees who elected coverage when first eligible, at retirement. For retirees electing coverage during this open enrollment period, coverage shall become effective the first of the month following the month in which the election of coverage is received by the Retirement Systems Division but not before February 1, 2008. Contribution rates for coverage shall be based upon the retiree's nearest age as of the effective date of coverage and shall begin by deduction from the retiree's net monthly retirement allowance in the month in which coverage becomes effective. Coverage elected by retirees during this open enrollment period shall be subject to all other laws and rules and regulations adopted by the Board of Trustees governing the Contributory Death Benefit for Retired Members."

Editor's Note. — Subdivision (7a)a, (7a)b, and (7a)c designations were added by the Revisor of Statutes.

Session Laws 1999-167, which in ss. 1 and 2 added the second sentence of subsection (10), deleted the second sentence of subdivision (11) (which was subsequently reinserted by Session Laws 1999-456, s. 37), and added the last sentence of subdivision (11), provided in s. 3 that the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System through the Office of the Attorney General was to request a letter of determination or ruling from the Internal Revenue Service as to whether the status of the North Carolina Local Governmental Employees' Retirement System as a governmental plan would be adversely affected by the participation of employees affected by this legislation. The request was to be made no later than 30 days after the effective date of the act, June 8, 1999, and fire departments affected by this legislation were to be eligible for participation in the North Carolina Local Governmental Employees' Retirement System upon the first day of the calendar quarter following receipt of a favorable letter of determination or ruling. An unfavorable determination was received.

Legal Periodicals. — For comment on the 1939 enactment, see 17 N.C.L. Rev. 369 (1939).

For comment on the 1941 amendment, see 19 N.C.L. Rev. 510 (1941).

CASE NOTES

This Article creates contractual rights and obligations. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Any cessation of employment, including retirement, constitutes a termination from service as an employee. Walker v. Board of Trustees, 348 N.C. 63, 499 S.E.2d 429 (1998).

Discretionary Power to Participate in Retirement System. — Where a city has become an employer participating in the State Retirement System under authority conferred by this Article and by an act amending its charter, the repeal of the charter provision leaves its governing authorities with discretionary power to participate in the Retirement System under authority conferred by this Article, and mandamus will not lie to compel it to withdraw from the State Retirement System. Laughinghouse v. City of New Bern, 232 N.C. 596, 61 S.E.2d 802 (1950).

Credit Denied to a Self-Insured City for Disability Retirement Payments. — North Carolina Industrial Commission's decision to deny a city credit for disability retirement payments that were made to an injured city employee from a public employee benefits program was not an abuse of discretion under G.S. 97-42 because the city and the employee jointly contributed to the plan, and competent evidence, in the form of testimony as to the funding of the disability benefits plan, existed to support the Commission's findings of fact and conclusions of law. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

Interest Accrual and Compounding. — Consistent with the purposes of G.S. 135-1(19) and subdivision (18) of this section, underpayments were found to accrue interest from the date they became due. Furthermore, court found that statutes entitled beneficiaries to interest, not only on the principle due, but also on the accrued or earned interest. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 133 N.C. App. 587, 515 S.E.2d 743, 1999 N.C. App. LEXIS 615 (1999), cert. denied, 351 N.C. 102, 540 S.E.2d 358 (1999).

Actuarial Equivalent to Include Interest. — The actuarial value includes interest and there was no double recovery where the court was following the definition of actuarial equivalent as prescribed by this section and included interest in the underpayment award. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Postjudgment Interest Not Awardable Against State. — Retirees under the state and local government retirement system were not entitled to post-judgment interest on retroactive disability benefits, because the state retirement statutes contain no provision for the allowance of such interest. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 132 N.C. App. 137, 510 S.E.2d 675, 1999 N.C. App.

LEXIS 89 (1999), cert. denied, 350 N.C. 379, 536 S.E.2d 620 (1999).

Retirement Is Withdrawal Not Termination. — This statute explicitly defines retirement as a withdrawal from active service not as termination of employment. Walker v. Board of Trustees, 127 N.C. App. 156, 487 S.E.2d 839 (1997), aff'd, 348 N.C. 63, 499 S.E.2d 429 (1998).

Applied in Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975); Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

Cited in Wallace v. Board of Trustees, 145 N.C. App. 264, 550 S.E.2d 552, 2001 N.C. App. LEXIS 650 (2001), cert. denied, 354 N.C. 580, 559 S.E.2d 553 (2001).

§ 128-22. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Article for employees of those counties, cities and towns or other eligible employers participating in the said Retirement System. Following the filing of the application as provided in G.S. 128-23(c), the Board shall set a date, effective the first day of a calendar quarter, not more than 90 days thereafter, as of which date participation of the employer may begin, which date shall be known as the date of participation for such employer: Provided, that in the judgment of the Board of Trustees an adequate number of persons have indicated their intention to participate; otherwise at such later date as the Board of Trustees may set.

It shall have the power and privileges of a corporation and shall be known as the "North Carolina Local Governmental Employees' Retirement System," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held. (1939, c. 390, s. 2; 1941, c. 357, s. 2; 1943, c. 535; 1945, c. 526, s. 2; 1959, c. 491, s. 3.)

State Government Reorganization. — The Local Governmental Employees' Retirement system was transferred to the Department of State Treasurer by G.S. 143A-35, enacted by Session Laws 1971, c. 864.

§ 128-23. Acceptance by cities, towns and counties.

(a) Pursuant to the favorable vote of a majority of the employees of any incorporated city or town, the governing body may, by resolution legally adopted and approved by the Board of Trustees, elect to have its employees become eligible to participate in the Retirement System, and the said municipal governing body may make the necessary appropriation therefor and if necessary levy annually taxes for payment of the same.

(b) Pursuant to the favorable vote of a majority of the employees of the county, the board of commissioners of any county may, by resolution legally adopted and approved by the Board of Trustees, elect to have its employees become eligible to participate in the Retirement System. Each county is authorized to make appropriations for these purposes and to fund them by levy of property taxes pursuant to G.S. 153-65 and by the allocation of other revenues whose use is not otherwise restricted by law.

(c) Any eligible employer desiring to participate in the Retirement System shall file with the Board of Trustees an application for participation under the conditions included in this Article on a form approved by the Board of Trustees. In such application the employer shall agree to make the contributions required of participating employers, to deduct from the salaries of employees who may become members the contributions required of members under this Article, and to transmit such contributions to the Board of Trustees. It shall also agree to make the employer's contributions for the participation in the Retirement System of all employees entering the service of the employer, after its participation begins, who shall become members.

(d) Such contributions as are made by employers shall be regarded as additions to the compensation of such employees as are members of the Retirement System and deducted therefrom for the purpose of making the employer's contribution, in addition to the deduction from the compensation of employees on account of member contributions.

(e) The agreement of such employer to contribute on account of its employees shall be irrevocable, but should an employer for any reason become financially unable to make the normal and accrued liability contributions payable on account of its employees, then such employer shall be deemed to be in temporary default. Such temporary default shall not relieve such employer from any liability for its contributions payable on account of its employees.

Notwithstanding anything to the contrary, the Retirement System shall not be liable for the payment of any pensions or other benefits on account of the employees or pensioners of any employer under this Article, for which reserves have not been previously created from funds contributed by such employer or its employees for such benefits.

(f) Effective January 1, 1955, there shall be three classes of employers to be designated Class A, Class B and Class C, respectively. Each employer whose date of participation occurs before July 1, 1951, shall be a Class A employer unless such an employer by written notice filed with the Board of Trustees on or before June 30, 1951, elected to be a Class B employer. Each employer whose date of participation occurs on or after July 1, 1951, but before January 1, 1955, shall be a Class A employer. Each employer whose date of participation occurs on or after January 1, 1955, shall be a Class C employer.

(g) Notwithstanding any other provisions of this Article, any employer who is not a participating employer and who employs law enforcement officers transferred from the Law Enforcement Officers' Retirement System to this Retirement System on January 1, 1986, or who employs law enforcement officers electing to become members of this Retirement System on and after January 1, 1986, shall be employers participating in this Retirement System as this participation pertains to their law enforcement officers. The election of membership in this Retirement System shall be at the sole discretion of law enforcement officers of participating employers described in this subsection. (1939, c. 390, s. 3; 1951, c. 274, s. 1; 1955, c. 1153, s. 1; 1971, c. 325, s. 5; 1973, c. 803, s. 16; 1985, c. 479, s. 196(c); 1991, c. 585, s. 1.)

Editor's Note. — G.S. 153-65, referred to in this section, was repealed by Session Laws 1973, c. 822.

§ 128-24. Membership.

The membership of this Retirement System shall be composed as follows:

(1) All employees entering or reentering the service of a participating employer after the date of participation in the Retirement System of the employer. On and after July 1, 1965, new extension service employees excluded from coverage under Title II of the Social Security Act in the employ of a county participating in the Local Governmental Employees' Retirement System are hereby excluded from participation in the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county; provided that on and after July 1, 1965, new extension service employees excluded from coverage under Title II of the Social Security Act who are required to accept a federal Civil Service appointment may elect in writing on a form acceptable to the Retirement System, to be excluded from the Teachers' and State Employees' Retirement System and the local Retirement System. At such time as Cooperative

Agricultural Extension Service Employees excluded from coverage under Title II of the Social Security Act become covered by Title II of the Social Security Act, such employees shall no longer be covered by the provisions of this section, provided no accrued rights of these employees under this section prior to coverage by Title II of the Social Security Act shall be diminished.

(1a) Should any member in any period of eight consecutive years after becoming a member be absent from service more than seven years, or should he withdraw his accumulated contributions or should he become a beneficiary or die, he shall thereupon cease to be a member; provided that on and after July 1, 1971, a member shall cease to be a member only if he withdraws his accumulated contributions, or becomes a beneficiary, or dies.

(2) All persons who are employees of a participating county, city, or town except those who shall notify the Board of Trustees in writing, on or before 90 days following the date of participation in the Retirement System by such county, city or town: Provided, further, that employees of county social services and health departments whose compensation is derived from federal, State, and local funds may be members of the North Carolina Local Governmental Employees' Retirement System to the full extent of their compensation. Any member on or after July 1, 1969, may deposit in the annuity savings fund by a single payment the contributions plus interest which would have been credited to his account had he not signed a nonelection blank, and be entitled to such membership service credits and any prior service credits which became void upon execution of such nonelection blank; provided that the employer will pay the appropriate matching contributions.

(3) Effective January 1, 1955, there shall be three classes of members, to be designated Class A, Class B and Class C respectively. Each member who is an employee of a Class A employer shall be a Class A member; each member who is an employee of a Class B employer shall be a Class B member; and each member who is an employee of a Class C employer shall be a Class C member.

(3a) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1.

(4) The provisions of this subdivision (4) shall apply to any member whose retirement became effective prior to July 1, 1965, and became entitled to benefits hereunder in accordance with the provisions hereof. Such benefits shall be computed in accordance with the provisions of G.S. 128-27(b1) as in effect at the date of such separation from service.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the time he shall have attained the age of 60 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in the Retirement System, shall have the right to retire on a deferred retirement allowance upon the date he shall have attained the age of 60 years, or if a uniformed policeman or fireman upon the date he shall have attained the age of 55 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days next following the date of filing such application, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 128-27(b), paragraphs (1), (2) and (3).

b. In lieu of the benefits provided in paragraph a of this subdivision (4), any member who separates from service prior to the time he shall have attained the age of 60 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 30 or more years of creditable service, and who leaves his total accumulated contributions in the Retirement System, may elect to retire on an early retirement allowance; provided that such a member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days next following the date of filing such application, he desires to be retired; provided further that such application shall be duly filed within 60 days following the date of such separation. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of age 60 years, or if a uniformed policeman or fireman at the attainment of age 55 years, upon proper application therefor.

c. Should an employee who retired on an early or service retirement allowance be restored to service prior to the time he shall have attained the age of 62 years, or if a uniformed policeman or fireman prior to the time he shall have attained the age of 55 years, his allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate for his class member. Upon his subsequent retirement, he shall be entitled to an allowance not less than the allowance described in 1 below reduced by the amount in 2 below.

1. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement, and his creditable service after he was restored to service.
2. The actuarial equivalent of the retirement benefits he previously received.

d. Should an employee who retired on an early or service retirement allowance be restored to service after the attainment of the age of 62 years, his retirement allowance shall be reduced to the extent necessary (if any) so that the sum of the retirement allowance at the time of retirement and earnings from employment by a unit of the Retirement System for any year (beginning January 1 and ending December 31) will not exceed the member's compensation received for the 12 months of service prior to retirement. Provided, however, that under no circumstances will the member's retirement allowance be reduced below the amount of his annuity as defined in G.S. 128-21(3).

(5) The provisions of this subdivision (5) shall apply to any member whose membership is terminated on or after July 1, 1965, and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to a member who is not a law enforcement officer or eligible former law enforcement officer.

b. In lieu of the benefits provided in paragraph a of this subdivision, any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 128-27(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

b1. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law enforcement officer at the time of separation from service prior to the attainment of the age of 50 years, for any reason other than death or disability as provided in this Article, after completing 15 or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System, may elect to retire on a deferred early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law enforcement officers.

b2. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law enforcement officer at the time of separation from service prior to the attainment of the age of 55 years, for any reason other than death or disability as provided in this Article, after completing five or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred service retirement allowance upon attaining the age of 55 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred service retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law enforcement officers.

b3. Deferred retirement allowance of members retiring on or after July 1, 1995. — In lieu of the benefits provided in paragraphs a. and b. of this subdivision, any member who separates from service prior to attainment of age 60 years, after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on a deferred retirement allowance upon attaining the age of 50 years or any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to a member who is not a law enforcement officer or an eligible former law enforcement officer.

c. Should a beneficiary who retired on an early or service retirement allowance be reemployed by, or otherwise engaged to perform services for, an employer participating in the Retirement System on a part-time, temporary, interim, or on fee-for-service basis, whether contractual or otherwise, and if such beneficiary earns an amount during the 12-month period immediately following the effective date of retirement or in any calendar year which exceeds fifty percent (50%) of the reported compensation, excluding terminal payments, during the 12 months of service preceding the effective date of retirement, or twenty thousand dollars ($20,000), whichever is greater, as hereinafter indexed, then the retirement allowance shall be suspended as of the first day of the month following the month in which the reemployment earnings exceed the amount above, for the balance of the calendar year, except when the reemployment earnings exceed the amount above in the month of December, in which case the retirement allowance shall not be suspended. The retirement allowance of the beneficiary shall be reinstated as of January 1 of each year following suspension. The amount that may be earned before suspension shall be increased on January 1 of each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent (1/10 of 1%).

d. Should a beneficiary who retired on an early or service retirement allowance be restored to service as an employee, then the retirement allowance shall cease as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

Upon his subsequent retirement, he shall be paid a retirement allowance determined as follows:

1. For a member who earns at least three years' membership service after restoration to service, the retirement allowance shall be computed on the basis of his compensation and service before and after the period of prior retirement without restriction; provided, that if the prior allowance was based on a social security leveling payment option, the allowance shall be adjusted actuarially for the difference between the amount received under the optional payment and what would have been paid if the retirement allowance had been paid without optional modification.
2. For a member who does not earn three years' membership service after restoration to service, the retirement allowance shall be equal to the sum of the retirement allowance to which he would have been entitled had he not been restored to service, without modification of the election of an optional allowance previously made, and the retirement allowance that results from service earned since being restored to service; provided, that if the prior retirement allowance was based on a social security leveling payment option, the prior allowance shall be adjusted actuarially for the difference between the amount that would have been paid for each month had the payment not been suspended and what would have been paid if the retirement allowance had been paid without optional modification.

(5a) Notwithstanding the provisions of paragraphs c and d of the subdivision (5) to the contrary, a beneficiary who was a beneficiary retired on an early or service retirement with the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by a participating employer and beneficiaries last employed by a participating employer to this Retirement System on January 1, 1986, and who also was a contributing member of this Retirement System on January 1, 1986, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership. Any beneficiary who retired on an early or service retirement allowance as an employee of any participating employer under the Law Enforcement Officers' Retirement System and becomes employed as an employee by an employer participating in the Retirement System after January 1, 1986, becomes subject to the provisions of G.S. 128-24(5)c. and G.S. 128-24(5)d. on and after January 1, 1989.

(6) Employees of a sending agency participating in an intergovernmental exchange of personnel under the provisions of Article 10 of Chapter 126 shall remain members entitled to all benefits of the System provided that the requirements of Article 10 of Chapter 126 are met; provided further, that a member may retain membership status while serving as an assigned employee or employee on leave under the provisions of Article 10 of Chapter 126 for purposes of receiving the death benefit regardless of whether he and his employer are contributing to his account during the exchange period except that no duplicate benefits shall be paid. (1939, c. 390, s. 4; 1941, c. 357, s. 3; 1949, cc. 1011, 1013; 1951, c. 274, s. 2; 1955, c. 1153, s. 2; 1957, c. 854; 1959, c. 491, s. 4; 1961, c. 515, s. 1; 1965, c. 781; 1967, c. 978, ss. 1, 2; 1969, c. 442, ss. 1-5, 7; c. 982; 1971, c. 325, ss. 6-8; c. 326, ss. 1, 2; 1973, c. 243, s. 1; 1977, c. 783, s. 2; 1981, c. 979, s. 2; 1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2; 1983, c. 556, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1106, ss. 1, 2; 1985, c. 479, s. 196(d)-(g); c. 649, s. 2; 1987, c. 513, s. 1; c. 738, s. 38(a); 1993 (Reg. Sess., 1994), c. 769, ss. 7.30(a), 7.31(a), (b); 1995, c. 507, s. 7.22(d); 2002-126, s. 28.13(b); 2007-431, s. 10.)

Local Modification. — Guilford: 1977, c. 278; city of Charlotte: 1949, c. 990; city of Raleigh: 1953, c. 1035; town of Troutman: 2005-279, s. 1.

Editor's Note. — Session Laws 2002-126, s. 28.13(c), provides, in part, that subsection (b) of Session Laws 2002-126, s. 28.13, which amended G.S. 128-24(5)c., does not apply during the 2002-2003 fiscal year to any person who was retired on or before September 1, 2002, and also had entered into any employment contract or commitment for some or all of that year.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, is a severability clause.

Effect of Amendments. — Session Laws 2007-431, s. 10, effective July 1, 2007, in the first sentence of subdivision (5)c., near the beginning, substituted "reemployed by" for "reemployed" and substituted "services for" for "services, by", and added "except when the reemployment earnings exceed the amount above in the month of December, in which case the retirement allowance shall not be suspended" following "for the balance of the calendar year" at the end.

CASE NOTES

Who Excluded from Membership. — The exclusion from membership in the Retirement System will not be interpreted to apply only to those receiving retirement allowances from general funds in the State Treasury derived from general taxation, but is applicable to those entitled to benefits from any funds coming into the hands of the State Treasurer by virtue of a State law. Gardner v. Board of Trustees, 226 N.C. 465, 38 S.E.2d 314 (1946), decided prior to later amendments to this section.

Cited in Miracle v. North Carolina Local Gov't Employees Retirement Sys., 124 N.C. App. 285, 477 S.E.2d 204 (1996); Taylor v. City of Lenoir, 129 N.C. App. 174, 497 S.E.2d 715 (1998), appeal dismissed, 140 N.C. App. 337, 536 S.E.2d 848 (2000).

§ 128-25. Membership in System.

Should sixty per centum (60%) of the members of any retirement, pension or annuity fund or system of any county, city or town of the State, hereafter referred to as a local pension system, elect to become members of the North Carolina Governmental Employees' Retirement System, by a petition duly signed by such members, the participation of such members in the Retirement System may be approved as provided in G.S. 128-24 as though such local pension system were not in operation, and the provisions of this Article shall also apply, except that the existing pensioners or annuitants of the local pension system who were being paid pensions on the date of the approval shall be continued and paid at their existing rates by the North Carolina Governmental Employees' Retirement System, and the liability on this account shall be included in the computation of the accrued liability by the actuary as provided by G.S. 128-30, subsection (d). Any cash and securities to the credit of the local pension system shall be transferred to the North Carolina Governmental Employees' Retirement System as of the date of the approval. The trustees or other administrative head of the local pension system as of the date of the approval shall certify the proportion, if any, of the funds of the System that represents the accumulated contributions of the members, and the relative shares of the members as of that date. Such shares shall be credited to the respective annuity savings accounts of such members in the North Carolina Governmental Employees' Retirement System. The balance of the funds transferred to the North Carolina Governmental Employees' Retirement System shall be offset against the accrued liability before determining the special accrued liability contribution to be paid by the county, city or town as provided by G.S. 128-30, subsection (d). The operation of the local pension system shall be discontinued as of the date of the approval. (1939, c. 390, s. 5; 1941, c. 357, s. 4.)

CASE NOTES

Applied in Mathews v. Board of Trustees, 96 N.C. App. 186, 385 S.E.2d 343 (1989).

Cited in Dillon v. Wentz, 227 N.C. 117, 41 S.E.2d 202 (1947).

§ 128-26. Allowance for service.

(a) Each person who becomes a member during the first year of his employer's participation, and who was an employee of the same employer at any time during the year immediately preceding the date of participation, shall file a detailed statement of all service rendered by him to that employer prior to the date of participation for which he claims credit.

A participating employer may allow prior service credit to any of its employees on account of: their earlier service to the aforesaid employer; or, their earlier service to any other employer as the term employer is defined in G.S. 128-21(11); or, their earlier service to any state, territory, or other governmental subdivision of the United States other than this State.

A participating employer may allow prior service credit to any of its employees on account of service, as defined in G.S. 135-1(23), to the State of North Carolina to the extent of such service prior to the establishment of the Teachers' and State Employees' Retirement System on July 1, 1941; provided that employees allowed such prior service credit pay in a total lump sum an amount calculated on the basis of compensation the employee earned when he first entered membership and the employee contribution rate at that time together with interest thereon from year of first membership to year of payment shall be one half of the calculated cost.

With respect to a member retiring on or after July 1, 1967, the governing board of a participating unit may allow credit for any period of military service in the armed forces of the United States if the person returned to the service of his employer within two years after having been honorably discharged, or becoming entitled to be discharged, released, or separated from such armed services; provided that, notwithstanding the above provisions, any member having credit for not less than 10 years of otherwise creditable service may be allowed credit for such military services which are not creditable in any other governmental retirement system; provided further, that a member will receive credit for military service under the provisions of this paragraph only if he submits satisfactory evidence of the military service claimed and the participating unit of which he is an employee agrees to grant credit for such military service prior to January 1, 1972.

A member retiring on or after July 1, 1971, who is not granted credit for military service under the provisions of the preceding paragraph will be allowed credit for any period in the armed services of the United States up to the date he was first eligible to be separated or released therefrom; provided that he was an employee as defined in G.S. 128-21(10) at the time he entered military service, and either of the following conditions is met:

(1) He returns to service, with the employer by whom he was employed when he entered military service, within a period of two years after he is first eligible to be separated or released from such military service under other than dishonorable conditions.

(2) He is in service, with the employer by whom he was employed when he entered military service, for a period of not less than 10 years after he is separated or released from such armed services under other than dishonorable conditions.

(b) The Board of Trustees shall fix and determine by appropriate rules and regulations how much service in any year is equivalent to one year of service, but in no case shall more than one year of service be creditable for all service in one calendar year.

(c) Subject to the above restrictions and to such other rules and regulations as the Board of Trustees may adopt, the Board of Trustees shall verify, as soon as practicable after the filing of such statements of service, the service therein claimed.

In lieu of a determination of the actual compensation of the members that was received during such period of prior service, the Board of Trustees may use for the purpose of this Article the compensation rates which if they had progressed with the rates of salary increase shown in the tables as prescribed in subsection (o) of G.S. 128-28 would have resulted in the same average salary of the member for the five years immediately preceding the date of participation of his employer, as the records show the member actually received.

(d) Any member may, up to his date of retirement and within one year thereafter, request the Board of Trustees to modify or correct his prior service credit.

(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of the service certified on his prior service certificate; and if he has sick leave standing to his credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof, but not less than one hour; sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for disability retirement or for a vested deferred allowance.

On and after July 1, 1971, a member whose account was closed on account of absence from service under the provisions of G.S. 128-24(1a) and who subsequently returns to service for a period of five years, may thereafter repay the amount withdrawn plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service by the amount of creditable service lost when this account was closed.

On and after July 1, 1973, a member whose account in the Teachers' and State Employees' Retirement System was closed on account of absence from service under the provisions of G.S. 135-3(3) and who subsequently became or becomes a member of this System with credit for five years of service, may thereafter repay in a lump sum the amount withdrawn from the Teachers' and State Employees' Retirement System plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service in this System by the amount of creditable service lost when his account was closed.

Notwithstanding any other provision of this Chapter, any member who entered service or was restored to service prior to July 1, 1982, and was excluded from membership service solely on account of having attained the age of 62 years, in accordance with former G.S. 128-24(3a), may purchase membership service credits for such excluded service by making a lump-sum payment equal to the contributions that would have been deducted pursuant to G.S. 128-30(b) had he been a member of the Retirement System, increased by interest calculated at a rate of seven percent (7%) per annum. Creditable service for unused sick leave shall be allowed only for sick leave accrued monthly during employment under a duly adopted sick leave policy and for which the member may be able to take credits and be paid for sick leave without restriction.

On and after January 1, 1986, the creditable service of a member who was a member of the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by participating employers from that System to this Retirement System and whose accumulated contributions are transferred from that System to this Retirement System, includes service that was creditable in the Law Enforcement Officers' Retirement System; and membership service with that System is membership service with this Retirement System; provided, notwithstanding any provisions of this Article to the contrary, any inchoate or accrued rights of such a member to purchase creditable service for military service, withdrawn service and prior service under the rules and regulations of the Law Enforcement Officers' Retirement System may not be diminished and may be purchased as creditable service with this Retirement System under the same conditions that would have otherwise applied.

(f) Effective January 1, 1955, there shall be three classes of prior service certificates, to be designated as Class A, Class B and Class C respectively. Each such certificate issued on account of service rendered to a Class A employer shall be a Class A prior service certificate; each such certificate issued on account of service rendered to a Class B employer shall be a Class B prior service certificate; and each such certificate issued on account of service rendered to a Class C employer shall be a Class C prior service certificate. Each Class C prior service certificate shall specify a prior service benefit percentage rate which shall be three per centum (3%) in the case of any member entitled to such certificate who is, at the date of participation of his employer, in a position covered by the Social Security Act under a federal-State agreement and which shall be five per centum (5%) in the case of a member entitled to such certificate but who at the date of participation of his employer is in a position not so covered.

(g) During periods when a member is on leave of absence and is receiving less than his full compensation, he will be deemed to be in service only if he is contributing to the Retirement System as provided in G.S. 128-30(b)(4). If he is so contributing, the annual rate of compensation paid to such employee immediately before the leave of absence began will be deemed to be the actual compensation rate of the employee during the leave of absence.

(h) Creditable service at retirement shall include any service rendered by a member while on leave of absence to serve as a member or officer of the General Assembly which is not creditable toward retirement under the Legislative Retirement Fund provided the allowance of such credit shall be contingent upon the cancellation of service credit in the fund and the transfer of the member's contributions plus accumulated interest from the fund to this System.

(h1) Any member may purchase creditable service for service as a member of the General Assembly not otherwise creditable under this section, provided the service is not credited in the Legislative Retirement Fund nor the Legislative Retirement System, and further provided the member pays a lump sum amount equal to the full cost of the additional service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which a member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(i) Notwithstanding any other provision of this Chapter, any person who withdrew his contributions in accordance with the provisions of G.S. 128-27(f) or 135-5(f) or the rules and regulations of the Law Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of five years of prior and current membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with interest compounded annually at the rate of six and one-half percent (6.5%) for each calendar year from the year of withdrawal to the year of repayment plus a fee to cover expense of handling which shall be determined by the Board of Trustees, and receive credit for the service forfeited at time of withdrawal(s). These provisions shall apply equally to retired members who had attained five years of prior and current membership service prior to retirement. The retirement allowance of a retired member who restores service under this subsection shall be increased the month following the month payment is received. The increase in the retirement allowance shall be the difference between the initial retirement allowance, under any optional allowance elected at the time of retirement, and the amount of the retirement allowance, under any optional allowance elected at the time of retirement, to which the retired member would have been entitled had the service not been previously forfeited, adjusted by any increases in the retirement accrual rate occurring between the member's date of retirement and the date of payment. The increase in the retirement allowance shall not include any adjustment for cost-of-living increases granted since the date of retirement.

(j) Repealed by Session Laws 1987, c. 617, s. 3.

(j1) Notwithstanding any other provision of this Chapter, any member and any retired member as herein described may purchase creditable service for service in the Armed Forces of the United States, not otherwise allowed, by paying a total lump sum payment determined as follows:

(1) For members who completed 10 years of membership service, and retired members who completed 10 years of membership service prior to retirement, and whose membership began on or prior to January 1, 1988, and who make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the monthly compensation the member earned when he first entered membership service times the employee contribution rate at that time times the months of service to be purchased with sufficient interest added thereto so as to equal one-half of the cost of allowing such service, plus an administrative fee to be set by the Board of Trustees.

(2) For members who complete five years of membership service, and retired members who complete five years of membership service prior

to retirement, and eligible members and retired members covered by paragraph (1) of this subdivision, whose membership began on or before January 1, 1988, but who did not or do not make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the full liability of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities and shall take into account the retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire on an unreduced allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service retirement allowance.

Creditable service allowed under this subdivision shall be only for the initial period of "active duty", as defined in 38 U.S. Code Section 101(21), in the Armed Forces of the United States up to the date the member was first eligible to be separated and released and for subsequent periods of "active duty", as defined in 38 U.S. Code Section 101(21), as required by the Armed Forces of the United States up to the date of first eligibility for separation or release, but shall not include periods of active duty in the Armed Forces of the United States creditable in any other retirement system except the national guard or any reserve component of the Armed Forces of the United States, and shall not include periods of "active duty for training", as defined in 38 U.S. Code Section 101(22), or periods of "inactive duty training", as defined in 38 U.S. Code Section 101(23), rendered in any reserve component of the Armed Forces of the United States. Provided, creditable service may be allowed only for active duty in the Armed Forces of the United States of a member that resulted in a general or honorable discharge from duty. The member shall submit satisfactory evidence of the service claimed. For purposes of this subsection, membership service may include any membership or prior service credits transferred to this Retirement System pursuant to G.S. 128-24.

(j2) Notwithstanding any other provision of this Chapter, any member and any retired member as herein described may purchase creditable service previously rendered to any state, territory, or other governmental subdivision of the United States other than this State by paying a total lump-sum payment determined as follows:

(1) For members who completed 10 years of prior and current membership service, and retired members who completed 10 years of prior and current membership service prior to retirement, and whose membership began on or before January 1, 1988, and who make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the monthly compensation the member earned when he first entered membership service, times the employee contribution rate at that time, times the months of service to be purchased, times two, with sufficient interest added thereto so as to equal the full cost of allowing such service, plus an administrative fee to be set by the Board of Trustees.

(2) For members who complete five years of prior and current membership service, and retired members who complete five years of prior and current membership service prior to retirement, and eligible members and retired members covered by subdivision (1) of this subsection, whose membership began on or before January 1, 1988,

but who did not or do not make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the full liability of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities and shall take into account the retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire on an unreduced allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service retirement allowance. Notwithstanding the requirement of five years of current membership service, a member whose membership began prior to the service the member desires to purchase shall be eligible to purchase creditable service under this subdivision upon returning to service as an employee upon completion of a total of five years of membership service and upon completion of one year of current membership service.

Current membership service shall mean membership service earned since the service previously rendered to any state, territory, or other governmental subdivision of the United States other than this State. Creditable service under this subsection shall be allowed only at the rate of one year of out-of-state service for each year of service in this State, with a maximum allowable of 10 years of out-of-state service. Such service is limited to full-time service which would be allowable under the laws governing this System. Credit will be allowed only if no benefit is allowable in another public retirement system as a result of the service.

(k) Notwithstanding any language to the contrary of any provision of this section, or of any repealed provision of this section that was repealed with the inchoate and accrued rights preserved, all repayments and purchases of service credits, allowed under the provisions of this section or of any repealed provision of this section that was repealed with inchoate and accrued rights preserved, must be made within three years after the member first becomes eligible to make such repayments and purchases. Any member who does not repay or purchase service credits within said three years after first eligibility to make such repayments and purchases may, under the same conditions as are otherwise required, repay or purchase service credits provided that the repayment or purchase equals the full cost of the service credits calculated on the basis of the assumptions used for purchases of the actuarial valuation of the System's liabilities and shall take into account the additional retirement allowance arising on account of such additional service credit commencing at the earliest age at which such member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance. Notwithstanding the foregoing, on and after January 1, 2003, the provisions of this subsection shall not apply to the repayment of contributions withdrawn pursuant to subsection (i) of this section.

(*l*) Notwithstanding any other provision of this Chapter, any member may purchase creditable service for periods of employer approved leaves of absence when in receipt of benefits under the North Carolina Workers' Compensation Act. This service shall be purchased by paying a cost calculated in the following manner:

(1) Leaves of Absence Terminated Prior to July 1, 1983. — The cost to a member whose employer approved leave of absence, when in receipt of benefits under the North Carolina Workers' Compensation Act, terminated upon return to service prior to July 1, 1983, shall be a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities, and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the board of trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(2) Leaves of Absence Terminating On and After July 1, 1983. — The cost to a member whose employer approved leave of absence, when in receipt of benefits under the North Carolina Workers' Compensation Act, terminates upon return to service on and after July 1, 1983, shall be a lump sum amount due and payable to the Annuity Savings Fund within six months from return to service equal to the total employee and employer percentage rates of contribution in effect at the time of purchase and based on the annual rate of compensation of the member immediately prior to the leave of absence; Provided, however, the cost to a member whose amount due is not paid within six months from return to service shall be the amount due plus one percent (1%) per month penalty for each month or fraction thereof the payment is made beyond the six-month period.

Whenever the creditable service purchased pursuant to this subsection is for a period that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 128-21(5) had the member not been on leave of absence without pay, then the compensation that the member would have received during the purchased period shall be included in calculating the member's average final compensation. In such cases, the compensation that the member would have received during the purchased period shall be based on the annual rate of compensation of the member immediately prior to the leave of absence.

In the case of a law enforcement officer electing to purchase service under this section who is in receipt of benefits under the North Carolina Workers' Compensation Act due to serious bodily injury suffered in the line of duty as a result of an intentional or unlawful act of another, as certified by the head of the employing law enforcement agency, and whose approved leave of absence terminates on or before a return to service on and after August 1, 2006, the employer percentage rate of contribution payable under subdivision (2) of this subsection shall be made by the employer that granted the leave of absence. The cost to the law enforcement officer shall be reduced by the amount paid by the employer. For purposes of this subsection, "serious bodily injury" means bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

Nothing in this subsection prevents an employer from voluntarily paying all or a part of the employee portion of the total cost of the service credit purchased, and the employer does not discriminate against any eligible law enforcement officer in this subsection employed by the employer by paying that portion of cost. To the extent paid by the employer, the employee portion paid by the employer shall be credited to the Pension Accumulation Fund; to the extent paid by the member, the employee portion paid by the member shall be credited to the member's annuity savings account. A member shall pay any part of the employee portion of the total cost not paid by the employer.

(m) Omitted Membership Service. — A member who had service as an employee as defined in G.S. 135-1(10) and G.S. 128-21(10) or as a teacher as defined in G.S. 135-1(25) and who was omitted from contributing membership through error may be allowed membership service, after submitting clear and convincing evidence of the error, as follows:

(1) within 90 days of the omission, by the payment of employee and employer contributions that would have been paid; or

(2) after 90 days and prior to three years of the omission, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees; or

(3) after three years of the omission, by the payment of an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities, and shall take into account the additional retirement allowance arising on account of such additional service credit commencing at the earliest age at which a member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

Nothing contained in this subsection shall prevent an employer or member from paying all or a part of the cost of the omitted membership service; and to the extent paid by the employer, the cost paid by the employer shall be credited to the pension accumulation fund; and to the extent paid by the member, the cost paid by the members shall be credited to the member's annuity savings account; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the cost of the omitted membership service. In the event an employer pays all or a part of the full actuarial cost as determined in subdivision (3) of this subsection, the employer may, at its option, pay such amount either in a lump sum or by increasing its "accrued liability contribution" for the remainder of its accrued liability period. In the event an employer has satisfied its accrued liability contribution, the employer may amortize its portion of the full actuarial cost over a period not to exceed ten years. The expense of making an actuarial valuation to determine the accrued liability contribution or the additional accrued liability contribution, required to amortize the portion of the full actuarial cost paid by the employer, shall be paid by the employer in a lump sum at the time of the actuarial valuation.

(n) Repealed by Session Laws 2002-153, s. 3, effective January 1, 2003.

(o) Credit at Full Cost for Federal Employment. — Notwithstanding any other provisions of this Chapter, a member, upon the completion of five years of membership service, may purchase creditable service for periods of federal employment, provided that the member is not receiving any retirement benefits resulting from this federal employment, and provided that the member is not vested in the particular federal retirement system to which the member may have belonged while a federal employee. The member shall purchase this service by making a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the liabilities of the Retirement System; and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Members may also purchase creditable service for periods of employment with public community service entities within the State funded entirely with federal funds, other than the federal government, that are not covered by the provisions of G.S. 128-21(11) or G.S. 135-1(11), under the same terms and conditions that are applicable to the purchase of creditable service for periods of federal employment in accordance with this subsection. "Public community service entities" as used in this subsection shall mean community action, human relations, manpower development, and community development programs as defined in Articles 19 and 21 of Chapter 160A and Article 18 of Chapter 153A of the General Statutes and any other similar programs that the Board of Trustees may adopt. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(p) Part-Time Service Credit. —

(1) Notwithstanding any other provision of this Chapter, upon completion of five years of membership service, any member may purchase service previously rendered as a part-time employee of a participating employer as defined in G.S. 128-21(11) or G.S. 135-1(11), except for temporary or part-time service rendered while a full-time student in pursuit of a degree or diploma in a degree-granting program. Payment shall be made in a single lump sum in an amount equal to the full actuarial cost of providing credit for the service, together with interest and an administrative fee, as determined by the Board of Trustees on the advice of the Retirement System's actuary. Notwithstanding the provisions of G.S. 128-26(b), the Board of Trustees shall fix and determine by appropriate rules and regulations how much service in any year, as based on compensation, is equivalent to one year of service in proportion to "earnable compensation", but in no case shall more than one year of service be creditable for all service in one year. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(2) Under all requirements and conditions set forth in the preceding subdivision of this subsection, except for the requirement that the

completion of five years of membership service be subsequent to service rendered as a part-time employee, any member with five or more years of membership service standing to his credit may purchase additional membership service for service rendered as a part-time employee of an employer as defined in G.S. 128-21(11) if (i) the member terminates or has terminated employment in any capacity as an employee, (ii) the purchase of the additional membership service causes the member to become eligible to commence an early or service retirement allowance, and (iii) the member immediately elects to commence retirement and become a beneficiary.

(q) Credit at Full Cost for Probationary Employment. — Notwithstanding any other provision of this Chapter, a member may purchase creditable service, prior to retirement, for employment with an employer as defined in this Article when considered to be in a probationary or employer imposed waiting period status and thereby not regularly employed, between date of employment and date of membership service with the retirement system, provided that the employer or former employer of such a member has revoked this probationary employment or waiting period policy.

Provided, the member shall purchase this service by making a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the liabilities of the retirement system, and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. In no instance shall the amount payable be less than the contributions a member would have made during the employment plus four percent (4%) interest compounded annually.

Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms “full cost”, “full liability”, and “full actuarial cost” include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

Nothing contained in this subsection shall prevent an employer or member from paying all or a part of the cost of the probationary employment; and to the extent paid by the employer, the cost paid by the employer shall be credited to the pension accumulation fund; and to the extent paid by the member, the cost paid by the member shall be credited to the member’s annuity savings account; provided, however, an employer does not discriminate against any member or group of members in its current employ in paying all or any part of the cost of the probationary employment. In the event an employer pays all or a part of the full actuarial cost, the employer may, at its option, pay such amount either in a lump sum or by increasing its “accrued liability contribution” for the remainder of its accrued liability period. In the event an employer has satisfied its accrued liability contribution, the employer may amortize its portion of the full actuarial cost over a period not to exceed 10 years. The expense of making an actuarial valuation to determine the accrued liability contribution or the additional accrued liability contribution, required to amortize the portion of the full actuarial cost paid by the employer, shall be paid by the employer in a lump sum at the time of the actuarial valuation.

(r) Credit at Full Cost for Temporary Government Employment. — Notwithstanding any other provisions of this Chapter, any member may purchase creditable service for government employment when classified as a temporary employee subject to the conditions that:

(1) The member was employed by an employer as defined in G.S. 128-21(11) or G.S. 135-1(11);
(2) The member's temporary employment met all other requirements of G.S. 128-21(10), or G.S. 135-1(10) or (25);
(3) The member has completed five years or more of membership service;
(4) The member acquires from the employer such certifications of temporary employment as are required by the Board of Trustees; and
(5) The member makes a lump sum payment into the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the retirement system's liabilities, and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary, plus an administrative fee to be determined by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(s) Credit at Full Cost for Employment Not Otherwise Creditable. — Notwithstanding any other provisions of this Chapter, any member may purchase creditable service for any employment as an employee, as defined in G.S. 128-21(10), of a local government employer not creditable in any other retirement system or plan, upon completion of five years of membership service by making a lump sum payment into the Annuity Savings Fund. The payment by the member shall be equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the retirement system's liabilities, and the calculation of the amount payable shall take into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary plus an administrative fee to be determined by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(t) Purchase of Service Credits Through Rollover Contributions From Certain Other Plans. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 128-26, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through rollover contributions to the Annuity Savings Fund from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code, (ii) an eligible plan under Section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state, (iii) an individual retirement account or annuity described in Section 408(a) or 408(b) of the Internal Revenue Code that is eligible to be rolled over and would otherwise be includible in gross income, or (iv) a qualified plan described in Section 401(a) or 403(a) of the Internal Revenue Code. Notwithstanding the foregoing, the Retirement System shall not accept any amount as a rollover contribution unless such amount is eligible to be rolled over to a qualified trust in accordance with applicable law and the member provides evidence satisfactory to the Retirement System that such amount qualifies for rollover treatment. Unless received by the Retirement System in the form of a direct rollover, the rollover contribution must be paid to the Retirement System on or before the 60th day after the date it was received by the member.

Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 128-26, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code or (ii) an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

(u) Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 128-26, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) the Supplemental Retirement Income Plans A, B, or C of North Carolina or (ii) any other defined contribution plan qualified under Section 401(a) of the Internal Revenue Code which is maintained by the State of North Carolina, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

(v) Retroactive Membership Service. — A member who is reinstated to service as an employee as defined in G.S. 128-21(10) retroactively to the date of prior involuntary termination (with backpay and benefits) may be allowed membership service, after submitting clear and convincing evidence of the reinstatement, as follows:

(1) Within 90 days of the involuntary termination, by the payment of employee and employer contributions that would have been paid; or

(2) After 90 days of the involuntary termination, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees.

Nothing contained in this subsection shall prevent an employer or member from paying all or a part of the cost of the retroactive membership service; and to the extent paid by the employer, the cost paid by the employer shall be credited to the pension accumulation fund; and to the extent paid by the member, the cost paid by the member shall be credited to the member's annuity savings account; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the cost of the retroactive membership service.

In the event a member received a return of accumulated contributions subsequent to an involuntary termination as provided in G.S. 128-27(f), the member may redeposit, within 90 days of reinstatement retroactive to the date of prior involuntary termination, in the annuity savings fund by single payment, an amount equal to the total amount he previously withdrew plus regular interest and restore the creditable service forfeited upon receiving his return of accumulated contributions.

(w) If a member who is an elected government official and has not vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member shall forfeit all benefits under this System. If a member who is an elected government official and has vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member is not entitled to any creditable service that accrued after July 1, 2007. No member shall forfeit any benefit or creditable service earned from a position not as an elected government official. (1939, c. 390, s. 6; 1941, c. 357, s. 5; 1943, c. 535; 1945, c. 526, s. 3; 1951, c. 274, s. 3; 1955, c. 1153, s. 3; 1967, c. 978, ss. 11, 12; 1969, c. 442, s. 6; 1971, c. 325, ss. 9-11, 19; 1973, c. 243, s. 2; c. 667, s. 1; c. 816, s. 3; c. 1310, ss. 1-4; 1975, c. 205, s. 1; c. 485, ss. 1-3; 1977, c. 973; 1979, c. 866, s. 1; c. 868, ss. 1, 2; c. 1059, s. 1; 1981, c. 557, s. 3; 1981 (Reg. Sess., 1982), c. 1283, s. 1; c. 1396, s. 3; 1983, c. 533, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 231; 1985, c. 407, s. 1; c. 479, s. 196(h); c. 649, ss. 1, 4; 1987, c. 533, s. 2; c. 617, ss. 1-4; c. 717, s. 1; 1987 (Reg. Sess., 1988), c. 1088, ss. 5, 6; c. 1110, s. 8; 1989, c. 255, ss. 1-10; c. 762, s. 2; 1989 (Reg. Sess., 1990), c. 1024, s. 28; 1991, c. 753, s. 1; 1991 (Reg. Sess., 1992), c. 1017, s. 1; 1995, c. 507, s. 7.23D(a); 1998-71, ss. 1, 2; 1998-214, s. 1; 1999-158, s. 1; 2001-487, s. 82; 2002-71, s. 3; 2002-153, ss. 1-3; 2003-359, ss. 17-19, 22; 2005-91, s. 8; 2006-29, s. 1; 2007-179, s. 2(b); 2007-304, s. 1.)

Editor's Note. — Session Laws 1987, c. 617, s. 3 directed the deletion of the last paragraph of subsection (j). However, subsection (j) only contained one paragraph. Thus it would appear that the intent of the act was to delete all of subsection (j).

Session Laws 1987, c. 617, s. 5 provided, inter alia: "For the purposes of Section 3 of this act, members of the Retirement System who are members before January 1, 1988, shall retain all rights and privileges to purchase military and out-of-state service credits under the same conditions that existed prior to the effective date of that section."

Session Laws 1987, c. 617, s. 3, effective January 1, 1988, deleted the last paragraph of subsection (a), which, as amended by c. 617, ss. 1 and 4, read:

"Notwithstanding any other provision of this Chapter, members not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of prior and current membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment to be determined by the Board of Trustees and assessed the member at the time of payment; provided that credit will be allowed only for the initial period of active duty in the armed forces of the United States up to the time the member was first eligible to be separated or released therefrom, and subsequent periods of such active duty as required by the armed forces of the United States up to the date of first eligibility for separation or release therefrom; and further provided that the member submit satisfactory evidence of the service claimed and that service credit be allowed only for that period of active service in the armed forces of the United States not creditable in any other retirement system, except the national guard or any reserve component of the armed forces of the United States. These provisions shall apply equally to retired members who had attained 10 years of prior and current membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of a member is made."

Session Laws 1987, c. 617, s. 3, effective January 1, 1988, also deleted subsection (j), which, as amended by c. 617, ss. 2 and 4, read:

"(j) Notwithstanding any other provision of this Chapter, any member may, upon completion of 10 years of prior and current membership service, purchase credit for service previously rendered to any state, territory or other governmental subdivision of the United States other than this State at the rate of one year of out-of-state service for each two years of service in this State with a maximum allowable of 10 years of out-of-state service. Such service is limited to full-time service which would be allowable under the laws governing this System. Credit will be allowed only if no benefit is allowable in another public retirement system as the result of the service. Payment shall be permitted only on a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time and shall be equal to the full cost of providing credit for such service plus a fee to cover expense of handling which shall be determined by the Board of Trustees. These provisions shall apply equally to retired members who had attained 10 years of prior and current membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of an individual is made."

Session Laws 2002-71, which added subsections (t) and (u), in s. 9, provides, in part, that s. 3 of the act becomes effective January 1, 2003, except that G.S. 128-26(u), as enacted by s. 3, becomes effective the later of January 1, 2003, or the date upon which the Department of State Treasurer receives a ruling from the Internal Revenue Service approving the direct transfers provided for in that subsection. The Revisor of Statutes is informed that a favorable letter of determination has been received.

Effect of Amendments. — Session Laws 2006-29, s. 1, effective August 1, 2006, and applicable to members who return to service from an approved leave of absence on or after that date, added the last two paragraphs in subdivision (*l*)(2).

Session Laws 2007-179, s. 2(b), effective July 1, 2007, and applicable to offenses committed on or after that date, added subsection (w).

Session Laws 2007-304, s. 1, effective July 28, 2007, in subsection (q), deleted the first sentence of the third paragraph related to employer payment of pension fund, and added the fourth paragraph.

OPINIONS OF ATTORNEY GENERAL

Effect of Purchase of Service Credits. — The purchase of prior credit service for the period of July 10, 1984 and the enrollment in November, 1984 of several public safety officers would not give those officers five years' service standing to their credit as of August 12, 1989; therefore, they would not thereby have a right to receive their retirement benefits tax-free. See Opinion of Attorney General to Mr. Ralph D. Karpinos, Town Attorney, Town of Chapel Hill, 2000 N.C. AG LEXIS 12 (10/2/2000).

§ 128-26A. Reciprocity of creditable service with other State-administered retirement systems.

(a) Only for the purpose of determining eligibility for benefits accruing under this Article, creditable service standing to the credit of a member of the Legislative Retirement System, Consolidated Judicial Retirement System, or the Teachers' and State Employees' Retirement System shall be added to the creditable service standing to the credit of a member of this System; provided, that in the event a person is a retired member of any of the foregoing retirement systems, such creditable service standing to the credit of the retired member prior to retirement shall be likewise counted. In no instance shall service credits maintained in the aforementioned retirement systems be added to the creditable service in this System for application of this System's benefit accrual rate in computing a service retirement benefit unless specifically authorized by this Article.

(b) A person who was a former member of this System and who has forfeited his creditable service in this System by receiving a return of contributions and who has creditable service in the Legislative Retirement System, Consolidated Judicial Retirement System, or the Teachers' and State Employees' Retirement System may count such creditable service for the purpose of restoring the creditable service forfeited in this System under the terms and conditions as set forth in this Article and reestablish membership in this System.

(c) Creditable service under this section shall not be counted twice for the same period of time whether earned as a member, purchased, or granted as prior service credits. (1989 (Reg. Sess., 1990), c. 1066, s. 35(b).)

§ 128-27. Benefits.

(a) Service Retirement Benefits. —

(1) Any member may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 120 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 60 years and have at least five years of creditable service or shall have completed 30 years of creditable service, or if a fireman, he shall have attained the age of 55 years and have at least five years of creditable service.

(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1019, s. 1.

(3) Repealed by Session Laws 1971, c. 325, s. 12.

(4) Any member who was in service October 8, 1981, who had attained 60 years of age, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired.

(5) Any member who is a law enforcement officer, and who attains age 50 and completes 15 or more years of creditable service in this capacity or who attains age 55 and completes five or more years of creditable service in this capacity, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided, also, any member who has met the conditions required by this subdivision but does not retire, and later becomes an employee other than as a law enforcement officer, continues to have the right to commence retirement.

(a1) Early Service Retirement Benefits. — Any member may retire and receive a reduced retirement allowance upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 50 years and have at least 20 years of creditable service.

(a2) Discontinued Service Retirement Allowance. — A member whose employment with a participating employer is involuntarily terminated as a result of a termination event as defined in this subsection may be allowed a discontinued service retirement allowance, provided that the discontinued service retirement allowance is approved by the terminated member's participating employer, and provided that reemployment with that participating employer is not available to the member at the time of the termination event. For purposes of this section, "termination event" means termination of employment as a result of (i) the participating employer's cessation of operations; (ii) the participating employer's dissolution; (iii) the merger of a participating employer with and into an unrelated entity, other than another participating employer; (iv) the acquisition of the participating employer by an unrelated entity, other than another participating employer; or (v) the determination by the participating employer that a reduction in force will accomplish economies in the participating employer's budget resulting from either the elimination of a job and its responsibilities or from lack of funds to support the job. Final action approving the discontinued service retirement allowance for a terminated member by the member's participating employer shall be taken in an open meeting.

Upon the occurrence of a termination event, and subject to the provisions of this subsection, an unreduced discontinued service retirement allowance, not otherwise allowed under this Chapter, may be approved for terminated members with 20 or more years of creditable service who are at least 55 years of age. Alternatively, upon the occurrence of a termination event, a discontinued service retirement allowance, not otherwise allowed under this Chapter, may be approved for terminated members with 20 or more years of creditable service who are at least 50 years of age, reduced by one-fourth of one percent (¼ of 1%) for each month that retirement precedes the member's fifty-fifth birthday.

In cases in which a discontinued service retirement allowance is approved, the terminated member's employer shall be responsible for making a lump-sum payment to the Retirement System's Board of Trustees equal to the actuarial present value of the additional liabilities imposed upon the Retirement System, to be determined by the Retirement System's consulting actuary, as a result of the discontinued service retirement allowance, plus an administrative fee to be determined by the Board of Trustees. An employer shall not discriminate against any member or group of members employed by the employer in the approval or disapproval of a discontinued service retirement allowance.

(b) Service Retirement Allowance of Persons Retiring on or after July 1, 1959, but prior to July 1, 1965. — Upon retirement from service on or after July 1, 1959, but prior to July 1, 1965, a member shall receive a service retirement allowance which shall consist of:

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(2) A pension equal to the annuity allowable at the age of 65 years or at his retirement age, whichever is the earlier, on the basis of contributions made prior to such earlier age; and

(3) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to the annuity which would have been provided at the age of 65 years, or at the earlier age of retirement if prior thereto, by twice the contributions which he would have made during such period of service had the System been in operation and he contributed thereunder at the rate of

  a. Six and twenty-five hundredths percent (6.25%) of his compensation if such certificate is a Class A certificate, or

  b. Five percent (5%) of his compensation if such certificate is a Class B certificate, or

  c. Four percent (4%) of his compensation if such certificate is a Class C certificate.

(b1) Service Retirement Allowances of Persons Retiring on or after July 1, 1965, but prior to July 1, 1967. — Upon retirement from service on or after July 1, 1965, but prior to July 1, 1967, a member shall receive a service retirement allowance which shall consist of:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to the sum of (i) one percent (1%) of the portion of his average final compensation not in excess of forty-eight hundred dollars ($4,800), plus one and one-half percent (1½%) of the portion of such compensation in excess of forty-eight hundred dollars ($4,800) multiplied by the number of years of his creditable service rendered prior to January 1, 1966, and (ii) one percent (1%) of the portion of his average final compensation not in excess of forty-eight hundred dollars ($4,800), plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service rendered after January 1, 1966.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday, his service retirement allowance shall be computed as in (1) above but shall be reduced by five twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(b).

(b2) Service Retirement Allowances of Persons Retiring on or after July 1, 1967, but prior to July 1, 1969. — Upon retirement from service on or after July 1, 1967, but prior to July 1, 1969, a member shall receive a service retirement allowance which shall consist of:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of five thousand six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of five thousand six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs before his sixty-fifth birthday, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provision, any member whose creditable service commenced prior to July 1, 1965, and policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b3) Service Retirement Allowances of Persons Retiring on or after July 1, 1969, but prior to July 1, 1973. — Upon retirement from service on or after July 1, 1969, but prior to July 1, 1973, a member shall receive a service retirement allowance which shall consist of:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or on or after his sixty-second birthday and the completion of 30 years of creditable service, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3a) If the member's service retirement date occurs before his sixty-second birthday but on or after his sixtieth birthday and on or after completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-second birthday.

(3b) If the member's service retirement date occurs before his sixtieth birthday but on or after completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (3a) above.

(4) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b4) Service Retirement Allowances of Members Retiring on or after July 1, 1973, but prior to July 1, 1976. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1973, but prior to July 1, 1976, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b5) Service Retirement Allowances of Members Retiring on or after July 1, 1976, but prior to July 1, 1978. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1976, but prior to July 1, 1978, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-half percent (1½%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b6) Service Retirement Allowance of Members Retiring on or after July 1, 1978, but prior to July 1, 1983. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1978, but prior to July 1, 1983, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (1/4 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b7) Service Retirement Allowances of Members Retiring on or after July 1, 1983, but prior to July 1, 1985. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1983, but prior to July 1, 1985, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the

completion of 30 years of creditable service, such allowance shall be equal to one and fifty-seven one-hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (1/4 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b8) Service Retirement Allowance of Law Enforcement Officers Retiring on or after January 1, 1986, but before July 1, 1988. — Upon retirement from service, in accordance with subsection (a) above, on or after January 1, 1986, but before July 1, 1988, a member who is a law enforcement officer or an eligible former law enforcement officer shall receive the following service retirement allowance:

(1) If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and fifty-eight one hundredths percent (1.58%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs after his 50th and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to his completion of 30 years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one-third of one percent (⅓ of 1%) for each month by which his retirement date precedes the first day of the month coincident with or next following his 55th birthday.

(b9) Service Retirement Allowance of Members Retiring on or after July 1, 1985, but before July 1, 1988. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1985, but before July 1, 1988, a member shall receive the following service retirement allowance:

(1) If the member's service retirement date occurs on or after his 65th birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-eight one hundredths percent (1.58%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) Such allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a), (2b), and (3).

(b10) Service Retirement Allowance of Members Retiring on or after July 1, 1988, but before July 1, 1989. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1988, but before July 1, 1989, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty hundredths percent (1.60%) of his average final compensation, multiplied by the number of years of his creditable service.
  b. Such allowance shall also be governed by the provisions of G.S. 128-27(b8)(2).

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service, or on or after his 60th birthday upon the completion of 25 years of creditable service, such allowance shall be equal to one and sixty-hundredths percent (1.60%) of his average final compensation, multiplied by the number of years of his creditable service.
  b. Such allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a), (2b) and (3).

(b11) Service Retirement Allowance of Members Retiring on or after July 1, 1989, but before July 1, 1990. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1989, but before July 1, 1990, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty-three hundredths percent (1.63%) of his average final compensation, multiplied by the number of years of his creditable service.
  b. This allowance shall also be governed by the provisions of G.S. 128-27(b8)(2).

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and sixty-three hundredths percent (1.63%) of his average final compensation, multiplied by the number of years of creditable service.
  b. This allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a) and (3).

(b12) Service Retirement Allowance of Members Retiring on or after July 1, 1990, but before July 1, 1992. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1990, but before July 1, 1992, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty-four hundredths percent (1.64%) of his average final compensation, multiplied by the number of years of his creditable service.
b. This allowance shall also be governed by the provisions of G.S. 128-27(b8)(2).

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and sixty-four hundredths percent (1.64%) of his average final compensation, multiplied by the number of years of creditable service.
b. This allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a) and (3).

(b13) Service Retirement Allowance of Members Retiring on or after July 1, 1992, but before July 1, 1994. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1992, but before July 1, 1994, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy hundredths percent (1.70%) of his average final compensation, multiplied by the number of years of his creditable service.
b. This allowance shall also be governed by the provisions of G.S. 128-27(b8)(2).

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy hundredths percent (1.70%) of his average final compensation, multiplied by the number of years of creditable service.
b. This allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a), (2b), and (3).

(b14) Service Retirement Allowance of Members Retiring on or after July 1, 1994, but before July 1, 1995. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1994, but before July 1, 1995, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a

law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-one hundredths percent (1.71%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 128-27(b8)(2).

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-one hundredths percent (1.71%) of his average final compensation, multiplied by the number of years of creditable service.

b. This allowance shall also be governed by the provisions of G.S. 128-27(b7)(2a), (2b), and (3).

(b15) Service Retirement Allowance of Members Retiring on or after July 1, 1995 but before July 1, 1997. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1995, but before July 1, 1997, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-two hundredths percent (1.72%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b15)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b15)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-two hundredths percent (1.72%) of his average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b15)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b15)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b15)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or

3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b15)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b16) Service Retirement Allowance of Member Retiring on or after July 1, 1997, but before July 1, 1998. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1997, but before July 1, 1998, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-six hundredths percent (1.76%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b16)(1)a., reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes

the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b16)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-six hundredths percent (1.76%) of average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b16)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b16)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b16)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or

3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b16)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b17) Service Retirement Allowance of Member Retiring on or After July 1, 1998, but before July 1, 2000. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1998, but before July 1, 2000, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-seven hundredths percent (1.77%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b17)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b17)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-seven hundredths percent (1.77%) of average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b17)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b17)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b17)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or

3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b17)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b18) Service Retirement Allowance of Member Retiring on or After July 1, 2000, but Before July 1, 2001. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2000, but before July 1, 2001, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-eight hundredths percent (1.78%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b18)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday;

2. The service retirement allowance as computed under G.S. 128-27(b18)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-eight hundredths percent (1.78%) of average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b18) (2) a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b18)(2)a. but reduced by the sum of five-twelfths of one percent (5/12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or
2. The service retirement allowance as computed under G.S. 128-27(b18)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b18)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b19) Service Retirement Allowance of Member Retiring on or After July 1, 2001, But Before July 1, 2002. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2001, but before July 1, 2002, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty-one hundredths percent (1.81%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b19)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday;
2. The service retirement allowance as computed under G.S. 128-27(b19)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty-one hundredths percent (1.81%) of average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b19)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b19)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b19)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or

3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b19)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b20) Service Retirement Allowance of Member Retiring on or After July 1, 2002, but Before July 1, 2003. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2002, but before July 1, 2003, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty-two hundredths percent (1.82%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 128-27(b20)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday;
2. The service retirement allowance as computed under G.S. 128-27(b20)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty-two hundredths percent (1.82%) of average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b20)(2) a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 128-27(b20)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or
2. The service retirement allowance as computed under G.S. 128-27(b20)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b20)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(b21) Service Retirement Allowance of Member Retiring on or After July 1, 2003. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2003, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
   a. If the member's service retirement date occurs on or after his 55th birthday and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty-five hundredths percent (1.85%) of his average final compensation, multiplied by the number of years of his creditable service.
   b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:
      1. The service retirement allowance payable under G.S. 128-27(b21)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday;
      2. The service retirement allowance as computed under G.S. 128-27(b21)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
   a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty-five hundredths percent (1.85%) of average final compensation, multiplied by the number of years of creditable service.
   b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 128-27(b21)(2) a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.
   c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:
      1. The service retirement allowance as computed under G.S. 128-27(b21)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 128-27(b21)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1995, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 128-27(b21)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, shall not receive less than the benefit provided by G.S. 128-27(b).

(c) Disability Retirement Benefits. — Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than one day nor more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired; Provided further the medical board shall determine if the member is able to engage in gainful employment and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced as in subsection (e) below. Provided further, that the Medical Board shall not certify any member as disabled who:

(1) Applies for disability retirement based upon a mental or physical incapacity which existed when the member first established membership in the system; or
(2) Is in receipt of any payments on account of the same disability which existed when the member first established membership in the system.

The Board of Trustees shall require each employee upon enrolling in the retirement system to provide information on the membership application concerning any mental or physical incapacities existing at the time the member enrolls.

Notwithstanding the requirement of five or more years of creditable service to the contrary, a member who is a law enforcement officer or a fireman as defined in G.S. 58-86-25 or rescue squad worker as defined in G.S. 58-86-30 and who has had one year or more of creditable service and becomes incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty, and meets all other requirements for disability retirement benefits, may be retired by the Board of Trustees on a disability retirement allowance.

Notwithstanding the foregoing to the contrary, any beneficiary who commenced retirement with an early or service retirement benefit has the right, within three years of his retirement, to convert to an allowance with disability retirement benefits without modification of any election of optional allowance previously made; provided, the beneficiary would have met all applicable requirements for disability retirement benefits while still in service as a member. The allowance on account of disability retirement benefits to the beneficiary shall be retroactive to the effective date of early or service retirement.

Notwithstanding the foregoing, effective April 1, 1991, the surviving designated beneficiary of a deceased member who met all other requirements for disability retirement benefits, except whose death occurred before the first day of the calendar month in which the member's disability retirement allowance was to be due and payable, may elect to receive the reduced retirement allowance provided by a one hundred percent (100%) joint and survivor payment option in lieu of a return of accumulated contributions, provided the following conditions apply:

(1) The member had designated as the principal beneficiary, to receive a return of accumulated contributions at the time of his death, one and only one person, and

(2) The member had not instructed the Board of Trustees in writing that he did not wish the provision of this subsection to apply.

(d) Allowance on Disability Retirement of Persons Retiring prior to July 1, 1965. — Upon retirement for disability, in accordance with subsection (c) above, prior to July 1, 1965, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall consist of:

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of the retirement;

(2) A pension equal to seventy-five percent (75%) of the pension that would have been payable upon service retirement at the age of 65 years had the member continued in service to the age of 65 years without further change in compensation.

Supplemental disability benefits heretofore provided are hereby made a permanent part of disability benefits after age 65, and shall not be discontinued at age 65.

(d1) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1965, but prior to July 1, 1969. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1965, but prior to July 1, 1969, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation, to the age of 60 years, minus the actuarial equivalent of the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(d).

(d2) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1969, but prior to July 1, 1971. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1969, but prior to July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation to the age of 65 years, minus the actuarial equivalent of the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(d).

(d3) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971, but prior to July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1971, but prior to July 1, 1982, a member shall receive a service retirement allowance if he has attained the age of 65 years; otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

  a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 128-27(d2);

  b. The amount of disability allowance payable from the reserve funds of the Retirement System to any member retiring on or after July 1, 1974, who is eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements; and

  c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements.

(d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

(e) Reexamination of Beneficiaries Retired on Account of Disability. — Once each year during the first five years following retirement of a member on a disability allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon, by the physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained the age of 60 years refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year, all his rights in and to his pension may be revoked by the Board of Trustees.

(1) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the

disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. This difference shall be increased on January 1 each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent (1⁄10 of 1%). Should the earning capacity of the disability beneficiary later change, the portion of his disability retirement allowance not provided by his contributions may be further modified. In lieu of the reductions on account of a disability beneficiary earning more than the aforesaid difference, he may elect to convert his disability retirement allowance to a service retirement allowance calculated on the basis of his average final compensation and creditable service at the time of disability retirement and his age at the time of conversion to service retirement. This election is irrevocable.

The provisions of this subdivision shall not apply to beneficiaries of the Law Enforcement Officers' Retirement System transferred to this Retirement System who commenced retirement on and before July 1, 1981.

(2) Should a disability beneficiary under the age of 62 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the contribution rate which is applicable during his subsequent membership service. Any prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and in addition, upon his subsequent retirement he shall be credited with all his service as a member, but should he be restored to active service on or after the attainment of the age of 50 years his pension upon subsequent retirement shall not exceed the sum of the pension which he was receiving immediately prior to his last restoration after June 30, 1951, and the pension that he would have received on account of his service since such last restoration had he entered service at that time as a new entrant.

(3) Notwithstanding the foregoing, a member retired on a disability retirement allowance who is restored to service and subsequently retires on or after July 1, 1971, shall be entitled to an allowance not less than the allowance prescribed in a below reduced by the amount in b below.

a. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service.

b. The actuarial equivalent of the retirement benefits he previously received.

(3a) Notwithstanding the foregoing, should a beneficiary who retired on a disability retirement allowance be restored to service as an employee, then the retirement allowance shall cease as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members. Upon the subsequent retirement of the beneficiary, he shall be entitled to an allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service. Provided, however, any election of an optional allowance cannot be changed unless the member subsequently completes three years of membership service after being restored to service.

(4) As a condition to the receipt of the disability retirement allowance provided for in G.S. 128-27(d), (d1), (d2) and (d3) each member retired on a disability retirement allowance shall, on or before April 15 of each calendar year, provide the Board of Trustees with a statement of his or her income received as compensation for services, including fees, commissions or similar items, and income received from business, for the previous calendar year. Such statement shall be filed on a form as required by the Board of Trustees. The benefit payable to a beneficiary who does not or refuses to provide the information requested within 60 days after such request shall not be paid a benefit until the information so requested is provided, and should such refusal or failure to provide such information continue for 240 days after such request, the right of a beneficiary to a benefit under the Article may be terminated.

The Director of the State Retirement Systems shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subdivision and may enter into agreements for the exchange of information.

(5) Notwithstanding any other provisions of this Article to the contrary, a beneficiary who was a beneficiary retired on a disability retirement with the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by a participating employer and beneficiaries last employed by a participating employer to this Retirement System and who also was a contributing member of this Retirement System at that time, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership. Any beneficiary who retired on a disability retirement allowance as an employee of any participating employer under the Law Enforcement Officers' Retirement System and becomes employed as an employee other than as a law enforcement officer by an employer participating in the Retirement System after the aforementioned transfer shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership until January 1, 1989, at which time his retirement allowance shall cease and his subsequent retirement shall be determined in accordance with the preceding subdivision (3a) of this section. Any beneficiary as hereinbefore described who becomes employed as a law enforcement officer by an employer participating in the Retirement System shall cease to be a beneficiary and shall immediately commence membership and his subsequent retirement shall be determined in accordance with subdivision (3a) of this section.

(6) Notwithstanding any other provision to the contrary, a beneficiary in receipt of a disability retirement allowance until the earliest date on which he would have qualified for an unreduced service retirement allowance shall thereafter (i) not be subject to further reexaminations

as to disability, (ii) not be subject to any reduction in allowance on account of being engaged in a gainful occupation other than with an employer participating in the Retirement System, and (iii) be considered a beneficiary in receipt of a service retirement allowance. Provided, however, a beneficiary in receipt of a disability retirement allowance whose allowance is reduced on account of reexamination as to disability or to ability to engage in a gainful occupation prior to the date on which he would have qualified for an unreduced service retirement allowance shall have only the right to elect to convert to an early or service retirement allowance as permitted under subdivision (1) above.

(f) Return of Accumulated Contributions. — Should a member cease to be an employee except by death or retirement under the provisions of this Chapter, he shall upon submission of an application be paid, not earlier than 60 days from the date of termination of service, his contributions and, if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service. Upon payment of such sum his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered except as provided in G.S. 128-26; and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder. Upon receipt of proof satisfactory to the Board of Trustees of the death, prior to retirement, of a member or former member there shall be paid to such person or persons as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the member's death, otherwise to the member's legal representatives, the amount of his accumulated contributions at the time of his death, unless the beneficiary elects to receive the alternate benefit under the provisions of (m) below. An extension service employee who made contributions to the Local Governmental Employees' Retirement System and the Teachers' and State Employees' Retirement System as a result of dual employment may not be paid his accumulated contributions unless he is eligible to be paid his accumulated contributions in both systems for the same period of service.

Pursuant to the provisions of G.S. 135-56.2, a member who is also a member of the Consolidated Judicial Retirement System may irrevocably elect to transfer any accumulated contributions to the Consolidated Judicial Retirement System or to the Supplemental Retirement Income Plan and forfeit any rights in or to any benefits otherwise payable hereunder.

(f1) Notwithstanding the foregoing provisions, upon or after retirement any member who was a uniformed fireman and any surviving beneficiary of a member who was a uniformed fireman, shall upon submission of an application, be paid the sum of accumulated contributions, with regular interest thereon, made under those provisions of G.S. 128-30(b)(1) that applied from July 1, 1965, through June 30, 1971, to the extent of the contributions required of the member that were in excess of the contributions required of other members of the Local Governmental Employees' Retirement System covered under the Social Security Act as was from time to time in effect; provided that, the return of contributions shall be payable only if the contributions did not increase the retirement allowance of the member or surviving beneficiary under the provisions of this Chapter.

(f2) Expired.

(g) Election of Optional Allowance. — With the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance, including any special retirement allowance, in a reduced allowance payable throughout life under the provisions of one of the Options set forth below. The election of Option two or Option three or nomination of the person thereunder shall be revoked if such person nominated dies prior to the date the first payment becomes normally due or the first retirement check has been cashed. Such election may be revoked by the member prior to the date the first payment becomes normally due or his first retirement check has been cashed. Provided, however, in the event a member has elected Option 2 or Option 3 and nominated his or her spouse to receive a retirement allowance upon the member's death, and the spouse predeceases the member after the first payment becomes normally due or the first retirement check has been cashed, if the member remarries he or she may request to nominate a new spouse to receive the retirement allowance under the previously elected option, within 90 days of the remarriage, and may nominate a new spouse to receive the retirement allowance under the previously elected option by written designation duly acknowledged and filed with the Board of Trustees within 120 days of the remarriage. The new nomination shall be effective on the first day of the month in which it is made and shall provide for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new nomination. Any member having elected Options two, three, or six and nominated his or her spouse to receive a retirement allowance upon the member's death may, after divorce from his or her spouse, revoke the nomination and elect a new option, effective on the first day of the month in which the new option is elected, providing for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new option.

Option one.

(a) In the Case of a Member Who Retires prior to July 1, 1965. — If he dies before he has received in annuity payments the present value of his annuity as it was at the time of his retirement, the balance shall be paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees or, if none, to his legal representative.

(b) In the Case of a Member Who Retires on or after July 1, 1965, but prior to July 1, 1993. — If he dies within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less one one-hundred-twentieth thereof for each month for which he has received a retirement allowance payment, shall be paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees or, if none, to his legal representative; or

Option two. Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement, provided that if the person selected is other than his spouse the reduced retirement allowance payable to the member shall not be less than one half of the retirement allowance without optional modification which would otherwise be payable to him; or

Option three. Upon his death, one half of his reduced retirement allowance shall be continued throughout the life of, and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement; or

Option four. Adjustment of Retirement Allowance for Social Security Benefits. — Until the first payment on account of any benefit becomes normally due, any member may elect to convert his benefit otherwise payable on his account after retirement into a retirement allowance of equivalent actuarial value of such amount that with his benefit under Table II of the Federal Social Security Act, he will receive, so far as possible, approximately the same amount per year before and after the earliest age at which he becomes eligible, upon application therefor, to receive a social security benefit.

Option five. For Members Retiring prior to July 1, 1993. — The member may elect to receive a reduced retirement allowance under the conditions of Option two or Option three, as provided for above, with the modification that if both he and the person nominated die within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120th thereof for each month for which a retirement allowance has been paid, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees.

Option six. A member may elect either Option two or Option three with the added provision that in the event the designated beneficiary predeceases the member, the retirement allowance payable to the member after the designated beneficiary's death shall be equal to the retirement allowance which would have been payable had the member not elected the option.

(g1) In the event of the death of a retired member while in receipt of a retirement allowance under the provisions of this Article, there shall be paid to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the retiree's death, otherwise to the retiree's legal representatives, a death benefit equal to the excess, if any, of the accumulated contributions of the retiree at the date of retirement over the total of the retirement allowances paid prior to the death of the retiree. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event that a retirement allowance becomes payable to the designated survivor of a retired member under the provisions above and such retirement allowance to the survivor shall terminate upon the death of the survivor before the total of the retirement allowances paid to the retiree and the designated survivor combined equals the amount of the accumulated contributions of the retiree at the date of retirement, the excess, if any, of such accumulated contributions over the total of the retirement allowances paid to the retiree and the survivor combined shall be paid in a lump sum to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time such payment falls due, otherwise to the retiree's legal representative. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event that a retirement allowance becomes payable to the principal beneficiary designated to receive a return of accumulated contributions pursuant to subsection (m) of this section and that beneficiary dies before the total of the retirement allowances paid equals the amount of the accumulated contributions of the member at the date of the member's death, the excess of those accumulated contributions over the total of the retirement allowances paid to the beneficiary shall be paid in a lump sum to the person or persons the member has designated as the contingent beneficiary for return of accumulated contributions, if the person or persons are living at the time the payment falls due, otherwise to the principal beneficiary's legal representative. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event a retiree purchases creditable service as provided in G.S. 128-26, there shall be paid to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the retiree's death, otherwise to the retiree's legal representatives, an additional death benefit equal to the excess, if any, of the cost of the creditable service purchased less the administrative fee, if any, over the total of the increase in the retirement allowance attributable to the additional creditable service, paid from the month following the month in which payment was received to the death of the retiree.

In the event that a retirement allowance becomes payable to the designated survivor of a retired member under the provisions above, and such retirement allowance to the survivor shall terminate upon the death of the survivor before the total of the increase in the retirement allowance attributable to the additional creditable service paid to the retiree and the designated survivor combined equals the cost of the creditable service purchased less the administrative fee, the excess, if any, shall be paid in a lump sum to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time such payment falls due, otherwise to the retiree's legal representative.

(h) Until June 30, 1951, all benefits payable to or on account of any beneficiary retired before such date shall be computed on the basis of the provisions of Chapter 128 as they existed at the date of establishment of the Retirement System. On and after July 1, 1951, all such benefits shall be adjusted to take into account, under such rules as the Board of Trustees may adopt, the provisions of Chapter 128 and all amendments thereto in effect on July 1, 1951, and no further contributions on account of such adjustments shall be required of such beneficiaries. The Board of Trustees may authorize such transfers of reserves between the funds of the Retirement System as may be required on account of such adjustments.

(i) No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

(j) Increase in Benefits to Those Persons Who Were in Receipt of Benefits prior to July 1, 1967. — From and after July 1, 1967, the monthly benefits, to or on account of persons who commenced receiving benefits from the System prior to July 1, 1967, shall be increased by a percentage thereof. Such percentage shall be determined in accordance with the following schedule:

Period in Which Benefits Commenced	Percentage
January 1, 1966, to June 30, 1967	5%
Year 1965	6%
Year 1964	7%
Year 1963	8%
Year 1962	9%
Year 1961	10%
Year 1960	11%

Period in Which Benefits Commenced	Percentage
Year 1959	12%
Year 1958	13%
Year 1957	14%
Year 1956	15%
Year 1955	16%
Year 1954	17%
Year 1953	18%
Year 1952	19%
Year 1951	20%
Year 1950	21%
Year 1949	22%
Year 1948	23%
Year 1947	24%
Year 1946	25%

The minimum increase pursuant to this subsection (j) shall be five dollars ($5.00) per month; provided that, if an optional benefit has been elected, said minimum shall be reduced actuarially as determined by the Board and shall be applicable to a retired member, if surviving, otherwise to his designated beneficiary under the option elected.

(k) Post-Retirement Increases in Allowances. — As of December 31, 1969, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase that equals or exceeds three per centum (3%), each beneficiary receiving a retirement allowance as of December 31, 1968, shall be entitled to have his allowance increased three per centum (3%) effective July 1, 1970.

As of December 31, 1970, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase of at least one per centum (1%), each beneficiary on the retirement rolls as of July 1, 1970, shall be entitled to have his allowance increased effective July 1, 1971, as follows:

Increase In Index	*Increase In Allowance*
1.00 to 1.49%	1%
1.50 to 2.49%	2%
2.50 to 3.49%	3%
3.50% or more	4%

As of December 31, 1971, an increase in retirement allowances shall be calculated and made effective July 1, 1972, in the manner described in the preceding paragraph. As of December 31 of each year after 1971, the ratio (R) of the Consumer Price Index to such index one year earlier shall be determined, and each beneficiary on the retirement rolls as of July 1 of the year of determination shall be entitled to have his allowance increased effective on July 1 of the year following the year of determination by the same percentage of increase indicated by the ratio (R) calculated to the nearest tenth of one per centum (1/10 of 1%), but not more than four per centum (4%); provided that any such increase in allowances shall be contingent upon the total fund providing sufficient investment gains to cover the additional actuarial liabilities on account of such increase.

The allowance of a surviving annuitant of a beneficiary whose allowance is increased under this subsection shall, when and if payable, be increased by the same per centum.

Any increase in allowance granted hereunder shall be permanent, irrespective of any subsequent decrease in the Consumer Price Index, and shall be included in determining any subsequent increase.

For purposes of this subsection, Consumer Price Index shall mean the Consumer Price Index (all items — United States city average), as published by the United States Department of Labor, Bureau of Labor Statistics.

(*l*) Death Benefit Plan. — The provisions of this subsection shall become effective for any employer only after an agreement to that effect has been executed by the employer and the Director of the Retirement System. There is hereby created a Group Life Insurance Plan (hereinafter called the "Plan") which is established as an employee welfare benefit plan that is separate and apart from the Retirement System and under which the members of the Retirement System shall participate and be eligible for group life insurance benefits. Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death, in service, of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

(1) The compensation on which contributions were made by the member during the calendar year preceding the year in which his death occurs, or

(2) The greatest compensation on which contributions were made by the member during a 12-month period of service within the 24-month period of service ending on the last day of the month preceding the month in which his last day of actual service occurs;

(3) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1049, s. 2; subject to a minimum of twenty-five thousand dollars ($25,000) and a maximum of fifty thousand dollars ($50,000). Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions under the System on his death pursuant to the provisions of subsection (f) of this section. For the purpose of the Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

The death benefit provided in this subsection shall not be payable, notwithstanding the member's compliance with all the conditions set forth in the preceding paragraph, if his death occurs

(1) After June 30, 1969 and after he has attained age 70; or
(2) After December 31, 1969 and after he has attained age 69; or
(3) After December 31, 1970 and after he has attained age 68; or
(4) After December 31, 1971 and after he has attained age 67; or
(5) After December 31, 1972 and after he has attained age 66; or
(6) After December 31, 1973 and after he has attained age 65; or
(7) After December 31, 1978, but before January 1, 1987, and after he has attained age 70.

Notwithstanding the above provisions, the death benefit shall be payable on account of the death of any member who died or dies on or after January 1, 1974, but before January 1, 1979, after attaining age 65, if he or she had not yet attained age 65, if he or she had not yet attained age 66, was at the time of death completing the work year for those individuals under specific contract, or during the fiscal year for those individuals not under specific contract, in which he or she attained age 65, and otherwise met all conditions for payment of the death benefit.

Notwithstanding the above provisions, the Board of Trustees may and is specifically authorized to provide the death benefit according to the terms and conditions otherwise appearing in this Plan in the form of group life insurance, either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate trust fund qualified under section 501(c)(9) of the Internal Revenue Code of 1954, as amended, for such purpose. To that end the Board of Trustees is authorized, empowered and directed to investigate the desirability of utilizing group life insurance by either of the foregoing methods for the purpose of providing the death benefit. If a separate trust fund is established, it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the trust fund shall be credited to such fund.

In administration of the death benefit the following shall apply:

(1) For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months. For all other purposes in this subsection "calendar year" shall mean the 12 months beginning January 1 and ending December 31.

(2) Last day of actual service shall be:

a. When employment has been terminated, the last day the member actually worked.

b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire.

(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 128-26(g).

(4) A member on leave of absence from his position as a local governmental employee for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service during sessions of the General Assembly and thereby covered by the provisions of the death benefit, if applicable. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a local governmental employee during the 12-month period immediately prior to the month in which death occurred, not to be less than twenty-five thousand dollars ($25,000) nor to exceed fifty thousand dollars ($50,000).

The provisions of the Retirement System pertaining to administration, G.S. 128-28, and management of funds, G.S. 128-29, are hereby made applicable to the Plan.

(*l*1) Death Benefit Plan for Law Enforcement Officers. — Under all requirements and conditions as otherwise provided for in subsection (*l*), except for the requirement that the provisions are effective only after an agreement has been executed by the employer and the Director of the Retirement System, all law enforcement officers who are members of the Retirement System shall participate and be eligible for group life insurance benefits under the Plan, and employers shall fund the cost of these benefits.

(*l*2) Death Benefit for Retired Members. — Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 1988, but before January 1, 1999, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of five thousand dollars ($5,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(*l*3) Death Benefit for Retired Members. — Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after January 1, 1999, but before July 1, 2004, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump sum payment in the amount of six thousand dollars ($6,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(*l*4) Death Benefit for Retired Members. — Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 2004, but before July 1, 2007, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of nine thousand dollars ($9,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 2007, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of ten thousand dollars ($10,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(m) Survivor's Alternate Benefit. — Upon the death of a member in service, the principal beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the reduced retirement allowance provided by Option two of subsection (g) above computed by assuming that the member had retired on the first day of the month following the date of his death, provided that all three of the following conditions apply:

(1)a. The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance, or

b. The member had obtained 20 years of creditable service in which case the retirement allowance shall be computed in accordance with G.S. 128-27(b21)(1)b. or G.S. 128-27(b21)(2)c., notwithstanding the requirement of obtaining age 50, or

c. The member had not commenced to receive a retirement allowance as provided under this Chapter.

(2) The member had designated as the principal beneficiary to receive a return of his accumulated contributions one and only one person who is living at the time of his death.

(3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection apply.

For the purpose of this benefit, a member is considered to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service. The last day of actual service shall be determined as provided in subsection (*l*) of this section. Upon the death of a member in service, the surviving spouse may make all purchases for creditable service as provided for under this Chapter for which the member had made application in writing prior to the date of death, provided that the date of death occurred prior to or within 60 days after notification of the cost to make the purchase.

(m1) Special Retirement Allowance for Law Enforcement Officers - Upon retirement, a member who is a law enforcement officer may elect to transfer his eligible accumulated contributions, not including any Roth after-tax contributions and the earnings thereon, from the Supplemental Retirement Income Plan of North Carolina to this Retirement System and receive, in addition to his basic service, early or disability retirement allowance, a special retirement allowance which shall be based upon his eligible accumulated account balance at the date of the transfer of the assets to this System. For the purpose of determining the special retirement allowance, the Board of Trustees shall adopt straight life annuity factors on the basis of mortality tables, such other tables as may be necessary and the interest assumption rate recommended by the actuary based upon actual experience including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees shall modify such factors every five years, as shall be deemed necessary, based upon the five year experience study as required by G.S. 128-29(o). Provided, however, a member who transfers his eligible accumulated contributions from the Supplemental Retirement Income Plan of North Carolina shall be taxed for North Carolina State Income tax purposes on the special retirement allowance the same as if that special retirement allowance had been paid directly by the Supplemental Retirement Income Plan of North Carolina. The Local Governmental Employees' Retirement System shall be responsible to determine the taxable amount, if any, and report accordingly.

(n) Increases in Benefits Paid in Respect to Members Retired prior to July 1, 1967. — From and after July 1, 1971, the monthly benefits to or on account of persons who commenced receiving benefits prior to July 1, 1965, shall be increased by twenty percent (20%) thereof; the monthly benefits to or on account of persons who commenced receiving benefits after June 30, 1965 and before July 1, 1967, shall be increased by five percent (5%) thereof. These increases shall be calculated after monthly retirement allowances as of July 1, 1971 have been increased to the extent provided for in subsection (k) above.

(o) Increases in Benefits to Those Persons Who Were Retired prior to January 1, 1969. — From and after July 1, 1973, the monthly benefits to or on account of persons who commenced receiving benefits from the System prior to January 1, 1969, shall be increased by a percentage thereof. Such percentage shall be determined in accordance with the following schedule:

Year(s) in Which Benefits Commenced	*Percentage*
1959 through 1968	10
1946 through 1958	25

These increases shall be calculated after monthly retirement allowances as of July 1, 1973, have been increased to the extent provided for in the preceding subsection (k).

(p) Increases in Benefits to Those Persons on Disability Retirement Who Were Retired prior to July 1, 1971. — From and after July 1, 1974, the monthly benefits to members who commenced receiving disability benefits prior to July 1, 1965, shall be increased by one percent (1%) thereof for each year by which the member retired prior to the age of 65 years; the monthly benefits to members who commenced receiving disability benefits after June 30, 1965, and before July 1, 1971, shall be increased by five percent (5%) thereof. These increases shall be calculated before monthly retirement allowances as of June 30, 1974, have been increased to the extent provided for in the preceding subsection (k).

(q) Notwithstanding any of the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1973, which shall become effective on July 1, 1974, as otherwise provided in G.S. 128-27(k), shall be the current maximum four percent (4%) plus an additional two percent (2%) to a total of six percent (6%) for the year 1974 only. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(r) Notwithstanding any of the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1974, which shall become payable on July 1, 1975, and to each beneficiary on the retirement rolls as of July 1, 1975, which shall become payable on July 1, 1976, as otherwise provided in G.S. 128-27(k), shall be the current maximum four percent (4%) plus an additional four percent (4%) to a total of eight percent (8%) for the years 1975 and 1976 only, provided that the increases do not exceed the actual percentage increase in the Consumer Price Index as determined in G.S. 128-27(k). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(s) Notwithstanding any other provision of this section, the increase in the allowance to each beneficiary on the retirement rolls as otherwise provided in G.S. 128-27(k) shall be the current maximum of four per centum (4%) plus an additional four per centum (4%) to a total of eight per centum (8%) on July 1, 1975, and July 1, 1976, provided the increases do not exceed the actual percentage increase in the cost of living as determined in G.S. 128-27(k). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. The cost of these increases shall be borne from the funds of the Retirement System.

(t) Increases in Benefits to Those Persons on Disability Retirement Who Were Retired prior to July 1, 1971. — From and after July 1, 1975, the monthly benefits to members who commenced receiving disability benefits prior to July 1, 1965, shall be increased one percent (1%) thereof for each year by which the member retired prior to age 65 years; the monthly benefits to members who commenced receiving disability benefits after June 30, 1965, and before July 1, 1971, shall be increased by five percent (5%) thereof. These increases shall be calculated before monthly retirement allowances as of June 30, 1975, have been increased to the extent provided in the preceding provisions of this Chapter.

(u) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1977, which shall become payable on July 1, 1978, as otherwise provided in G.S. 128-27(k), shall be the current maximum four percent (4%) plus an additional two and one-half percent (2 ½%) for the year beginning July 1, 1978. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(v) Increases in Allowances Paid Beneficiaries Retired prior to July 1, 1976. — From and after July 1, 1978, the monthly allowances paid to or on account of beneficiaries who commenced receiving such allowances prior to July 1, 1976, shall be increased by seven percent (7%) thereof. This increase shall be calculated before monthly allowances, as of July 1, 1978, have been increased to the extent provided for in the preceding subsections (k) and (u). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(w) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1978, which shall become payable on July 1, 1979, as otherwise provided in G.S. 128-27(k), shall be five percent (5%) for the year beginning July 1, 1979. Provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(x) Increases in Benefits to Those Persons Who Were Retired prior to July 1, 1978. — From and after July 1, 1980, the monthly benefits to or on account of persons who commenced receiving benefits from the system prior to July 1, 1978, shall be increased by a percentage in accordance with the following schedule:

Period in Which Benefits Commenced	*Percentage*
On or before June 30, 1959	10%
July 1, 1959, to June 30, 1968	7%
July 1, 1968, to June 30, 1978	2%

This increase shall be calculated independent of any other post-retirement increase, without compounding, otherwise payable from and after July 1, 1980.

(y) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1980, which shall become payable on January 1, 1982, as otherwise provided in G.S. 128-27(h), shall be the percentage available therefrom plus an additional six and six-tenths percent (6.6%); provided that in no case shall the increase exceed a total of seven percent (7%). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of the beneficiary.

(z) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary as of July 1, 1983, which shall become payable on July 1, 1984, shall be three and eight-tenths percent (3.8%) as provided in G.S. 128-27(k) plus an additional four and two-tenths percent (4.2%) to a total of eight percent

(8%). The provision of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. The cost of these increases shall be borne from the funds of the Retirement System.

(z1) Notwithstanding the foregoing provisions, from and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1984, shall be increased by four percent (4%) of the allowance payable on July 1, 1984, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1984, but before June 30, 1985, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1984, and June 30, 1985.

(aa) From and after July 1, 1985, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1985, shall be increased by six-tenths percent (0.6%) of the allowance payable on June 1, 1985. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1985, so as not to be compounded on any other increases payable on allowances in effect on June 30, 1985.

(bb) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985, and June 30, 1986.

(cc) From and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1986, shall be increased by four percent (4.0%) of the allowance payable on July 1, 1986, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1986, but before June 30, 1987, shall be increased by a prorated amount of four percent (4.0%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1986, and June 30, 1987.

(dd) From and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1987, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on July 1, 1987, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1987, but before June 30, 1988, shall be increased by a prorated amount of three and six-tenths percent (3.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1987, and June 30, 1988.

(ee) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1988. — From and after July 1, 1988, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1988, shall be increased by one and two-tenths percent (1.2%) of the allowance payable on June 1, 1988. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1988, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1987 Session of the General Assembly.

(ff) From and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1988, shall be increased by three and one-half percent (3.5%) of the allowance payable on July 1, 1988, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1988, but before June 30, 1989, shall be increased by a prorated amount of three and one-half percent (3.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1988, and June 30, 1989.

(gg) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1989. — From and after July 1, 1989, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1989, shall be increased by one and nine-tenths percent (1.9%) of the allowance payable on June 1, 1989. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1989, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1989 Session of the General Assembly.

(hh) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1990. — From and after July 1, 1990, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1990, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 1990. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1990, so as not to be compounded on any other increase granted by act of the 1989 Session of the General Assembly (1990 Regular Session).

(ii) From and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1989, shall be increased by six and one-tenth percent (6.1%) of the allowance payable on July 1, 1989, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1989, but before June 30, 1990, shall be increased by a prorated amount of six and one-tenth percent (6.1%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1989, and June 30, 1990.

(jj) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1992. — From and after July 1, 1992, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1992, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on June 1, 1992. This allowance shall be calculated on the allowance payable and in effect on June 30, 1992, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1991 Session of the General Assembly, 1992 Regular Session.

(kk) From and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1991, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1991, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1991, but before June 30, 1992, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1991 and June 30, 1992.

(*ll*) From and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1992, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1992, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1992, but before June 30, 1993, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1992, and June 30, 1993.

(mm) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1994. — From and after July 1, 1994, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1994, shall be increased by six-tenths of one percent (.6%) of the allowance payable on June 1, 1994. This allowance shall be calculated on the allowance payable and in effect on June 30, 1994, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1993 General Assembly in 1994.

(nn) From and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1993, shall be increased by two and eight-tenths percent (2.8%) of the allowance payable on July 1, 1993, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1993, but before June 30, 1994, shall be increased by a prorated amount of two and eight-tenths percent (2.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1993, and June 30, 1994.

(oo) From and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1994, shall be increased by two percent (2%) of the allowance payable on July 1, 1994, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1994, but before June 30, 1995, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1994, and June 30, 1995.

(pp) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1995. — From and after July 1, 1995, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1995, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 1995. This allowance shall be calculated on the allowance payable and in effect on June 30, 1995, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1995 General Assembly.

(qq) From and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1993, shall be increased by seven-tenths of one percent (0.7%) of the allowance payable on July 1, 1993, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1993, but before June 30, 1994, shall be increased by a prorated amount of seven-tenths of one percent (0.7%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1993, and June 30, 1994.

(rr) From and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1995, shall be increased by four and four-tenths percent (4.4%) of the allowance payable on July 1, 1995, in accordance with G.S. 128-27(k). Furthermore, from and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1995, but before June 30, 1996, shall be increased by a prorated amount of four and four-tenths percent (4.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1995, and June 30, 1996.

(ss) From and after July 1, 1997, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1996, shall be increased by four percent (4%) of the allowance payable on June 1, 1997, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1997, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1996, but before June 30, 1997, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1996, and June 30, 1997.

(tt) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1997. — From and after July 1, 1997, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1997, shall be increased by two and three-tenths percent (2.3%) of the allowance payable on June 1, 1997. This allowance shall be calculated on the allowance payable and in effect on June 30, 1997, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1997 General Assembly.

(uu) From and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1997, shall be increased by two and one-half percent (2.5%) of the allowance payable on June 1, 1998, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1997, but before June 30, 1998, shall be increased by a prorated amount of two and one-half percent (2.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1997, and June 30, 1998.

(vv) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1998. — From and after July 1, 1998, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1998, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 1998. This allowance shall be calculated on the allowance payable and in effect on June 30, 1998, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1997 General Assembly.

(ww) From and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1998, shall be increased by one percent (1.0%) of the allowance payable on June 1, 1999, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1998, but before June 30, 1999, shall be increased by a prorated amount of one percent (1.0%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1998, and June 30, 1999.

(xx) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2000. — From and after July 1, 2000, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2000, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1,2000. This allowance shall be calculated on the allowance payable and in effect on June

30, 2000, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 1999 General Assembly, 2000 Regular Session.

(yy) From and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1999, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on June 1, 2000, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1999, but before June 30, 2000, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1999, and June 30, 2000.

(zz) From and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2000, shall be increased by two percent (2%) of the allowance payable on June 1, 2001, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2000, but before June 30, 2001, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2000, and June 30, 2001.

(aaa) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2001. — From and after July 1, 2001, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2001, shall be increased by one and seven-tenths percent (1.7%) of the allowance payable on June 1, 2001. This allowance shall be calculated on the allowance payable and in effect on June 30, 2001, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 2001 General Assembly.

(bbb) From and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2001, shall be increased by one and four-tenths percent (1.4%) of the allowance payable on June 1, 2002, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2001, but before June 30, 2002, shall be increased by a prorated amount of one and four-tenths percent (1.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2001, and June 30, 2002.

(ccc) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2002. — From and after July 1, 2002, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2002, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 2002. This allowance shall be calculated on the allowance payable and in effect on June 30, 2002, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 2002 Regular Session of the 2001 General Assembly.

(ddd) From and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2002, shall be increased by two percent (2.0%) of the allowance payable on June 1, 2003, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2002, but before June 30, 2003, shall be increased by a prorated amount of two percent (2.0%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2002, and June 30, 2003.

(eee) From and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before June 1, 1982, shall be increased by six percent (6.0%) of the allowance payable on June 1, 2003, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced on or after July 1, 1982, but before July 1, 1993, shall be increased by one and one-tenth percent (1.1%) of the allowance payable on June 1, 2003, in accordance with subsection (k) of this section. This allowance shall be calculated on the allowance payable and in effect on June 30, 2003, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 2003 Regular Session of the 2003 General Assembly.

(fff) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2003. — From and after July 1, 2003, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2003, shall be increased by one and one-half percent (1.5%) of the allowance payable on June 1, 2003. This allowance shall be calculated on the allowance payable and in effect on June 30, 2003, so as not to be compounded on any other increase payable under subsection (k) of this section or otherwise granted by act of the 2003 General Assembly.

(ggg) From and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2004, shall be increased by two and one-half percent (2.5%) of the allowance payable on June 1, 2005, in accordance with subsection (k) of this section. Furthermore, from and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2004, but before June 30, 2005, shall be increased by a prorated amount of two and one-half percent (2.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2004, and June 30, 2005. (1939, c. 390, s. 7; 1945, c. 526, s. 4; 1951, c. 274, ss. 4-6; 1955, c. 1153, ss. 4-6; 1957, c. 855, ss. 1-4; 1959, c. 491, ss. 5-8; 1961, c. 515, ss. 2, 6, 7; 1965, c. 781; 1967, c. 978, ss. 3-7; 1969, c. 442, ss. 7-14; c. 898; 1971, c. 325, ss. 12-16, 19; c. 326, ss. 3-7; 1973, c. 243, ss. 3-7; c. 244, ss. 1-3; c. 816, s. 4; c. 994, ss. 2, 4; c. 1313, ss. 1, 2; 1975, c. 486, ss. 1, 2; c. 621, ss. 1, 2; 1975, 2nd Sess., c. 983, ss. 126-128; 1977, 2nd Sess., c. 1240; 1979, c. 862, ss. 2, 6, 7; c. 974, s. 1; c. 1063, s. 2; 1979, 2nd Sess., c. 1196, s. 2; cc. 1213, 1240; 1981, c. 672, s. 2; c. 689, s. 1; c. 940, s. 1; c. 975, s. 2; c. 978, ss. 3, 4; c. 980, ss. 1, 2; c. 981, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1284, ss. 1, 2; 1983, c. 467; c. 761, ss. 226, 227; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1044; c. 1049, ss. 1-3; c. 1086; 1985, c. 138; c. 348, s. 2; c. 479, s. 196(i)-(n); c. 520, s. 2; c. 649, ss. 8, 10; c. 751, ss. 1-4, 6; c. 791, s. 56; 1985 (Reg. Sess., 1986), c. 1014, s. 49(d); 1987, c. 181, s. 1; c. 513, s. 1; c. 738, ss. 27(c), 37(b); c. 824, s. 2; 1987 (Reg. Sess., 1988), c. 1061, s. 2; c. 1086, s. 22(c); c. 1108, s. 3; c. 1110, ss. 4-7; 1989, c. 717, ss. 13, 13.1; c. 731, s. 2; c. 752, s. 41(c); c. 792, ss. 3.4-3.6; 1989 (Reg. Sess., 1990), c. 1077, ss. 13-16; c. 1080; 1991, c. 636, s. 20(a); 1991 (Reg. Sess., 1992), c. 766, s. 1; c. 900, ss. 52(e)-(g), 53(a); c. 929, s. 1; c. 1030, s. 51.1; 1993, c. 321, ss. 74(b), 74.1(c), (d); c. 531, s. 3; 1993 (Reg. Sess., 1994), c. 769, ss. 7.30(b)-(d), (l); 1995, c. 507, ss. 7.22(e), (f), 7.23(c), (d), 7.23A(c); 1996, 2nd Ex. Sess., c. 18, s. 28.21(d); 1997-443, s. 33.22(g)-(j); 1998-153, s. 21(d)-(h); 1998-212, ss. 28.26(b), 28.27(e), (f); 1999-237, s. 28.23(d); 2000-67, ss. 26.20(g)-(j); 2001-424, ss. 32.22(d), 32.23(a)-(d); 2001-435, s. 1; 2002-126, ss. 28.8(b), 28.9(e)-(h); 2003-319, ss. 1-4; 2003-359, ss. 15, 16, 21; 2004-136, s. 1; 2004-147, ss. 2, 3; 2005-91, ss. 9, 10; 2005-276, s. 29.25(d); 2007-384, ss. 10.1, 10.2; 2007-431, ss. 2, 6; 2007-496, s. 2.)

Editor's Note. — The designation of subsection (aaa) is as directed by the Revisor of Statutes, the designation in Session Laws 2001-424, s. 32.23(d), having been (zz).

The changes to the death benefit amounts in subsection (*l*), as amended by Session Laws 2004-136, s. 1, effective July 1, 2004, are applicable to persons dying on or after that date.

Subsections (*l*3) and (*l*4), as amended by Session Laws 2004-147, ss. 2 and 3, effective July 1, 2004, are applicable to persons dying on or after that date.

Session Laws 2007-384, s. 11(b), provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

Effect of Amendments. — Session Laws 2007-384, ss. 10.1 and 10.2, inserted "allowance, including any special retirement allowance" following "actuarial equivalent of such retirement allowance" in the first sentence of subsection (g); and added subsection (m1). For effective date, see Editor's note.

Session Laws 2007-431, ss. 2 and 6, effective July 1, 2007, substituted "120 days" for "90 days" in subdivision (a)(1); and added the last sentence in each of the first three paragraphs of subsection (g1).

Session Laws 2007-496, s. 2, effective July 1, 2007, and applicable to eligible retirees who die on or after that date, in subdivison (*l*4), inserted "but before July 1, 2007" following "on or after July 1, 2004" near the beginning of the first paragraph, and added the second paragraph.

CASE NOTES

The relationship between public employees and the retirement system is one of contract. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Right of Employee to Rely on Retirement Plan. — A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, continually promised him over many years, will not be removed or diminished. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Where plaintiff had attained more than five years of creditable service before his injury, and before the date he submitted his application for disability retirement, he had contractual rights in pension fund. Hogan v. City of Winston-Salem, 121 N.C. App. 414, 466 S.E.2d 303 (1996).

Impairment of Rights by 1981 Amendment. — Rights arising under this Article were impaired inasmuch as plaintiff employees stood to suffer significant reductions in their retirement allowances as a result of the 1981 legislative amendment of this section adding subsection (d4), and where challenge thereto had been resolved below by grant of summary judgment in defendants' favor, but defendants' affidavit failed to demonstrate or reflect that the changes in question were reasonable and necessary to serve an important state interest, the case would be remanded for further proceedings. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Decedent terminated her employment within the meaning and intent of subsection (*l*) on the date that she went on disability retirement. Walker v. Board of Trustees, 348 N.C. 63, 499 S.E.2d 429 (1998).

Where over 180 days expired between the last day decedent actually worked and the date she died, her spouse was not entitled to a death benefit under subsection (*l*). Walker v. Board of Trustees, 348 N.C. 63, 499 S.E.2d 429 (1998).

Disability Benefits Classified as Sepa-

rate Property. — The amount of plaintiff's "disability retirement benefits" attributable to his physical disability was plaintiff's separate property, under G.S. 50-20. Johnson v. Johnson, 117 N.C. App. 410, 450 S.E.2d 923 (1994).

The statute of limitations in subsection (i) applied and allowed plaintiffs to pursue claims for underpayment of disability retirement benefits for three years before they commenced actions. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Part-Time Status Did Not Equate to Retirement. — An employee of a local government employer who went to a part-time status did not "retire" when she changed jobs and lessened her hours and was not eligible to receive disability retirement benefits under G.S. 128-27. Wallace v. Board of Trustees, 145 N.C. App. 264, 550 S.E.2d 552, 2001 N.C. App. LEXIS 650 (2001), cert. denied, 354 N.C. 580, 559 S.E.2d 553 (2001).

Last Day of Service. — When decedent retired on disability, she was not terminated within the meaning of the death benefit statute; therefore, the last day of the decedent's actual service was the date on which her sick and annual leave expired. Walker v. Board of Trustees, 127 N.C. App. 156, 487 S.E.2d 839 (1997), aff'd, 348 N.C. 63, 499 S.E.2d 429 (1998).

Spouse Not Entitled to Death Benefit. — Where decedent died more than 180 days after she last earned a salary surviving spouse was not entitled to the death benefit. Walker v. Board of Trustees, 127 N.C. App. 156, 487 S.E.2d 839 (1997), aff'd, 348 N.C. 63, 499 S.E.2d 429 (1998).

Spouse Entitled to Death Benefit. — A beneficiary of a public employee under G.S. 128-27(g1), who has become entitled under the terms of G.S. 128-27 to the death benefit provided in subsection G.S. 128-27(g1), may choose to elect the Survivor's Alternate Benefit alternative of G.S. 128-27(m) in lieu of the lump sum payment provided in G.S. 128-27(g1) if the retired member dies within 180 days of the member's last day of actual service, and if the three conditions in G.S. 128-27(m) are satisfied. Grooms v. State Dep't of State Treasurer, 144 N.C. App. 160, 550 S.E.2d 204, 2001 N.C. App. LEXIS 433 (2001).

Reemployment By Local Government. — Retired city police officer lost his right to receive a separation allowance pursuant to G.S. 143-166.42 when he became reemployed by a county sheriff's office, which was a local government as defined by G.S. 143-166.41. Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

Credit Denied to a Self-Insured City for Disability Retirement Payments. — North Carolina Industrial Commission's decision to deny a city credit for disability retirement payments that were made to an injured city employee from a public employee benefits program was not an abuse of discretion under G.S. 97-42 because the city and the employee jointly contributed to the plan, and competent evidence, in the form of testimony as to the funding of the disability benefits plan, existed to support the Commission's findings of fact and conclusions of law. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

Cited in Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Liptrap v. City of High Point, 128 N.C. App. 353, 496 S.E.2d 817 (1998), cert. denied, 348 N.C. 73, 505 S.E.2d 873 (1998).

§ 128-28. Administration and responsibility for operation of System.

(a) Vested in Board of Trustees. — The general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of this Article are hereby vested in the Board of Trustees: Provided, that all expenses in connection with the administration of the North Carolina Local Governmental Employees' Retirement System shall be charged against and paid from the expense fund as provided in subsection (f) of G.S. 128-30.

(b) Board of Trustees a Body Politic and Corporate; Powers and Authority; Exemption from Taxation. — The Board of Trustees shall be a body politic and corporate under the name Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, and as a body politic and corporate shall have the right to sue and be sued, shall have perpetual succession and a common seal, and in said corporate name shall be able and capable in law to take, demand, receive and possess all kinds of real and personal property necessary and proper for its corporate purposes, and to bargain, sell, grant, alien, or dispose of all such real and personal property as it may lawfully acquire. All such property owned or acquired by said body politic and corporate shall be exempt from all taxes imposed by the State or any political subdivision thereof, and shall not be subject to income taxes.

(c) Members of Board. — The Board shall consist of (i) seven members of the Board of Trustees of the Teachers' and State Employees' Retirement System appointed under G.S. 135-6(b): the State Treasurer; the Superintendent of Public Instruction; the two members appointed by the General Assembly; and the three members appointed by the Governor who are not members of the teaching profession or State employees; and (ii) seven members designated by the Governor:

(1) One member shall be a mayor or a member of the governing body of a city or town participating in the Retirement System;
(2) One member shall be a county commissioner of a county participating in the Retirement System;
(3) One member shall be a law-enforcement officer employed by an employer participating in the Retirement System;
(4) One member shall be a county manager of a county participating in the Retirement System;
(5) One member shall be a city or town manager of a city or town participating in the Retirement System;
(6) One member shall be an active, Fair Labor Standards Act nonexempt, local governmental employee of an employer; and
(7) One member shall be a retired, Fair Labor Standards Act nonexempt, local governmental employee of an employer.

The Governor shall designate seven members on April 1 of years in which an election is held for the office of Governor, or as soon thereafter as possible, and the seven members designated by the Governor shall serve on the Board in addition to the regular duties of their city, town, or county office: Provided, that if for any reason any member appointed pursuant to subdivisions (1) through (6) of this subsection vacates the city, town, or county office or employment which the member held at the time of this designation, the Governor shall designate another member to serve until the next regular date for the designation of members to serve on the Board.

(d) Compensation of Trustees. — The trustees shall be paid during sessions of the Board at the prevailing rate established for members of State boards and commissions, and they shall be reimbursed for all necessary expenses that they incur through service on the Board.

(e) Oath. — Each trustee other than the ex officio members shall, within 10 days after his appointment, take an oath of office, that, so far as it devolves upon him, he will diligently and honestly administer the affairs of the said Board, and that he will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to the Retirement System. Such oath shall be subscribed to by the member making it, and certified by the officer before whom it is taken, and immediately filed in the office of the Secretary of State: Provided, that where a local governmental official designated by the Governor has taken an oath of office in connection with the local governmental office that he holds, the oath for his local governmental office shall be deemed to be sufficient, and he shall not be required to take the oath hereinabove provided.

(f) Voting Rights. — Each trustee shall be entitled to one vote in the Board. A majority of affirmative votes in attendance shall be necessary for a decision by the trustees at any meeting of said Board.

(g) Rules and Regulations. — Subject to the limitations of this Chapter, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created by this Chapter and for the transaction of its business. The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

(h) Officers and Other Employees, Salaries and Expenses. — The Board of Trustees shall elect from its membership a chairman, and shall, by a majority vote of all the members, appoint a director, who may be, but need not be, one of its members. The Board of Trustees shall engage such actuarial and other service as shall be required to transact the business of the Retirement System. The compensation of all persons engaged by the Board of Trustees, and all other expenses of the Board necessary for the operation of the Retirement System, shall be paid at such rates and in such amounts as the Board of Trustees shall approve.

(i) Actuarial Data. — The Board of Trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System.

(j) Record of Proceedings; Annual Report. — The Board of Trustees shall keep a record of all of its proceedings which shall be open to public inspection. It shall publish annually a report showing the fiscal transactions of the Retirement System for the preceding year, the amount of the accumulated cash and securities of the System, and the last balance sheet showing the financial condition of the System by means of an actuarial valuation of the assets and liabilities of the Retirement System.

(k) Legal Adviser. — The Attorney General shall be the legal adviser of the Board of Trustees.

(*l*) Medical Board. — The Board of Trustees shall designate a Medical Board to be composed of not less than three nor more than five physicians not eligible to participate in the Retirement System. If required, other physicians may be employed to report on special cases. The Medical Board shall arrange for and pass upon all medical examinations required under the provisions of this Chapter, and shall investigate all essential statements and certificates by or on behalf of a member in connection with an application for disability retirement, and shall report in writing to the Board of Trustees its conclusion and recommendations upon all the matters referred to it.

(m) Duties of Actuary. — The Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter and shall perform such other duties as are required in connection therewith.

(n) Immediately after the establishment of the Retirement System the actuary shall make such investigation of the mortality, service and compensation experience of the members of the System as he shall recommend and the Board of Trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Trustees such tables and such rates as are required in subsection (o), paragraphs (1) and (2), of this section. The Board of Trustees shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates of the assets and liabilities of the funds created by this Chapter.

(o) In the year 1945, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the Retirement System, and shall make a valuation of the assets and liabilities of the funds of the System, and taking into account the result of such investigation and valuation, the Board of Trustees shall:

(1) Adopt for the Retirement System such mortality, service and other tables as shall be deemed necessary; and

(2) Certify the rates of contributions payable by the participating units on account of new entrants at various ages.

(p) On the basis of such tables and interest assumption rate as the Board of Trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the System created by this Chapter.

(q) Notwithstanding any law, rule, regulation or policy to the contrary, any board, agency, department, institution or subdivision of the State maintaining lists of names and addresses in the administration of their programs may upon request provide to the Retirement System information limited to social security numbers, current name and addresses of persons identified by the System as members, beneficiaries, and beneficiaries of members of the System. The System shall use such information for the sole purpose of notifying members, beneficiaries, and beneficiaries of members of their rights to and accruals of benefits in the Retirement System. Any social security number, current name and address so obtained and any information concluded therefrom and the source thereof shall be treated as confidential and shall not be divulged by any employee of the Retirement System or of the Department of State Treasurer except as may be necessary to notify the member, beneficiary, or beneficiary of the member of their rights to and accruals of benefits in the Retirement System. Any person, officer, employee or former employee violating this provision shall be guilty of a Class 1 misdemeanor; and if such offending person be a public official or employee, he shall be dismissed from office or employment and shall not hold any public office or employment in this State for a period of five years thereafter. (1939, c. 390, s. 8; 1941, c. 357, s. 6; 1945, c. 526, s. 7; 1961, c. 515, ss. 3, 4; 1965, c. 781; 1969, c. 442, s. 15; 1973, c. 243, s. 8; 1985, c. 479, s. 196(o); 1987, c. 539, s. 1; 1993, c. 539, s. 944; 1994, Ex. Sess., c. 24, s. 14(c); 2006-64, ss. 1.1, 1.2.)

Editor's Note. — Session Laws 2006-64, s. 2, provides: "This act is effective when it becomes law [July 9, 2006], and the additional members shall be designated by the Governor to serve until April 1, 2008, when their successors shall be designated."

Effect of Amendments. — Session Laws 2006-64, ss. 1.1 and 1.2, effective July 9, 2006, rewrote subsection (c); and, in the last sentence of subsection (f), substituted "A majority of" for "Five" and inserted "in attendance."

§ 128-29. Management of funds.

(a) Vested in Board of Trustees. — The Board of Trustees shall be the trustee of the several funds created by this Article as provided in G.S. 128-30.

(b) Annual Allowance of Regular Interest. — The Board of Trustees annually shall allow regular interest on the mean amount for the preceding year in each of the funds with the exception of the expense fund. The amounts so allowed shall be due and payable to said funds, and shall be annually credited thereto by the Board of Trustees from interest and other earnings on the moneys of the Retirement System. Any additional amount required to meet the interest on the funds of the Retirement System shall be paid from the pension accumulation fund, and any excess of earnings over such amount required shall be paid to the pension accumulation fund. Regular interest shall mean interest at the rate of four per centum (4%) per annum with respect to all calculations and allowances on account of members' contributions and at the rate of three per centum (3%) per annum with respect to employers' contributions, with the right reserved to the Board of Trustees to set a different rate or rates from time to time.

(c) Custodian of Funds. — The State Treasurer shall be the custodian of the several funds and shall invest their assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3. All payments from said funds shall be made by him only upon vouchers signed by two persons designated by the Board of Trustees. The secretary of the Board of Trustees shall furnish said Board a surety bond in a company authorized to do business in North Carolina in such amount as shall be required by the Board, the premium to be paid from the expense fund.

(d) Cash Deposits for Meeting Disbursements. — For the purpose of meeting disbursements for pensions, annuities and other payments there may be kept available cash, not exceeding ten per centum (10%) of the total amount in the several funds of the Retirement System, on deposit in one or more banks or trust companies of the State of North Carolina, organized under the laws of the State of North Carolina, or of the United States: Provided, that the sum on deposit in any one bank or trust company shall not exceed twenty-five per centum (25%) of the paid up capital and surplus of such bank or trust company.

(e) Selection of Depositories. — The Board of Trustees shall select a bank or banks for the deposits of the funds and securities of the Retirement System in the same manner as such banks are selected by the Treasurer of the State of North Carolina. Such banks selected shall be required to conform to the law governing banks selected by the State. The funds and properties of the North Carolina Governmental Employees' Retirement System held in any bank of the State shall be safeguarded by a fidelity and surety bond, the amount to be determined by the Board of Trustees.

(f) Immunity of Funds. — Except as otherwise herein provided, no trustee and no employee of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees, nor as such receive any pay or emolument for this service. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use the same, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned or borrowed from the Board of Trustees. (1939, c. 390, s. 9; 1941, c. 357, s. 7; 1945, c. 526, s. 5; 1957, c. 846, s. 1; 1959, c. 1181, s. 1; 1961, c. 397; 1967, c. 978, s. 8; 1971, c. 386, s. 3; 1973, c. 243, s. 10; 1979, c. 467, ss. 12, 13.)

§ 128-29.1. Authority to invest in certain common and preferred stocks.

In addition to all other powers of investment, the Board of Trustees, within the limitations set forth in this section, is also authorized to invest Retirement System funds in stocks, preferred or common, issued or guaranteed by a corporation created or existing under the laws of the United States or any state, district, or territory thereof, provided:

(1) That for a period of five fiscal years for which the necessary statistical data are available next preceding the date of investment, such corporation as disclosed by its published fiscal annual statements shall have had an average annual net income plus its average annual fixed charges (as herein used, fixed charges shall mean interest on funded or unfunded debt, contingent interest charges, amortization of debt discount and expense and rentals for leased property and, in the case of consolidated earnings statements of parent and subsidiary corporations shall include all fixed charges and preferred dividend requirement, if any, of the subsidiaries) at least equal to one and one-half times the sum of its average annual dividend requirement for preferred stock and its average annual fixed charges for the same period; however, during neither of the last two years of such period shall the sum of its annual net income and its annual fixed charges have been less than one and one-half times the sum of its dividend requirements for preferred stock and its fixed charges for the same period;

(2) That such corporation shall have no arrears of dividends on its preferred stock;

(3) That such common stock is registered on a national securities exchange as provided in the Federal Securities Exchange Act, but such registration shall not be required of the following stocks:

  a. The common stock of a bank which is a member of Federal Deposit Insurance Corporation and has capital funds, represented by capital, surplus and undivided profits, of at least twenty million dollars ($20,000,000);
  b. The common stock of a life insurance company which has capital funds represented by capital, special surplus funds and unassigned surplus, of at least fifty million dollars ($50,000,000);
  c. The common stock of a fire or casualty insurance company, or a combination thereof, which has capital funds represented by capital, net surplus and voluntary reserves, of at least fifty million dollars ($50,000,000);

(4) That the preferred stock of such corporation, if any be outstanding, shall qualify for investment under this section;

(5) That such corporation, having no preferred stock outstanding, shall have had earnings for the five fiscal years next preceding the date of investment of at least twice the interest on all mortgages, bonds, debentures, and funded debts, if any, after deduction of the proper charges for replacements, depreciation, and obsolescence;

(6) That such corporation shall have paid a cash dividend on its common stock in each year of the 10-year period next preceding the date of investment and the aggregate net earnings available for dividends on the common stock of such corporation for the whole of such period shall have been at least equal to the amount of such dividends paid;

(7) That in applying the earnings test under this section to any issuing, assuming, or guaranteeing corporation, where such corporation, shall have acquired its property or any substantial part thereof within a five-year period immediately preceding the date of investment by consolidation, merger, or by the purchase of all or a substantial portion of the property of any other corporation or corporations, or shall have acquired the assets of any unincorporated business enterprise by purchase or otherwise, net income, fixed charges and preferred dividends of the several predecessor or constituent corporations or enterprises shall be consolidated and adjusted so as to ascertain whether or not the applicable requirements of this section have been complied with;

(8) That the total value of common and preferred stocks shall not exceed twenty-five per centum (25%) of the total value of all invested funds of the Retirement System; provided, further:
  a. Not more than one and one-half per centum (1 1/2%) of the total value of such funds shall be invested in the stock of a single corporation, and provided further;
  b. The total number of shares in a single corporation shall not exceed eight per centum (8%) of the issued and outstanding stock of such corporation, and provided further;
  c. As used in this subdivision (8), value shall consist of the par value or unpaid balance of all unmatured or unpaid investments requiring the payment of a fixed amount at payment date and the cost price of all other investments.

In order to carry out the duties and exercise the powers imposed and granted by this section, the chairman of the Board of Trustees is authorized to appoint an investment committee consisting of five members, three of whom shall be members of the Board of Trustees designated ex officio by the chairman and two of whom shall not be members of the Board. Such investment committee shall have such powers and duties as the Board of Trustees may prescribe. The members of the investment committee shall receive for their services the same per diem and other allowances as are granted the members of the State Boards and commissions generally. (1961, c. 626; 1965, c. 415, s. 2; 1973, c. 243, s. 10.)

§ 128-30. Method of financing.

(a) Funds to Which Assets of Retirement System Credited. — All of the assets of the Retirement System shall be credited according to the purpose for which they are held to one of five funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, the pension reserve fund and the expense fund.

(b) Annuity Savings Fund. — The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to and payments from the annuity savings fund shall be made as follows:

(1) Prior to July 1, 1951, each participating employer shall cause to be deducted from the salary of each member of each and every payroll of such employer for each and every payroll period four per centum (4%) of his earnable compensation. On and after such date the rate so deducted shall be five per centum (5%) in the case of a Class A member or a Class C member, and four per centum (4%) in the case of a Class B member; provided, however, that with respect to any member who is covered under the Social Security Act in accordance with the agreement entered into during 1955 in accordance with the provisions of Article 2 of Chapter 135 of Volume 17 of the General Statutes, as amended, such deduction shall, commencing with the first day of the period of service with respect to which such agreement is effective, be at the rate of three per centum (3%) of the part of his actual compensation not in excess of the amount taxable to him under the Federal Insurance Contributions Act as from time to time in effect plus five per centum (5%) of the part of his actual compensation not so taxable; provided that in the case of any member so eligible and receiving compensation from two or more employers such deductions may be adjusted under such rules as the Board of Trustees may establish so as to be as nearly equivalent as practicable to the deductions which would have been made had the member received all of such compensation from one employer. Notwithstanding the foregoing, the Board of Trustees may in its discretion cause such portion as it may determine of deductions made between January 1, 1955, and December 1, 1955, to be transferred into the contribution fund established under G.S. 135-24, such amounts so transferred shall in that event be deemed to be taxes contributed by employees as required under Article 2 of Chapter 135 of Volume 17 of the General Statutes, as amended, and shall be in lieu of contributions otherwise payable in the same amount as so required. In determining the amount earned by a member whose compensation is derived partly or wholly from fees, such member shall submit a sworn statement to his employer monthly, or at least quarterly, each year as to the amount of fees received by such member as compensation during the period, and each month, or at least quarterly, such member shall pay to his employer the proper per centum of such compensation received from fees, which shall be considered as deductions by the employer as provided in subdivisions (1) and (2) of this subsection.

Notwithstanding the foregoing, effective July 1, 1965, with respect to the period of service commencing on July 1, 1965, and ending December 31, 1965, the rates of such deductions shall be four per centum (4%) of the portion of compensation not in excess of forty-eight hundred dollars ($4,800) and six per centum (6%) of the portion of compensation in excess of forty-eight hundred dollars ($4,800); and with respect to the period of service commencing January 1, 1966, and ending June 30, 1967, the rate of such deduction shall be four per centum (4%) of the portion of compensation not in excess of fifty-six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars ($5,600); and with respect to the period of service commencing July 1, 1967, and ending June 30, 1976, the rate of such deductions shall be five per centum (5%) of the portion of compensation not in excess of five thousand six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of five thousand six hundred dollars ($5,600). Such rates shall apply uniformly to all members of the Retirement System, irrespective of class.

Notwithstanding the foregoing, effective July 1, 1976, with respect to compensation paid on and after July 1, 1976, the rate of such deductions shall be six per centum (6%) of the compensation received by any member. Such rates shall apply uniformly to all members of the Retirement System, irrespective of class.

(2) The deductions provided for herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Article. The employer shall certify to the Board of Trustees on each and every payroll or in such other manner as the Board of Trustees may prescribe, the amounts to be deducted; and each of said amounts shall be deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon to the individual account of the member from whose compensation said deduction was made.

(3) The accumulated contributions of a member drawn by him, or paid to his estate or to his designated beneficiary in event of his death as provided in this Article, shall be paid from the annuity savings fund. Upon the retirement of a member his accumulated contributions shall be transferred from the annuity savings fund to the annuity reserve fund.

(4) The Board of Trustees may approve the purchase of creditable service by any member for leaves of absence or for interrupted service to an employer for the sole purpose of acquiring knowledge, talents, or abilities and to increase the efficiency of service to the employer. This approval shall be made prior to the purchase of the creditable service, is limited to a career total of four years for each member, and may be obtained in the following manner:

a. Approved leave of absence. — Where the employer grants an approved leave of absence, a member may make monthly contributions to the annuity savings fund on the basis of compensation the member was earning immediately prior to such leave of absence. The employer shall make monthly contributions equal to the normal and accrued liability contribution on such compensation or, in lieu thereof, the member may pay into the annuity savings fund monthly an amount equal to the employer's normal and accrued liability contribution when the policy of the employer is not to make such payment.

b. No educational leave policy. — Where the employer has a policy of not granting educational leaves of absence or the member has unsuccessfully petitioned for leave of absence and the member has interrupted service for educational purposes, the member may make monthly contributions into the annuity savings fund in an amount equal to the employee contribution plus the employer normal and accrued liability contribution on the basis of the compensation the member was earning immediately prior to the interrupted service.

c. Educational program prior to July 1, 1981. — Creditable service for leaves of absence or interrupted service for educational purposes prior to July 1, 1981, may be purchased by a member, before or after retirement, who returned as a contributing employee or teacher within 12 months after completing the educational program and completed 10 years of subsequent membership service, by making a lump sum payment into the annuity savings fund equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance as determined by the board of trustees upon the advice of the consulting actuary, plus a fee to be determined by the board of trustees.

Payments required to be made by the member and/or the employer under subparagraphs a or b are due by the 15th of the month following the month for which the service credit is allowed and payments made after the due date shall be assessed a penalty, in lieu of interest, of one percent (1%) per month or fraction thereof the payment is made beyond the due date; provided, that these payments shall be made prior to retirement and provided further, that if the member did not become a contributing member within 12 months after completing the educational program and failed to complete three years of subsequent membership service, except in the event of death or disability, any payment made by the member including penalty shall be refunded with regular interest thereon and the service credits cancelled prior to or at retirement.

(b1) Pick Up of Employee Contributions. — Anything within this section to the contrary notwithstanding, effective July 1, 1982, an employer, pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended, may elect to pick up and pay the contributions which would be payable by the employees as members under subsection (b) of this section with respect to the service of employees after June 30, 1982.

The members' contributions picked up by an employer shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the annuity savings fund and accumulated within the fund in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Member contributions picked up by an employer shall be payable from the same source of funds used for the payment of compensation to a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by his employer. This deduction, however, shall not reduce his compensation as defined in subdivision (7a) of G.S. 128-21. Picked-up contributions shall be transmitted to the System monthly for the preceding month by means of a warrant drawn by the employer and payable to the Local Governmental Employees' Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed. In the case of a failure to fulfill these conditions the provisions of subsection (g)(3) of this section shall apply.

(b2) Retroactive Adjustment in Compensation or an Underreporting of Compensation. — A member who is awarded backpay in cases of a denied promotional opportunity in which the aggrieved member is granted a promotion retroactively, or in cases in which an employer errs in the reporting of compensation, including the employee and employer contributions, the member and employer may make employee and employer contributions on the retroactive or additional compensation after submitting clear and convincing evidence of the retroactive promotion or underreporting of compensation, as follows:

(1) Within 90 days of the denial of the promotion or the error in reporting, by the payment of employee and employer contributions that would have been paid; or

(2) After 90 days of the denial of the promotion or the error in reporting, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees.

For members electing to make the employee contributions on the retroactive adjustment in compensation or on the underreported compensation, the member's employer, which granted the retroactive promotion or erred in underreporting compensation and contributions, shall make the required employer contributions. Nothing contained in this subsection shall prevent an employer from paying all or a part of the interest assessed on the employee contributions; and to the extent paid by the employer, the interest paid by the employer shall be credited to the pension accumulation fund; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the interest assessed on the employee contributions due.

In the event the retroactive adjustment in compensation or the underreported compensation is for a period that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 135-1(5), the compensation the member would have received during the period shall be included in calculating the member's average final compensation only in the event the appropriate employee and employer contributions are paid on such compensation.

An employer error in underreporting compensation shall not include a retroactive increase in compensation that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 135-1(5), for reasons other than a wrongfully denied promotional opportunity where the member is promoted retroactively.

(c) Annuity Reserve Fund. — The annuity reserve fund shall be the fund in which shall be held the reserves on all annuities in force and from which shall be paid all annuities and all benefits in lieu of annuities, payable as provided in this Article. Should a beneficiary retired on account of disability be restored to active service with a compensation not less than his average final compensation at the time of his last retirement his annuity reserve shall be transferred from the annuity reserve fund to the annuity savings fund and credited to his individual account therein.

(d) Pension Accumulation Fund. — The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by employers and from which shall be paid all pensions and other benefits on account of members with prior service credit. Contributions to and payments from the pension accumulation fund shall be made as follows:

(1) Each participating employer shall pay to the pension accumulation fund monthly, or at such other intervals as may be agreed upon with the Board of Trustees, an amount equal to a certain percentage of the actual compensation of each member, to be known as the "normal contribution" and an additional amount equal to a percentage of his actual compensation to be known as the "accrued liability contribution." The rate per centum of such contributions shall be fixed on the basis of the liabilities of the Retirement System as shown by actuarial valuation. Until the first valuation for any employer whose participation commenced prior to July 1, 1951, the normal contribution shall be three percent (3%) for general employees and five percent (5%) for firemen and policemen, and the accrued liability contribution shall be three percent (3%) for general employees and six percent (6%) for firemen and policemen. Until the first valuation for any employer whose participation commenced on or after July 1, 1951, the normal contribution shall be four percent (4%) for general employees and six and two-thirds percent (6⅔%) for firemen and policemen, and the accrued liability contribution shall be four percent (4%) for general employees and eight percent (8%) for firemen and policemen.

(2) On the basis of regular interest and of such mortality and other tables as shall be adopted by the Board of Trustees, the actuary engaged by the Board to make each valuation required by this Article during the period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the actual compensation of the average new entrant throughout his entire period of active service which would be sufficient to provide for the payment of any pension payable on his account and for the pro rata share of the cost of administration of the Retirement System. The rate per centum so determined shall be known as the "normal contribution" rate. After the accrued liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable salary of all members obtained by deducting from the total liabilities of the pension accumulation fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum (1%) of the present value of the prospective future salaries of all members as computed on the basis of the mortality and service tables adopted by the Board of Trustees and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation. A normal contribution rate shall be determined separately for general employees as a group and for law enforcement officers as a group, these rates to be applied to the respective group payrolls of each employer in determining the normal contribution required of each employer.

(3) The "accrued liability contribution" shall be set for each employer on the basis of the prior service credits allowable to the employees thereof, who are entitled to prior service certificates, and shall be paid for a period of approximately 30 years, provided that the length of the period of payment for each employer after contributions begin shall be the same for all employers and shall be determined by the Board of Trustees as the result of actuarial valuations.

(4) At the end of the first year following the date of participation for each employer, the accrued liability payable by such employer shall be set, by deducting from the present value of the total liability for all pensions payable on account of all members and pensioners of the System who became participants through service for such employer,

the present value of the future normal contributions payable, and the amount of any assets resulting from any contributions previously made by such employer. Then the "accrued liability contribution" rate for such employer shall be the per centum of the total annual compensation of all members employed by such employer which is equivalent to four per centum (4%) of the amount of such accrued liability. The expense of making such actuarial valuation to determine the accrued liability contribution for each employer shall be paid by such employer. The accrued liability contribution rate shall be increased on the basis of subsequent valuation if benefits are increased over those included in the valuations on the basis of which the original accrued liability contribution rate was determined.

(5) The total amount payable in each year to the pension accumulation fund shall not be less than the sum of the rate per centum known as the normal contribution rate and the accrued liability contribution rate of the total earned compensation of all members during the preceding year: Provided, however, that the amount of each annual accrued liability contribution shall be at least three per centum (3%) greater than the preceding annual accrued liability payment, and that the aggregate payment by employers shall be sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the year then current.

(6) The accrued liability contribution shall be discontinued as soon as the accumulated reserve in the pension accumulation fund shall equal the present value, as actuarially computed and approved by the Board of Trustees, of the total liability of such fund less the present value, computed on the basis of the normal contribution rate then in force, of the prospective normal contributions to be received on account of all persons who are at that time members, as separately determined for general employees and law-enforcement officers.

(7) All pensions, and benefits in lieu thereof, with the exception of those payable on account of members who received no prior service allowance, payable from contributions of employers, shall be paid from the pension accumulation fund.

(8) Upon the retirement of a member not entitled to credit for prior service, an amount equal to his pension reserve shall be transferred from the pension accumulation fund to the pension reserve fund.

(9) Notwithstanding the foregoing provisions of this subsection, beginning with the December 31, 1985 valuation, the actuary shall determine an additional "accrued liability contribution" on account of each employer's law enforcement officers. This contribution shall be that percentage of law enforcement officer compensation necessary to liquidate the "existing unfunded accrued liability" over a period of years to be determined by the Board of Trustees. The "existing unfunded accrued liability" for each employer shall be equal to the sum of two liabilities. The first is that portion of the unfunded accrued liability of the Law Enforcement Officers' Retirement System as of December 31, 1985, attributable to the accrued liability for each employer's law enforcement officers participating in that System, all based on actuarial assumptions and methods applicable to that System. The second is the accrued liability for additional benefits payable to each employer's law enforcement officers who are members of this Retirement System on December 31, 1985. The "accrued liability contribution" determined on the basis of this paragraph shall be added to that determined under subdivision (3) and shall be included in the total amount payable under subdivision (5).

(e) Pension Reserve Fund. — The pension reserve fund shall be the fund in which shall be held the reserves of all pensions granted to members not entitled to credit for prior service and from which such pensions and benefits in lieu thereof shall be paid. Should such a beneficiary retired on account of disability be restored to active service with a compensation not less than his average final compensation at the time of his last retirement the pension thereon shall be transferred from the pension reserve fund to the pension accumulation fund. Should the pension of such disability beneficiary be reduced as a result of an increase in his earning capacity, the amount of the annual reduction in his pension shall be paid annually into the pension accumulation fund during the period of such reduction.

(f) Expense Fund. — The expense fund shall be the fund from which the expenses of the administration of the Retirement System shall be paid, exclusive of amounts payable as retirement allowances and as other benefits provided herein. Contribution shall be made to the expense fund as follows:

(1) The Board of Trustees shall determine annually the amount required to defray such administrative expenses for the ensuing fiscal year and shall adopt a budget in accordance therewith. The budget estimate of such expenses shall be paid to the expense fund from the pension accumulation fund.

(2) For the purpose of organizing the Retirement System and establishing an office, the Board of Trustees may provide as a prerequisite to participation in the Retirement System that each participating employer or employee or both shall pay an additional contribution to the Retirement System for the expense fund not to exceed two dollars ($2.00) for each employee, such contribution of the employee to be credited to his individual account in the annuity savings fund at such later time as the Board of Trustees shall determine, and/or the Board of Trustees may borrow such amounts as may be necessary to organize and establish the Retirement System.

(g) Collection of Contributions. —

(1) The collection of members' contributions shall be as follows:

a. Each employer shall cause to be deducted on each and every payroll of a member for each and every payroll subsequent to the date of participation in the Retirement System the contributions payable by such member as provided in this Article. Each employer shall certify to the treasurer of said employer on each and every payroll a statement as vouchers for the amount so deducted.

b. The treasurer of each employer on the authority from the employer shall make deductions from salaries of members as provided in this Article and shall transmit monthly, or at such time as the Board of Trustees shall designate, the amount specified to be deducted, to the secretary-treasurer of the Board of Trustees. The secretary-treasurer of the Board of Trustees after making a record of all such receipts shall deposit them in a bank or banks selected by said Board of Trustees for use according to the provisions of this Article.

(2) The collections of employers' contributions shall be made as follows: Upon the basis of each actuarial valuation provided herein the Board of Trustees shall annually prepare and certify to each employer a statement of the total amount necessary for the ensuing fiscal year to the pension accumulation fund as provided under subsection (d) of this section. Such employer contributions shall be transmitted to the secretary-treasurer of the Board of Trustees together with the employee deductions as provided under sub-subdivision b. of subdivision (1) of this subsection.

(3) In the event the employee or employer contributions required under this section are not received by the date set by the Board of Trustees, the Board shall assess the employer with a penalty of 1% per month with a minimum penalty of twenty-five dollars ($25.00). If within 90 days after request therefor by the Board any employer shall not have provided the System with the records and other information required hereunder or if the full accrued amount of the contributions provided for under this section due from members employed by an employer or from an employer shall not have been received by the System from the chief fiscal officer of such employer within 30 days after the last due date as herein provided, then, notwithstanding anything herein or in the provisions of any other law to the contrary, upon notification by the Board to the State Treasurer as to the default of such employer as herein provided, any distributions which might otherwise be made to such employer, or the municipality or county of which such employer is an integral part, from any funds of the State or any funds collected by the State shall be withheld from such employer until notice from the Board to the State Treasurer that such employer is no longer in default.

(h) Merger of Annuity Reserve Fund, and Pension Reserve Fund into Pension Accumulation Fund. — Notwithstanding the foregoing, effective at such date not later than December 31, 1959, as the Board of Trustees shall determine, the annuity reserve fund and the pension reserve fund shall be merged into and become a part of the pension accumulation fund, provided that such merger shall in no way adversely affect the rights of any members or retired members of the System and further provided the Board of Trustees shall be and hereby is authorized to make such changes in the accounting methods and procedures of the System from time to time as, in its opinion, are in the interest of sound and proper administration of the System. (1939, c. 390, s. 10; 1941, c. 357, s. 8; 1943, c. 535; 1945, c. 526, s. 6; 1951, c. 274, ss. 7-9; 1955, c. 1153, s. 7; 1959, c. 491, s. 9; 1965, c. 781; 1967, c. 978, ss. 9, 10; 1971, c. 325, ss. 17-19; 1975, 2nd Sess., c. 983, ss. 129, 130; 1981, c. 1000, ss. 1, 3; 1981 (Reg. Sess., 1982), c. 1282, s. 9; 1985, c. 479, s. 196(p)-(r); c. 539, ss. 1, 2; 1991, c. 585, s. 2; 1995, c. 509, s. 68; 2003-359, s. 20.)

§ 128-31. Exemptions from execution.

Except for the applications of the provisions of G.S. 110-136, and G.S. 110-136.3 et seq., and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Article, and the moneys in the various funds created by this Article, are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Article specifically otherwise provided. Notwithstanding any provisions to the contrary, any overpayment of benefits to a member in a State-administered retirement system, the Disability Salary Continuation Plan, or the Disability Income Plan of North Carolina may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person, the person's estate, or designated beneficiary. (1939, c. 390, s. 11; 1985, c. 402; c. 649, s. 5; 1989, c. 665, s. 3; c. 792, s. 2.4; 2005-91, s. 11.)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

§ 128-32. Protection against fraud.

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this Retirement System in any attempt to defraud such System as a result of such act shall be guilty of a Class 1 misdemeanor. Should any change or error in the records result in any member or beneficiary receiving from the Retirement System more or less than he would have been entitled to receive had their records been correct, the Board of Trustees shall correct such error, and as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid. (1939, c. 390, s. 12; 1993, c. 539, s. 945; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Legislative Intent. — This section shows the intent of the General Assembly to allow the courts to require that compensation paid for underpayment of a pension compensation be paid at the actuarial value. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Calculation of Additional Benefit. — The re-calculation of additional benefits owed to retirees did not mandate the use of a mortality factor, where the right to payments was not forfeited upon the death of a retiree but was passed to the retiree's survivors. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 132 N.C. App. 137, 510 S.E.2d 675, 1999 N.C. App. LEXIS 89 (1999), cert. denied, 350 N.C. 379, 536 S.E.2d 620 (1999).

§ 128-32.1. Failure to respond.

If a member fails to respond in any way within 90 days after preliminary option figures and Form 6-E, Election of Benefits, are mailed, the Form 6, Application for Service, Early, or Disability Retirement, shall be null and void; the retirement system shall not be liable for any benefits due on account of the voided application, and a new application must be filed establishing a subsequent effective date of retirement. If an applicant for disability retirement fails to furnish requested additional medical information within 90 days following such request, the application shall be declared null and void under the same conditions outlined above, unless the applicant is eligible for early or service retirement in which case the application shall be processed accordingly, using the same effective date as would have been used had the application for disability retirement been approved. (2005-91, s. 12.)

§ 128-33. Certain laws not applicable to members.

Subject to the provisions of Article 2 of Chapter 135 of Volume 17 of the General Statutes, as amended, no other provision of law in any other statute which provides wholly or partly at the expense of any county, city or town for pensions or retirement benefits for employees of the said county, city or town, their widows, or other dependents shall apply to members or beneficiaries of the Retirement System established by this Article. (1939, c. 390, s. 13; 1955, c. 1153, s. 8.)

§ 128-34. Transfer of members.

(a) Any member of the North Carolina Governmental Employees' Retirement System who leaves the service of his employer and enters the service of another employer participating in the North Carolina Governmental Employees' Retirement System shall maintain his status as a member of the Retirement System and shall be credited with all of the amounts previously credited to his account in any of the funds under this Article, but the new employer shall be responsible for any accrued liability contribution payable on account of any prior service credit which such employee may have at the time of the transfer, and such employee shall be given such status and be credited with such service with the new employer as allowed with the former employer.

(b) Any member of the Local Governmental Employees' Retirement System shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the Teachers' and State Employees' Retirement System: Provided, the actual transfer of employment is made while he has an active account in the State System and such person shall request the State System to transfer his accumulated contributions, interest, and service credits to this Retirement System; provided further, the State System agrees to transfer to this Retirement System the amount of reserve held in the State System as the result of previous contributions of the employer on behalf of the transferring employee.

(c) Any member whose services are terminated for any reason other than retirement or death who becomes employed by an employer participating in the Teachers' and State Employees' Retirement System shall be entitled to transfer to the State System his credits for membership and prior service in this Retirement System in accordance with G.S. 135-18.1: Provided, the actual transfer of employment is made while he has an active account in this Retirement System and such persons shall request this Retirement System to transfer his accumulated contributions, interest, and service credits to the State System. When such request is made by a member who is entitled to make it and who becomes a member of the State System after July 1, 1969, this Retirement System will also transfer to the State System the amount of reserve held by this System as a result of previous contributions of the employer on behalf of the transferring employee.

(d) The accumulated contributions and creditable service of any member whose service as an employee has been or is terminated other than by retirement or death and who, while still a member of this Retirement System, became or becomes a member, as defined in G.S. 135-53(11), of the Consolidated Judicial Retirement System for a period of five or more years may, upon application of the member, be transferred from this Retirement System to the Consolidated Judicial Retirement System. In order to effect the transfer of a member's creditable service from the Local Governmental Employees' Retirement System to the Consolidated Judicial Retirement System, there shall be transferred from the Local Governmental Employees' Retirement System to the Consolidated Judicial Retirement System the sum of (i) the accumulated contributions of the member credited in the annuity savings fund and (ii) the amount of reserve held in the Local Governmental Employees' Retirement System as a result of previous contributions by the employer on behalf of the transferring member. (1939, c. 390, s. 14; 1971, c. 325, s. 20; 1973, c. 242, s. 11; 1999-237, s. 28.24(a).)

§ 128-35. Obligations of pension accumulation fund.

The maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various funds as provided in G.S. 128-30, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Article, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived from deposits and investments authorized by this Article shall be used for the payment of said obligations of the said fund. (1939, c. 390, s. 15.)

§ 128-36. Local laws unaffected; when benefits begin to accrue.

Nothing in this Article shall have the effect of repealing any public-local or private act creating or authorizing the creation of any officers' or employees' retirement system in any county, city or town or prohibiting the enactment of any public-local or private act creating or authorizing the creation of any officers' or employees' retirement system in any county, city, or town. No payment on account of any benefit granted under the provisions of G.S. 128-27, subsections (a) to (d) inclusive, shall become effective or begin to accrue until the end of one year following the date the System is established nor shall any compulsory retirement be made during that period. The provisions of this Article shall apply only to those counties, cities or towns whose governing authorities voluntarily elect to be bound by same. (1939, c. 390, s. 16; 1941, c. 357, s. 9B; 1945, c. 526, s. 7A.)

§ **128-36.1:** Repealed by Session Laws 1977, c. 318.

§ 128-37. Membership of employees of district health departments or public health authorities.

Under such rules and regulations as the Board of Trustees shall establish and promulgate, the boards of county commissioners of any group of counties composing a district health department, or the governing board of any public health authority, or the board of county commissioners of any county as to county boards of health, or the governing authorities of any county and/or city as to city-county boards of health, may elect that employees of such health departments may be members of the North Carolina Local Governmental Employees' Retirement System to the extent of that part of their compensation paid by the various counties composing said district health department. (1949, c. 1012; 1951, c. 700; 1997-502, s. 4.)

§ 128-37.1. Membership of employees of county social services department.

Under such rules and regulations as the Board of Trustees shall establish and promulgate, the board of county commissioners of any county may elect that employees of the county social services department may be members of the North Carolina Local Governmental Employees' Retirement System; provided, that such membership may be elected jointly with such county health department employees as provided under G.S. 128-37. (1959, c. 1179; 1969, c. 982.)

§ 128-38. Reservation of power to change.

The General Assembly reserves the right at any time and from time to time, and if deemed necessary or appropriate by said General Assembly in order to coordinate with any changes in the benefit and other provisions of the Social Security Act made after January 1, 1955, to modify or amend in whole or in part any or all of the provisions of the North Carolina Local Governmental Employees' Retirement System. (1955, c. 1153, s. 9.)

CASE NOTES

Relationship between public employees and retirement system is one of contract. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Right of Employee to Rely on Retirement Plan. — A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Impairment of Rights by 1981 Amendment. — Rights arising under this Article were impaired inasmuch as plaintiff employees stood to suffer significant reductions in their retirement allowances as a result of the 1981 legislative amendment of G.S. 128-27 adding subsection (d4), and where challenge thereto had been resolved below by grant of summary judgment in defendants' favor, but defendants' affidavit failed to demonstrate or reflect that the changes in question were reasonable and necessary to serve an important state interest, the case would be remanded for further proceedings. Simpson v. North Carolina Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd, 323 N.C. 362, 372 S.E.2d 559 (1988).

Cited in Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

§ 128-38.1. Termination or partial termination; discontinuance of contributions.

In the event of the termination or partial termination of the Retirement System or in the event of complete discontinuance of contributions under the Retirement System, the rights of all affected members to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the members' accounts, shall be nonforfeitable and fully vested. (1987, c. 177, s. 1(a), (b).)

Editor's Note. — Session Laws 1987, c. 177, s. 1(c) made this section effective upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling from the Internal Revenue Service, United States Department of Treasury, that the Retirement Systems were qualified trusts under Section 401(a) of the Internal Revenue Code of 1954 as amended. A favorable letter was received prior to the enactment of Session Laws 1987, c. 177.

§ 128-38.2. Internal Revenue Code compliance.

(a) Notwithstanding any other provisions of law to the contrary, compensation for any calendar year after 1988 in which employee or employer contributions are made and for which annual compensation is used for computing any benefit under this Article shall not exceed the higher of two hundred thousand dollars ($200,000) or the amount determined by the Commissioner of Internal Revenue as the limitation for calendar years after 1989; provided the imposition of the limitation shall not reduce a member's benefit below the amount determined as of December 31, 1988.

Effective January 1, 1996, the annual compensation of a member taken into account for determining all benefits provided under this Article shall not exceed one hundred fifty thousand dollars ($150,000), as adjusted pursuant to section 401(a)(17)(B) of the Internal Revenue Code and any regulations issued under the Code. However, with respect to a person who became a member of the Retirement System prior to January 1, 1996, the imposition of this limitation on compensation shall not reduce the amount of compensation which may be taken into account for determining the benefits of that member under this Article below the amount of compensation which would have been recognized under the provisions of this Article in effect on July 1, 1993.

Effective January 1, 2002, the annual compensation of a person, who became a member of the Retirement System on or after January 1, 1996, taken into account for determining all benefits accruing under this Article for any plan year after December 31, 2001, shall not exceed two hundred thousand dollars ($200,000) or the amount otherwise set by the Internal Revenue Code or determined by the Commissioner of Internal Revenue as the limitation for calendar years after 2002.

(b) Notwithstanding any other provisions of law to the contrary, the annual benefit payable on behalf of a member shall, if necessary, be reduced to the extent required by Section 415(b) and with respect to calendar years commencing prior to January 1, 2000, Section 415(e) of the Internal Revenue Code, as adjusted by the Secretary of the Treasury or his delegate pursuant to Section 415(d) of the Code. If a member is a participant under any qualified defined contributions plan that is required to be taken into account for the purposes of the limitation contained in Section 415 of the Internal Revenue Code, the annual benefit payable under this Article shall be reduced to the extent required by Section 415(e) prior to making any reduction under the defined contribution plan provided by the employer. However, with respect to a member who has benefits accrued under this Article but whose benefit had not commenced as of December 31, 1999, the combined plan limitation contained in Section 415(e) of the Internal Revenue Code shall not be applied to such member for calendar years commencing on or after January 1, 2000.

(c) On and after January 1, 1989, the retirement allowance of a member who has terminated employment shall begin no later than the later of April 1 of the calendar year following the calendar year that the member attains 70 ½ years of age or April 1 of the calendar year following the calendar year in which the member terminates employment.

(d) This subsection applies to distributions made on or after January 1, 1993. Notwithstanding any other provision of the Plan to the contrary that would otherwise limit a distributee's election under this Article, a distributee may elect, at the time and in the manner prescribed by the Plan administrator, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover. Provided, an eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more; any distribution to the extent such distribution is required under section 401(a)(9) of the Code; and the portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net realized appreciation with respect to employer securities). Effective as of January 1, 2002, and notwithstanding the preceding sentence, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Section 408(a) or (b) of the Code, or to a qualified defined contribution plan described in Section 401(a) or 403(a) of the Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible. Provided, an eligible retirement plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, an annuity plan described in section 403(a) of the Code, or a qualified trust described in section 401(a) of the Code, that accepts the distributee's eligible rollover distribution. Effective on and after January 1, 2002, an eligible retirement plan shall also mean an annuity contract described in Section 403(b) of the Code and an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. The definition of eligible retirement plan shall also apply in the case of a distribution to surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code, or a court-ordered equitable distribution of marital property, as provided under G.S. 50-30. Provided, a distributee includes an employee or former employee. Provided further, a direct rollover is a payment by the Plan to the eligible retirement plan specified by the distributee. (1989, c. 276, s. 2; 1993, c. 531, s. 4; 1995, c. 361, s. 3; 2002-71, s. 4.)

§ 128-38.3. Deduction for payment to certain employees' associations allowed.

Any beneficiary who is a member of a domiciled employees' or retirees' association that has at least 2,000 members, the majority of whom are active or retired employees of employers as defined in G.S. 128-21(11), may authorize, in writing, the periodic deduction from the beneficiary's retirement benefits a designated lump sum to be paid to the employees' or retirees' association. The authorization shall remain in effect until revoked by the beneficiary. A plan of deductions pursuant to this section shall become void if the employees' or retirees' association engages in collective bargaining with the State, any political subdivision of the State, or any local school administrative unit. (2001-424, s. 32.31; 2002-126, s. 6.4(b).)

§ 128-38.4. Forfeiture of retirement benefits for certain felonies.

(a) Except as provided in G.S. 128-26(w), the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony under the federal laws listed in subsection (b) of this section or the laws of this State listed in subsection (c) of this section if all of the following apply:

- (1) The federal or State offense is committed while serving as an elected government official.
- (2) The conduct on which the federal or State offense is based is directly related to the member's service as an elected government official.

(b) The federal offenses covered by this section are as follows:

- (1) A felony violation of 18 U.S.C. § 201 (Bribery of public officials and witnesses), 18 U.S.C. § 286 (Conspiracy to defraud the Government with respect to claims), 18 U.S.C. § 287 (False, fictitious or fraudulent claims), 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States), 18 U.S.C. § 597 (Expenditures to influence voting), 18 U.S.C. § 599 (Promise of appointment by candidate), 18 U.S.C. § 606 (Intimidation to secure political contributions), 18 U.S.C. § 641 (Public money, property, or records), 18 U.S.C. § 666 (Embezzlement and theft), 18 U.S.C. § 1001 (Statements or entries generally), 18 U.S.C. § 1341 (Frauds and swindles), 18 U.S.C. § 1343 (Fraud by wire, radio, or television), 18 U.S.C. § 1503 (Influencing or injuring officer or juror generally), 18 U.S.C. § 1951 (Interference with commerce by threats or violence), 18 U.S.C. § 1952 (Interstate and foreign travel or transportation in aid of racketeering enterprises), 18 U.S.C. § 1956 (Laundering of monetary instruments), 18 U.S.C. § 1962 (Prohibited activities), or section 7201 of the Internal Revenue Code (Attempt to evade or defeat tax).

(2) Reserved for future codification purposes.

(c) The offenses under the laws of this State covered by this section are as follows:

(1) A felony violation of Article 29, 30, or 30A of Chapter 14 of the General Statutes (Relating to bribery, obstructing justice, and secret listening) or G.S. 14-228 (Buying and selling offices), or Part 1 of Article 14 of Chapter 120 of the General Statutes (Code of Legislative Ethics), Article 20 or 22 of Chapter 163 of the General Statutes (Relating to absentee ballots, corrupt practices and other offenses against the elective franchise, and regulating of contributions and expenditures in political campaigns).

(2) Perjury or false information as follows:

a. Perjury committed under G.S. 14-209 in falsely denying the commission of an act that constitutes an offense within the purview of an offense listed in subdivision (1) of subsection (c) of this section.

b. Subornation of perjury committed under G.S. 14-210 in connection with the false denial of another as specified by subdivision (2) of this subsection.

c. Perjury under Article 22A of Chapter 163 of the General Statutes.

(d) All monies forfeited under this section shall be remitted to the Civil Penalty and Forfeiture Fund. (2007-179, s. 2(a).)

Editor's Note. — Session Laws 2007-179, s. 5, made this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2007-179, s. 2(a), enacted this section with a subdivision (b)(1), but no subdivision (b)(2). Subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

ARTICLE 4.

Leaves of Absence.

§ 128-39. Leaves of absence for State officials for protracted illness or other reason.

Any elective or appointive State official may obtain leave of absence from the official's duties for protracted illness or other reason satisfactory to the Governor, for such period as the Governor may designate. The leave shall be obtained only upon application by the official and with the consent of the Governor. The official shall receive no salary during the period of leave unless the leave of absence is granted by reason of protracted illness, in which event the granting of a leave of absence shall not deprive the official of the benefits of cumulative sick leave to which the official may be entitled under rules and regulations adopted pursuant to G.S. 143-37 or to which he may otherwise be entitled by law. The period of leave may be extended upon application to and with the approval of the Governor if the reason for the original leave still exists, and it may be shortened if the reason shall unexpectedly terminate: Provided, that no leave or extension thereof shall operate to extend the term of office of any official beyond the period for which the official was elected or appointed. If, by reason of the length of the period of absence or the nature of the duties of the official, the Governor deems it necessary, the Governor may appoint any citizen of the State, without regard to residence or district, as a temporary replacement for the period of the official's leave of absence. This appointee shall have all the authority, duties, perquisites, and emoluments of the official temporarily replaced. The appointee shall possess all the qualifications required by law for holding the office for which the temporary replacement official is appointed. (1941, c. 121, s. 1; 2007-432, s. 1.)

Editor's Note. — G.S. 143-37, referred to in this section, was repealed by Session Laws 1965, c. 640, s. 1. For present provisions as to leave, see G.S. 126-8.

Effect of Amendments. — Session Laws 2007-432, s. 1, effective August 23, 2007, added "for protracted illness or other reason" in the section heading; substituted "the official's duties for protracted illness" for "his duties for military or naval service, protracted illness" in the first sentence; substituted "deprive the official" for "operate to deprive any such official" in the third sentence; rewrote the former last sentence as the present last three sentences; and made minor stylistic and gender neutralization changes throughout.

CASE NOTES

Acceptance of Temporary Army or Navy Commission. — Under this section any State official may be given a leave of absence to accept a temporary officer's commission in the United States Army or Navy, as prescribed in this section, without perforce vacating his civil office and without violation of the provisions of former N.C. Const., Art. XIV, § 7 (now N.C. Const., Art. VI, § 9). In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944).

Acceptance of Appointment Creating Vacancy. — Where a judge of a superior court has been granted a leave of absence under this section, his acceptance of appointment as judge of the United States Zonal Court in Germany would contravene the provisions of former N.C. Const., Art. XIV, § 7 (now N.C. Const., Art. VI, § 9), and ipso facto create a vacancy in his office. In re Phillips, 226 N.C. 772, 39 S.E.2d 217 (1946).

§ 128-39.1. Leaves of absence for State officials for military or naval service.

(a) Any elective or appointive State official may obtain leave of absence from the official's duties when the official enters active duty in the armed forces of the United States or the North Carolina National Guard as a result of being voluntarily or involuntarily activated, drafted, or otherwise called to duty. The official shall receive no salary during the period of leave. No vacancy is created by a State official obtaining a leave of absence under this section.

(b) If the official will be on active duty for a period of at least 30 days, a leave of absence may be obtained, and a temporary replacement for the official may be appointed in the following manner:

(1) If the official is not a member of the General Assembly:
  a. Leave of absence shall be obtained by filing a copy of the official's active duty orders with the Office of the Governor.
  b. G.S. 128-39 shall provide the procedure for selecting a temporary replacement official.

(2) If the official is a member of the General Assembly:
  a. Leave of absence shall be obtained by filing a copy of the official's active duty orders with the clerk of the house of the General Assembly of which the official is a member.
  b. The Governor shall select a person to serve as the temporary replacement representative or senator. If the appropriate party executive committee recommends an eligible person within 14

days of the occurrence of the vacancy, the appointment shall be made under the same procedure as provided by G.S. 163-11. If a recommendation is not made on a timely basis, the Governor may appoint any person who is both:

1. A resident of the legislative district represented by the legislator being temporarily replaced.
2. A member of the same political party as the legislator being temporarily replaced.

In any case, the person appointed must be eligible to serve under Section 6 of Article II of the North Carolina Constitution if a senator or Section 7 of Article II of the North Carolina Constitution if a representative.

(c) If the official will be on active duty for a period of less than 30 days, a temporary replacement official shall not be appointed, even if a leave of absence is obtained.

(d) The Governor shall appoint the temporary replacement to begin service on the date specified in writing by the official being temporarily replaced as the date the official will enter active military service, or as soon as practicable thereafter. A temporary replacement official shall have all the authority, duties, perquisites, and emoluments of the official temporarily replaced.

(e) The term of the temporary replacement official appointed under this section shall terminate as soon as any of the following occurs:

(1) On the third day after the last day of active duty status of the official who is temporarily replaced.
(2) The clerk of the appropriate house of the General Assembly receives written notice from the official who is temporarily replaced that the official is ready and able to resume the duties of his or her office.
(3) The term of office of the official who is temporarily replaced expires. (2007-432, s. 2.)

Editor's Note. — Session Laws 2007-432, s. 6, made this section effective August 23, 2007. The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 2007-432, s. 2 having been 128-39A.

§ 128-40. Leaves of absence for county officials for protracted illness or other reason.

Any elective or appointive county official may obtain leave of absence from the official's duties for protracted illness or other reason satisfactory to the board of county commissioners of his county, for such period as the board of county commissioners may designate. The leave shall be obtained only upon application by the official and with the consent of the board of county commissioners. The official shall receive no salary during the period of leave unless the leave of absence is granted by reason of protracted illness, in which event the granting of a leave of absence shall not deprive the official of the benefits of any sick leave to which the official may be entitled by law. The period of leave may be extended upon application to and with the approval of the board of county commissioners if the reason for the original leave still exists, and it may be shortened if the reason shall unexpectedly terminate: Provided, that no leave or extension thereof shall operate to extend the term of office of any official beyond the period for which the official was elected or appointed. If, by reason of the length of the period of absence or the nature of the duties of the official, the board of county commissioners deems it necessary, the board may appoint any qualified citizen of the county as a temporary replacement for the period of the official's leave of absence. This appointee shall have all the authority, duties, perquisites, and emoluments of the official temporarily replaced. The appointee shall possess all the qualifications required by law for holding the office for which the temporary replacement official is appointed. (1941, c. 121, s. 2; 2007-432, s. 3.)

Effect of Amendments. — Session Laws 2007-432, s. 3, effective August 23, 2007, added "officials for protracted illness or other reason" in the section heading; substituted "the official's duties for protracted illness" for "his duties for military or naval service, protracted illness" in the first sentence; substituted "deprive the official" for "operate to deprive any such official" in the third sentence; rewrote the former last sentence as the present last three sentences; and made minor stylistic and gender neutralization changes throughout.

CASE NOTES

Cited in In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944).

§ 128-41. Leaves of absence for municipal officials for protracted illness or other reason.

Any elective or appointive municipal official may obtain leave of absence from the official's duties for protracted illness or other reason satisfactory to the governing body of the municipality, for such period as the governing body may designate. The leave shall be obtained only upon application by the official and with the consent of the governing body. The official shall receive no salary during the period of leave unless the leave of absence is granted by reason of protracted illness, in which event the granting of a leave of absence shall not deprive the official of the benefits of any sick leave to which the official may be entitled by law. The period of leave may be extended upon application to and with the approval of the governing body of the municipality if the reason for the original leave still exists, and it may be shortened if the reason shall unexpectedly terminate: Provided, that no leave or extension thereof shall operate to extend the term of office of any official beyond the period for which the official was elected or appointed. If, by reason of the length of the period of absence or the nature of the duties of the official, the governing body deems it necessary, it may appoint any qualified citizen of the municipality as a temporary replacement for the period of the official's leave of absence. This appointee shall have all the authority, duties, perquisites, and emoluments of the official temporarily replaced. The appointee shall possess all the qualifications required by law for holding the office for which the temporary replacement official is appointed. (1941, c. 121, s. 3; 2007-432, s. 4.)

Effect of Amendments. — Session Laws 2007-432, s. 4, effective August 23, 2007, substituted "officials for protracted illness or other reason" for "officers" in the section heading; substituted "the official's duties for protracted illness" for "his duties for military or naval service, protracted illness" in the first sentence; substituted "deprive the official" for "operate to deprive any such official" in the third sentence; rewrote the former last sentence as the present last three sentences; and made minor stylistic and gender neutralization changes throughout.

CASE NOTES

Cited in In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944).

§ 128-42. Leaves of absence for county or municipal officials for military or naval service.

(a) Any elective or appointive county or municipal official may obtain leave of absence from the official's duties when the official enters active duty in the armed forces of the United States or the North Carolina National Guard as a result of being voluntarily or involuntarily activated, drafted, or otherwise called to duty. The official shall receive no salary during the period of leave. No vacancy is created by a county or municipal official obtaining a leave of absence under this section.

(b) If the official will be on active duty for a period of at least 30 days, a leave of absence may be obtained, and a temporary replacement for the official may be appointed in the following manner:

(1) Leave of absence shall be obtained by placing a copy of the official's active duty orders with the clerk.

(2) G.S. 128-41 shall govern the procedure for selecting a temporary replacement official if the official being temporarily replaced is a municipal official; otherwise, G.S. 128-40 shall govern.

(c) If the official will be on active duty for a period of less than 30 days, a temporary replacement official shall not be appointed, even if a leave of absence is obtained.

(d) The appropriate authority under G.S. 128-40 or G.S. 128-41 shall appoint the temporary replacement to begin service on the date specified in writing by the official being temporarily replaced as the date the official will enter active military service, or as soon as practicable thereafter. A temporary replacement official shall have all the authority, duties, perquisites, and emoluments of the official temporarily replaced. The appointee shall possess all the qualifications required by law for holding the office for which the temporary replacement official is appointed.

(e) The term of the temporary replacement official appointed under this section shall terminate as soon as any of the following occurs:

(1) On the third day after the last day of active duty status of the official who is temporarily replaced.

(2) The clerk receives written notice from the official who is temporarily replaced that the official is ready and able to resume the duties of his or her office.

(3) The term of office of the official who is temporarily replaced expires.

(f) As used in this section, the term 'clerk' means the city clerk as defined in G.S. 160A-171 if the official being temporarily replaced is a municipal official and means the clerk to the board of county commissioners as defined in G.S. 153A-1(2) if the official being temporarily replaced is a county official. (2007-432, s. 5.)

Editor's Note. — Session Laws 2007-432, s. 6, made this section effective August 23, 2007.

Chapter 129.

Public Buildings and Grounds.

Article 1.

General Services Division [Repealed or Transferred.]

Sec.
129-1 through 129-3. [Repealed.]
129-4 through 129-9. [Transferred.]
129-10, 129-11. [Repealed.]

Article 2.

Building Program.

129-12. [Transferred.]

Article 2A.

State Legislative Building.

129-12.1. Official name.

Article 3.

State Legislative Building Commission.

129-13 through 129-17. [Repealed.]

Article 3.1.

Legislative Building Governing Commission.

129-17.1 through 129-17.5. [Repealed.]

Article 4.

Heritage Square and Commission.

Sec.
129-18 through 129-25. [Repealed.]

Article 5.

State Capital Planning Commission.

129-26 through 129-30. [Expired.]

Article 6.

North Carolina Capital Planning Commission.

129-31 through 129-39. [Repealed.]

Article 7.

North Carolina Capital Building Authority.

129-40 through 129-49. [Repealed.]

Article 8.

State Construction Finance Authority.

129-50 through 129-70. [Repealed.]

ARTICLE 1.

General Services Division.

§§ **129-1 through 129-3:** Repealed by Session Laws 1971, c. 1097, s. 5.

§ **129-4:** Transferred to G.S. 143-340 by Session Laws 1971, c. 1097, s. 2.

§ **129-5:** Transferred to G.S. 143-341 by Session Laws 1971, c. 1097, s. 3.

§§ **129-6 through 129-9:** Transferred to G.S. 143-345.1 to 143-345.4 by Session Laws 1971, c. 1097, s. 4.

§§ **129-10, 129-11:** Repealed by Session Laws 1971, c. 1097, s. 5.

ARTICLE 2.

Building Program.

§ **129-12:** Transferred to G.S. 143-345.5 by Session Laws 1971, c. 1097, s. 4.

ARTICLE 2A.

State Legislative Building.

§ 129-12.1. Official name.

The building constructed under the direction of the State Legislative Building Commission in Raleigh, and which is used to house the legislative branch of the State government is officially designated as the State Legislative Building, and all references in publications issued by the State of North Carolina or any agency, department or institution thereof shall refer to the building as the State Legislative Building. (1963, c. 8.)

Editor's Note. — Article 2.1 was renumbered as Article 2A pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

ARTICLE 3.

State Legislative Building Commission.

§§ 129-13 through 129-17: Repealed by Session Laws 1973, c. 99, s. 3.

Cross References. — For present provisions as to use and maintenance of the State Legislative Building, and as to transfer of functions, personnel, moneys, etc., see G.S. 120-32.1.

ARTICLE 3.1.

Legislative Building Governing Commission.

§§ 129-17.1 through 129-17.5: Repealed by Session Laws 1973, c. 99, s. 4.

Cross References. — For present provisions as to use and maintenance of the State Legislative Building, and as to transfer of functions, personnel, moneys, etc., see G.S. 120-32.1.

ARTICLE 4.

Heritage Square and Commission.

§§ 129-18 through 129-25: Repealed by Session Laws 1965, c. 1002, s. 1.

ARTICLE 5.

State Capital Planning Commission.

§§ 129-26 through 129-30: Expired.

Editor's Note. — These sections, which were enacted by Session Laws 1961, c. 361, expired by their own terms July 1, 1965.

ARTICLE 6.

North Carolina Capital Planning Commission.

§§ 129-31 through 129-39: Repealed by Session Laws 1975, c. 879, s. 12.

Cross References. — For present provisions as to the North Carolina Capital Planning Commission, see G.S. 143B-373, 143B-374.

ARTICLE 7.

North Carolina Capital Building Authority.

§§ 129-40 through 129-49: Repealed by Session Laws 1987, c. 71, s. 2.

Cross References. — As to the State Building Commission, see G.S. 143-135.25 et seq.

ARTICLE 8.

State Construction Finance Authority.

§§ 129-50 through 129-70: Repealed by Session Laws 1975, c. 879, s. 46.

Cross References. — As to transfer of functions of the State Construction Finance Authority to the Department of Administration, see G.S. 143B-368.

Chapter 130.

Public Health.

§§ 130-1 through 130-285: Repealed.

Cross References. — For the Midwifery Practice Act, see G.S. 90-178.1 et seq. For provisions relating to the public health, see now Chapter 130A. As to health care facilities and services, see now Chapter 131E.

Editor's Note. — Session Laws 1983, c. 775, s. 1, effective January 1, 1984, repealed G.S. 130-3(a), 130-9(e), 130-9.5, 130-9.7, 130-170.1, 130-170.2, 130-230, 130-232 to 130-235 and 130-264 to 130-277. Session Laws 1983, c. 891, s. 1, also effective January 1, 1984, repealed all of Chapter 130, except for those provisions repealed by c. 775, as listed above, and except for G.S. 130-166.21D, 130-187, and 130-203 to 130-205. Session Laws 1985, c. 462, s. 13, effective June 24, 1985, repealed G.S. 130-187 and 130-203 to 130-205. Session Laws 1989, c. 168, s. 10, effective May 30, 1989, repealed G.S. 130-166.21D.

Chapter 130A.

Public Health.

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ARTICLE 1.

Definitions, General Provisions and Remedies.

Part 1. General Provisions.

§ 130A-1. Title.

This Chapter shall be known as the Public Health Law of North Carolina. (1983, c. 891, s. 2.)

Editor's Note. — Session Laws 1983, c. 891 repealed most of Chapter 130, and enacted in its place a new Chapter 130A. Session Laws 1983, c. 775 repealed most of those sections of Chapter 130 not repealed by c. 891. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in new Chapter 130A.

Session Laws 2004-124, s. 10.1, provides: "The Department of Health and Human Services shall centralize all activities throughout the Department relating to the coordination and processing of criminal record checks required by law. The centralization shall include the transfer of positions, corresponding State appropriations, federal funds, and other funds. The Department shall implement the centralization beginning January 1, 2005, and shall report on the details of the centralization and implementation to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division not later than January 1, 2005."

Session Laws 2004-124, ss. 10.2C(a)-(d), provides: "(a) Based upon information gathered by the Department of Health and Human Services in conducting the recently completed department-wide examination and analysis of the Department's information technology infrastructure, including IT expenditures and management structure, the Department shall complete planning and begin implementation of those plans to consolidate management of all IT operations, services, and functions that are common to and necessary in all divisions, offices, and programs of the Department.

"(b) The consolidation and implementation should place emphasis on improving successful and timely implementation of IT projects and ongoing maintenance within the Department while eliminating duplication of efforts and equipment, controlling the use of personal service contracts, establishing continuity in process and systems development, strengthening systems security, coordinating and overseeing all IT efforts within the Department, and identifying other efficiencies. The plan for consolidation of these IT functions shall be implemented in a manner that will allow for the maintenance of a complete accounting of IT efforts within the Department and the costs related to those efforts, including identification of funding needs. The plan should set forth the management and operational structure of the consolidated IT function, including how the structure will enhance IT operations and efficiency within the Department.

"(c) The Department shall restrict the future creation or filling of any IT-related position within any departmental division, office, or program when the function of the position is determined under the consolidation plan to be properly placed or managed within the consolidated IT function.

"(d) The consolidation plan, including time lines for implementation, shall be submitted to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division upon completion, but not later than October 1, 2004. The Department shall provide a report on the progress of implementation of the consolidation plan to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on or before March 1, 2005."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Legal Periodicals. — For legislative survey on medicine, see 22 Campbell L. Rev. 253 (2000).

§ 130A-1.1. Mission and essential services.

(a) The General Assembly recognizes that unified purpose and direction of the public health system is necessary to ensure that all citizens in the State have equal access to essential public health services. The General Assembly declares that the mission of the public health system is to promote and contribute to the highest level of health possible for the people of North Carolina by:

(1) Preventing health risks and disease;
(2) Identifying and reducing health risks in the community;
(3) Detecting, investigating, and preventing the spread of disease;
(4) Promoting healthy lifestyles;
(5) Promoting a safe and healthful environment;
(6) Promoting the availability and accessibility of quality health care services through the private sector; and
(7) Providing quality health care services when not otherwise available.

(b) As used in this section, the term "essential public health services" means those services that the State shall ensure because they are essential to promoting and contributing to the highest level of health possible for the citizens of North Carolina. The Departments of Environment and Natural Resources and Health and Human Services shall attempt to ensure within the resources available to them that the following essential public health services are available and accessible to all citizens of the State, and shall account for the financing of these services:

(1) Health Support:
  a. Assessment of health status, health needs, and environmental risks to health;
  b. Patient and community education;
  c. Public health laboratory;
  d. Registration of vital events;
(2) Environmental Health:
  a. Lodging and institutional sanitation;
  b. On-site domestic sewage disposal;
  c. Water and food safety and sanitation; and
(3) Personal Health:
  a. Child health;
  b. Chronic disease control;
  c. Communicable disease control;
  d. Dental public health;
  e. Family planning;
  f. Health promotion and risk reduction;
  g. Maternal health.

The Commission for Public Health shall determine specific services to be provided under each of the essential public health services categories listed above.

(c) The General Assembly recognizes that there are health-related services currently provided by State and local government and the private sector that are important to maintaining a healthy social and ecological environment but that are not included on the list of essential public health services required under this section. Omission of these services from the list of essential public health services shall not be construed as an intent to prohibit or decrease their availability. Rather, such omission means only that the omitted services may be more appropriately assured by government agencies or private entities other than the public health system.

(d) The list of essential public health services required by this section shall not be construed to limit or restrict the powers and duties of the Commission for Public Health or the Departments of Environment and Natural Resources and Health and Human Services as otherwise conferred by State law. (1991, c. 299, s. 1; 1997-443, s. 11A.54; 2007-182, s. 2.)

Cross References. — As to the Hospital Authorities Act, see G.S. 131E-15.

Editor's Note. — Session Laws 1997-502, s. 12, provides any county which, on or prior to July 1, 1997, established a hospital authority board composed of no more than seven members under the provisions of Part B of Article 2 of Chapter 131E of the General Statutes may, by resolution adopted by its board of county commissioners and with the approval of the State Health Director, assign that authority board the power, duties, and responsibilities to provide public health services as outlined in G.S. 130A-1.1. Thereafter, such authority board shall act as the local board of health for the county together with such additional powers, duties, and authority assigned to it by the board of county commissioners.

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the concluding paragraph of subsection (b) and in subsection (d).

§ 130A-2. Definitions.

The following definitions shall apply throughout this Chapter unless otherwise specified:

(1) "Accreditation board" or "Board" means the Local Health Department Accreditation Board.

(1a) "Commission" means the Commission for Public Health.

(1b) "Communicable condition" means the state of being infected with a communicable agent but without symptoms.

(1c) "Communicable disease" means an illness due to an infectious agent or its toxic products which is transmitted directly or indirectly to a person from an infected person or animal through the agency of an intermediate animal, host, or vector, or through the inanimate environment.

(2) "Department" means the Department of Health and Human Services.

(3) "Imminent hazard" means a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the environment if no immediate action is taken.

(3a) "Isolation authority" means the authority to issue an order to limit the freedom of movement or action of persons or animals that are infected or reasonably suspected to be infected with a communicable disease or communicable condition for the period of communicability to prevent the direct or indirect conveyance of the infectious agent from the person or animal to other persons or animals who are susceptible or who may spread the agent to others.

(4) "Local board of health" means a district board of health or a public health authority board or a county board of health.

(5) "Local health department" means a district health department or a public health authority or a county health department.

(6) "Local health director" means the administrative head of a local health department appointed pursuant to this Chapter.

(6a) "Outbreak" means an occurrence of a case or cases of a disease in a locale in excess of the usual number of cases of the disease.

(7) "Person" means an individual, corporation, company, association, partnership, unit of local government or other legal entity.

(7a) "Quarantine authority" means the authority to issue an order to limit the freedom of movement or action of persons or animals which have been exposed to or are reasonably suspected of having been exposed to a communicable disease or communicable condition for a period of time as may be necessary to prevent the spread of that disease. Quarantine authority also means the authority to issue an order to limit access by any person or animal to an area or facility that may be contaminated with an infectious agent. The term also means the authority to issue an order to limit the freedom of movement or action of persons who have not received immunizations against a communicable disease when the State Health Director or a local health director determines that the immunizations are required to control an outbreak of that disease.

(8) "Secretary" means the Secretary of Health and Human Services.

(9) "Unit of local government" means a county, city, consolidated city-county, sanitary district or other local political subdivision, authority or agency of local government.

(10) "Vital records" means birth, death, fetal death, marriage, annulment and divorce records registered under the provisions of Article 4 of this

Chapter. (1957, c. 1357, s. 1; 1963, c. 492, ss. 5, 6; 1967, c. 343, s. 2; c. 1257, s. 1; 1973, c. 476, s. 128; 1975, c. 751, s. 1; 1981, c. 130, s. 1; c. 340, ss. 1-4; 1983, c. 891, s. 2; 1989, c. 727, s. 141; 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991, c. 631, s. 1; 1997-443, s. 11A.55; 1997-502, s. 2(a), (b); 2002-179, s. 4; 2004-80, s. 1; 2005-369, s. 1(a); 2007-182, s. 2.)

Local Modification to Former § 130-3. — Cumberland: 1965, c. 1152, s. 1.

Cross References. — As to provisions for regional solid waste management authorities, see Article 22 of Chapter 153A, G.S. 153A-421 et seq.

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subdivision (1a).

Legal Periodicals. — For note that addresses the effect of United States Supreme Court decision on sodomy laws and the manner in which society may shape its characterization of Acquired Immune Deficiency Syndrome (AIDS) and homosexuality, see 66 N.C.L. Rev. 226 (1987).

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 130A-3. Appointment of the State Health Director.

The Secretary shall appoint the State Health Director. The State Health Director shall be a physician licensed to practice medicine in this State. The State Health Director shall perform duties and exercise authority assigned by the Secretary. (1983, c. 891, s. 2.)

§ 130A-4. Administration.

(a) Except as provided in subsection (c) of this section, the Secretary shall administer and enforce the provisions of this Chapter and the rules of the Commission. A local health director shall administer the programs of the local health department and enforce the rules of the local board of health.

(b) When requested by the Secretary, a local health department shall enforce the rules of the Commission under the supervision of the Department. The local health department shall utilize local staff authorized by the Department to enforce the specific rules.

(c) The Secretary of Environment and Natural Resources shall administer and enforce the provisions of Part 4 of Article 5 and Articles 8, 9, 10, 11, and 12 of this Chapter and the rules of the Commission.

(d) When requested by the Secretary of Environment and Natural Resources, a local health department shall enforce the rules of the Commission and the rules adopted by the Environmental Management Commission pursuant to G.S. 87-87 under the supervision of the Department of Environment and Natural Resources. The local health department shall utilize local staff authorized by the Department of Environment and Natural Resources to enforce the specific rules. (1983, c. 891, s. 2; 1995, c. 123, s. 2; 1997-443, s. 11A.56; 2001-474, s. 18; 2006-202, s. 5; 2006-255, s. 13.1.)

Effect of Amendments. — Session Laws 2006-202, s. 5, effective August 7, 2006, inserted "and the rules adopted by the Environmental Management Commission pursuant to G.S. 87-87" in the middle of the first sentence of subsection (d).

Session Laws 2006-255, s. 13.1, effective August 23, 2006, inserted "Part 4 of Article 5 and" near the middle of subsection (c).

CASE NOTES

Subject Matter Jurisdiction. — Trial court was without subject matter jurisdiction to enter findings or conclusions regarding an animal rights organization's claim against a private agency for alleged violations by the agency of G.S. 130A-192, as enforcement of the statute was proper against the local board of health in the Office of Administrative Hearings under G.S. 130A-4(a) and G.S. 130A-24. Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005).

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in Edwards v. Johnston County Health Dep't, 885 F.2d 1215 (4th Cir. 1989); Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

§ 130A-4.1. State funds for maternal and child health care/nonsupplanting.

(a) The Department shall ensure that local health departments do not reduce county appropriations for maternal and child health services provided by the local health departments because they have received State appropriations for this purpose.

(b) All income earned by local health departments for maternal and child health programs supported in whole or in part from State or federal funds, received from the Department, shall be budgeted and expended by local health departments to further the objectives of the program that generated the income. (1991, c. 689, s. 170; 1997-443, s. 11A.57.)

CASE NOTES

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

§ 130A-4.2. State funds for health promotion/nonsupplanting.

The Department shall ensure that local health departments do not reduce county appropriations for health promotion services provided by the local health departments because they have received State appropriations for this purpose. (1991, c. 689, s. 171; 1997-443, s. 11A.58.)

CASE NOTES

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

§ 130A-5. Duties of the Secretary.

The Secretary shall have the authority:

(1) To enforce the State health laws and the rules of the Commission;

(2) To investigate the causes of epidemics and of infectious, communicable and other diseases affecting the public health in order to control and prevent these diseases; to provide, under the rules of the Commission, for the prevention, detection, reporting and control of communicable, infectious or any other diseases or health hazards considered harmful to the public health;

(3) To develop and carry out reasonable health programs that may be necessary for the protection and promotion of the public health and

the control of diseases. The Commission is authorized to adopt rules to carry out these programs;

(4) To make sanitary and health investigations and inspections;

(5) To investigate occupational health hazards and occupational diseases and to make recommendations for the elimination of the hazards and diseases. The Secretary shall work with the Industrial Commission and shall file sufficient reports with the Industrial Commission to enable it to carry out all of the provisions of the Workers' Compensation Act with respect to occupational disease.

(6) To receive donations of money, securities, equipment, supplies, realty or any other property of any kind or description which shall be used by the Department for the purpose of carrying out its public health programs;

(7) To acquire by purchase, devise or otherwise in the name of the Department equipment, supplies and other property, real or personal, necessary to carry out the public health programs;

(8) To use the official seal of the Department. Copies of documents in the possession of the Department may be authenticated with the seal of the Department, attested by the signature or a facsimile of the signature of the Secretary, and when authenticated shall have the same evidentiary value as the originals;

(9) To disseminate information to the general public on all matters pertaining to public health; to purchase, print, publish, and distribute free, or at cost, documents, reports, bulletins and health informational materials. Money collected from the distribution of these materials shall remain in the Department to be used to replace the materials;

(10) To be the health advisor of the State and to advise State officials in regard to the location, sanitary construction and health management of all State institutions; to direct the attention of the State to health matters which affect the industries, property, health and lives of the people of the State; to inspect at least annually State institutions and facilities; to make a report as to the health conditions of these institutions or facilities with suggestions and recommendations to the appropriate State agencies. It shall be the duty of the persons in immediate charge of these institutions or facilities to furnish all assistance necessary for a thorough inspection;

(11) To establish a schedule of fees based on income to be paid by a recipient for services provided by Migrant Health Clinics and Development Evaluation Centers;

(12) To establish fees for the sale of specimen containers, vaccines and other biologicals. The fees shall not exceed the actual cost of such items, plus transportation costs;

(13) To establish a fee to cover costs of responding to requests by employers for industrial hygiene consultation services and occupational consultation services. The fee shall not exceed two hundred dollars ($200.00) per on site inspection; and

(14) To establish a fee for companion animal certificate of examination forms to be distributed, upon request, by the Department to licensed veterinarians. The fee shall not exceed the cost of the form and shipping costs.

(15) To establish a fee not to exceed the cost of analyzing clinical Pap smear specimens sent to the State Laboratory by local health departments and State-owned facilities and for reporting the results of the analysis. This fee shall be in addition to the charge for the Pap smear test kit.

(16) To charge a fee of up to fifty-five dollars ($55.00) for analyzing private well-water samples sent to the State Laboratory of Public Health by

local health departments. The fee shall be imposed only for analyzing samples from newly constructed wells. The fee shall be computed annually by the Director of the State Laboratory of Public Health by analyzing the previous year's testing at the State Laboratory of Public Health, and applying the amount of the total cost of the private well-water testing, minus State appropriations that support this effort. The fee includes the charge for the private well-water panel test kit. (1957, c. 1357, s. 1; 1961, c. 51, s. 4; c. 833, s. 14; 1969, c. 982; 1973, c. 476, ss. 128, 138; 1979, c. 714, s. 2; 1981, c. 562, s. 4; 1983, c. 891, s. 2; 1985, c. 470, s. 1; 1991, c. 227, s. 1; 1993 (Reg. Sess., 1994), c. 715, s. 1; 2003-284, s. 34.13(a); 2006-66, s. 10.20(a); 2007-115, s. 2.)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 10.20(b), provides: "The Department of Health and Human Services, Division of Public Health, shall use funds available for the 2006-2007 fiscal year to pay for positions for the private well water safety program authorized in the Current Operations and Capital Improvements Appropriations Act of 2006. Funds realized from fees collected during the 2006-2007 fiscal year shall be used to replace available funds authorized under this subsection and allocated for positions authorized for the private well water safety program for the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 10.20(a), effective July 1, 2006, added new subdivision (16).

Session Laws 2007-115, s. 2, effective June 21, 2007, deleted the provisions in subdivision (2) pertaining to the obtaining of privileged patient medical records.

§ 130A-5.1. State health standards.

(a) The Secretary shall adopt measurable standards and goals for community health against which the State's actions to improve the health status of its citizens will be measured. The Secretary shall report annually to the General Assembly upon its convening or reconvening and to the Governor on all of the following:

(1) How the State compares to national health measurements and established State goals for each standard. Comparisons shall be reported using disaggregated data for health standards.
(2) Steps taken by State and non-State entities to meet established goals.
(3) Additional steps proposed or planned to be taken to achieve established goals.

(b) The Secretary may coordinate and contract with other entities to assist in the establishment of standards and preparation of the report. The Secretary may use resources available to implement this section. (2000-67, s. 11.)

§ 130A-6. Delegation of authority.

Whenever authority is granted by this Chapter upon a public official, the authority may be delegated to another person authorized by the public official. (1983, c. 891, s. 2.)

§ 130A-7. Grants-in-aid.

The State is authorized to accept, allocate and expend any grants-in-aid for public health purposes which may be made available to the State by the federal government. This Chapter is to be liberally construed in order that the State and its citizens may benefit fully from these grants-in-aid. The Commission is authorized to adopt rules, not inconsistent with the laws of this State, as required by the federal government for receipt of federal funds. Any federal funds received are to be deposited with the State Treasurer and are to be appropriated by the General Assembly for the public health purposes specified. (1957, c. 1357, s. 1; 1983, c. 891, s. 2.)

§ 130A-8. Counties to recover indirect costs on certain federal public health or mental health grants.

(a) The Department shall include in its request for federal funds applicable to public health or mental health grants from the federal government to the State or any of its agencies, indirect costs incurred by counties acting as subgrantees under the grants or otherwise providing services to the Department with regard to the grants to the full extent permitted by OMB Circular A-87 or its successor. The Department shall allow counties to claim and recover their indirect costs on these grants to the full extent permitted by the Circular.

(b) This section shall not apply to those federal public health or mental health grants which are formula grants to the State or which are otherwise limited as to the maximum amounts receivable on a statewide basis. (1977, c. 876, ss. 1, 2; 1983, c. 891, s. 2.)

§ 130A-9. Standards.

The Commission is authorized to establish reasonable standards governing the nature and scope of public health services rendered by local health departments. (1957, c. 1357, s. 1; 1973, c. 110; 1975, c. 83; 1979, c. 504, s. 15; 1983, c. 891, s. 2.)

§ 130A-10. Advisory Committees.

The Secretary is authorized to establish and appoint as many special advisory committees as may be necessary to advise and confer with the Department concerning the public health. Members of any special advisory committee shall serve without compensation but may be allowed travel and subsistence expenses in accordance with G.S. 138-6. (1957, c. 1357, s. 1; 1975, c. 281; 1983, c. 891, s. 2.)

§ 130A-11. Residencies in public health.

The Department shall establish a residency program designed to attract dentists into the field of public health and to train them in the specialty of public health practice. The program shall include practical experience in public health principles and practices. (1975, c. 945, s. 1; 1983, c. 891, s. 2; 1991, c. 342, s. 6.)

§ 130A-12. Confidentiality of records.

All records containing privileged patient medical information, information protected under 45 Code of Federal Regulations Parts 160 and 164, and information collected under the authority of Part 4 of Article 5 of this Chapter that are in the possession of the Department of Health and Human Services, the Department of Environment and Natural Resources, or local health departments shall be confidential and shall not be public records pursuant to G.S. 132-1. Information contained in the records may be disclosed only when disclosure is authorized or required by State or federal law. Notwithstanding G.S. 8-53 or G.S. 130A-143, the information contained in the records may be disclosed for purposes of treatment, payment, or health care operations. For purposes of this section, the terms "treatment," "payment," and "health care operations" have the meanings given those terms in 45 Code of Federal Regulations § 164.501. (1985, c. 470, s. 2; 1991 (Reg. Sess., 1992), c. 890, s. 9; 1995, c. 428, s. 1.1; 2004-80, s. 4; 2006-255, s. 13.2.)

Effect of Amendments. — Session Laws 2006-255, s. 13.2, effective August 23, 2006, in the first sentence, deleted "or" following the first occurrence of "information," substituted "Code of Federal Regulations" for "C.F.R.," inserted "and information collected under the authority of Part 4 of Article 5 of this Chapter," inserted "of Health and Human Services, the Department of Environment and Natural Resources" and made minor punctuation changes; and substituted "Code of Federal Regulations" for "C.F.R." near the end of the last sentence.

CASE NOTES

HIV Testing. — Proposed confidential HIV testing program did not violate plaintiffs' privacy rights in their personal medical information. Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

§ 130A-13. Application for eligibility for Department medical payment program constitutes assignment to the State of right to third party benefits.

(a) Notwithstanding any other provisions of law, by applying for financial eligibility for any Department medical payment program administered under this Chapter, the recipient patient or responsible party for the recipient patient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled to the extent of the amount of the Department's payment on behalf of the recipient patient. Any attorney retained by the recipient patient shall be compensated for his services in accordance with the following schedule and in the following order of priority from any amount of such third party benefits obtained on behalf of the recipient by settlement, with judgment against, or otherwise from a third party:

(1) First to the payment of any court costs taxed by the judgment;

(2) Second to the payment of the fee of the attorney representing the beneficiary making the settlement or obtaining the judgment, but this fee shall not exceed one-third of the amount obtained or recovered to which the right of subrogation applies;

(3) Third to the payment of the amount of assistance received by the beneficiary as prorated with other claims against the amount obtained or received from the third party to which the right of subrogation applies, but the amount shall not exceed one-third of the amount obtained or recovered to which the right of subrogation applies; and

(4) Fourth to the payment of any amount remaining to the beneficiary or his personal representative.

The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) The Department shall establish a third party resources collection unit that is adequate to ensure collection of third party resources.

(c) The Commission may adopt rules necessary to implement this section.

(d) Notwithstanding any other law to the contrary, in all actions brought by the State pursuant to subsection (a) of this section to obtain reimbursement for payments for medical services, liability shall be determined on the basis of the same laws and standards, including bases for liability and applicable defenses, as would be applicable if the action were brought by the individual on whose behalf the medical services were rendered. (1989, c. 483, s. 1; 1995, c. 508, s. 1.)

§ 130A-14. Department may assist private nonprofit foundations.

(a) The Secretary may allow employees of the Department to assist any private nonprofit foundation that works directly with services or programs of the Department and whose sole purpose is to support the services and programs of the Department, and may provide other appropriate services to any such foundation. No employee of the Department may work with a foundation for more than 20 hours in any one month. Chapter 150B of the General Statutes does not apply to any assistance or services provided to a private nonprofit foundation pursuant to this section.

(b) The board of directors of any private nonprofit foundation that receives assistance or services pursuant to this section shall secure and pay for the services of the Department of State Auditor or shall employ a certified public accountant to conduct an annual audit of the financial accounts of the foundation. The board of directors of the foundation shall transmit a copy of the annual financial audit report to the Secretary. (1991, c. 761, s. 37.3; 1993, c. 553, s. 40.1.)

§ 130A-15. Access to information.

(a) Health care providers and persons in charge of health care facilities or laboratories shall, upon request and proper identification, permit the State Health Director to examine, review, and obtain a copy of records containing privileged medical information or information protected under the Health Information Portability and Accountability Act (HIPAA) medical privacy rule, 45 C.F.R. Parts 160 and 164, that the State Health Director deems are necessary to prevent, control, or investigate a disease or health hazard that may present a clear danger to the public health.

(b) Privileged medical information or protected health information received by the State Health Director pursuant to this section shall be confidential and is not a public record under G.S. 132-1. The information shall not be released, except when the release is made pursuant to any other provision of law, to another federal, state, or local public health agency for the purpose of preventing or controlling a disease or public health hazard or to a court or law enforcement official or law enforcement officer for the purpose of enforcing the provisions of this Chapter or for the purpose of investigating a disease or public health hazard.

(c) A person who permits examination, review, or copying of records or who provides copies of the records pursuant to subsection (a) of this section is immune from any civil or criminal liability that might otherwise be incurred or imposed. (2007-115, s. 1.)

Editor's Note. — Session Laws 2007-115, s. 7, made this section effective June 27, 2007.

§ 130A-16: Reserved for future codification purposes.

Part 2. Remedies.

§ 130A-17. Right of entry.

(a) The Secretary and a local health director shall have the right of entry upon the premises of any place where entry is necessary to enforce the provisions of this Chapter or the rules adopted by the Commission or a local board of health. If consent for entry is not obtained, an administrative search and inspection warrant shall be obtained pursuant to G.S. 15-27.2. However, if an imminent hazard exists, no warrant is required for entry upon the premises.

(b) The Secretary of Environment and Natural Resources and a local health director shall have the same rights enumerated in subsection (a) of this section to enforce the provisions of Part 4 of Article 5 and Articles 8, 9, 10, 11, and 12 of this Chapter. (1983, c. 891, s. 2; 1997-443, s. 11A.60; 2001-474, s. 19; 2006-255, s. 13.3.)

Effect of Amendments. — Session Laws 2006-255, s. 13.3, effective August 23, 2006, inserted "Part 4 of Article 5 and" near the end of subsection (b).

§ 130A-18. Injunction.

(a) If a person shall violate any provision of this Chapter, the rules adopted by the Commission or rules adopted by a local board of health, or a condition or term of a permit or order issued under this Chapter, the Secretary or a local health director may institute an action for injunctive relief, irrespective of all other remedies at law, in the superior court of the county where the violation occurred or where a defendant resides.

(b) The Secretary of Environment and Natural Resources and a local health director shall have the same rights enumerated in subsection (a) of this section to enforce the provisions of Part 4 of Article 5 and Articles 8, 9, 10, 11, and 12 of this Chapter. (1983, c. 891, s. 2; 1997-443, s. 11A.61; 2001-474, s. 20; 2006-255, s. 13.4; 2007-550, s. 2(a).)

Editor's Note. — Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2006-255, s. 13.4, effective August 23, 2006, inserted "Part 4 of Article 5 and" near the end of subsection (b).

Session Laws 2007-550, s. 2, effective August 1, 2007, and applicable to violations that occur on or after that date, in subsection (a), made a stylistic change, and inserted "or a condition or term of a permit or order issued under this Chapter."

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores and the extent State law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-19. Abatement of public health nuisance.

(a) If the Secretary or a local health director determines that a public health nuisance exists, the Secretary or a local health director may issue an order of abatement directing the owner, lessee, operator or other person in control of the property to take any action necessary to abate the public health nuisance. If the person refuses to comply with the order, the Secretary or the local health director may institute an action in the superior court of the county where the public health nuisance exists to enforce the order. The action shall be calendared for trial within 60 days after service of the complaint upon the defendant. The court may order the owner to abate the nuisance or direct the Secretary or the local health director to abate the nuisance. If the Secretary or the local health director is ordered to abate the nuisance, the Department or the local health department shall have a lien on the property for the costs of the abatement of the nuisance in the nature of a mechanic's and materialmen's lien as provided in Chapter 44A of the General Statutes and the lien may be enforced as provided therein.

(b) The Secretary of Environment and Natural Resources and a local health director shall have the same rights enumerated in subsection (a) of this section to enforce the provisions of Part 4 of Article 5 and Articles 8, 9, 10, 11, and 12 of this Chapter. (1893, c. 214, s. 22; Rev., ss. 3446, 4450; 1911, c. 62, ss. 12, 13; 1913, c. 181, s. 3; C.S., ss. 7071, 7072; 1957, c. 1357, s. 1; 1983, c. 891, s. 2; 1997-443, s. 11A.62; 2006-255, s. 13.5.)

Effect of Amendments. — Session Laws 2006-255, s. 13.5, effective August 23, 2006, inserted "Part 4 of Article 5 and" near the end of subsection (b).

CASE NOTES

County May Not Initiate Action. — As the power to initiate action to abate a public nuisance is vested in the local health director, a county may not proceed without him. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981), decided under former G.S. 130-20.

Use of property by the State may not be enjoined by the courts as a nuisance where the use of the property is in a manner authorized by valid legislative authority. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981), decided under former G.S. 130-20.

Cited in EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), overruled on other grounds, Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

§ 130A-20. Abatement of an imminent hazard.

(a) If the Secretary or a local health director determines that an imminent hazard exists, the Secretary or a local health director may order the owner, lessee, operator, or other person in control of the property to abate the imminent hazard or may, after notice to or reasonable attempt to notify the owner, lessee, operator, or other person in control of the property enter upon any property and take any action necessary to abate the imminent hazard. If the Secretary or a local health director abates the imminent hazard, the Department or the local health department shall have a lien on the property of the owner, lessee, operator, or other person in control of the property where the imminent hazard existed for the cost of the abatement of the imminent hazard. The lien may be enforced in accordance with procedures provided in Chapter 44A of the General Statutes. The lien may be defeated by a showing that an imminent hazard did not exist at the time the Secretary or the local health director took the action. The owner, lessee, operator, or any other person against whose property the lien has been filed may defeat the lien by showing that that person was not culpable in the creation of the imminent hazard.

(b) The Secretary of Environment and Natural Resources and a local health director shall have the same rights enumerated in subsection (a) of this section to enforce the provisions of Part 4 of Article 5 and Articles 8, 9, 10, 11, and 12 of this Chapter. (1893, c. 214, s. 22; Rev., ss. 3446, 4450; 1911, c. 62, ss. 12, 13; 1913, c. 181, s. 3; C.S., ss. 7071, 7072; 1957, c. 1357, s. 1; 1983, c. 891, s. 2; 1997-443, s. 11A.63; 2002-179, s. 6; 2006-255, s. 13.6.)

Effect of Amendments. — Session Laws 2006-255, s. 13.6, effective August 23, 2006, inserted "Part 4 of Article 5 and" near the end of subsection (b).

§ 130A-20.01. Action for the recovery of costs of hazardous materials emergency medical response.

A person who causes the release of a hazardous material that results in the activation of one or more State Medical Assistance Teams (SMATs) or the Epidemiology Section of the Division of Public Health of the Department of Health and Human Services shall be liable for all reasonable costs incurred by each team or the Epidemiology Section that responds to or mitigates the incident. The Secretary of Health and Human Services shall invoice the person liable for the hazardous materials release and, in the event of nonpayment, may institute an action to recover those costs in the superior court of the county in which the release occurred. (2007-107, s. 3.1(b).)

Editor's Note. — Session Laws 2007-107, s. 3.1.(c) made this section effective June 26, 2007, and applicable to civil actions filed on or after that date.

Session Laws 2007-102, s. 4.2(a), provides: "The Department of Crime Control and Public Safety and the Department of Health and Human Services shall jointly identify and evaluate sources of permanent funding for State Medical Assistance Teams in light of the uncertain future availability of federal and local funding. The Department shall jointly report its findings and recommendations, including any legislative proposals, to the Fiscal Research Division on or before 1 January 2008."

Session Laws 2007-107, s. 5.2(a), provides: "The Occupational and Environmental Epidemiology Branch of the Division of Public Health of the Department of Health and Human Services shall contract with an industrial hygienist who shall develop a model plan for public health response to events with a potential for chemical, biological, or radiological contamination. The plan shall address all stages of the contamination event. The contract shall provide for the services of the industrial hygienist for up to 18 months. The contract shall require the industrial hygienist to:

"(1) Develop a model plan and a training program that provides for training in all North Carolina counties.

"(2) Analyze existing environmental data related to the hazardous waste facilities in the State, develop a statement of need for the integration of that data, and recommend any additional tests that may be needed, including tests to establish background levels of selected hazardous materials.

"(3) Initiate and facilitate a staff-level work group of federal, State, and local response personnel to provide continuity and to assist with the development of best practice response protocols."

Session Laws 2007-107, s. 6.2, contains a severability clause.

§ 130A-21. Embargo.

(a) In addition to the authority of the Department of Agriculture and Consumer Services pursuant to G.S. 106-125, the Secretary of Environment and Natural Resources or a local health director has authority to exercise embargo authority concerning food or drink pursuant to G.S. 106-125(a), (b) and (c) when the food or drink is in an establishment that is subject to regulation by the Department of Environment and Natural Resources pursuant to this Chapter, that is subject to rules adopted by the Commission, or that is the subject of an investigation pursuant to G.S. 130A-144; however, no such action shall be taken in any establishment or part of an establishment that is under inspection or otherwise regulated by the Department of Agriculture and Consumer Services or the United States Department of Agriculture other than the part of the establishment that is subject to regulation by the Department of Environment and Natural Resources pursuant to this Chapter. Any action under this section shall only be taken by, or after consultation with, Department of Environment and Natural Resources regional environmental health specialists, or the Director of the Division of Environmental Health or the Director's designee, in programs regulating food and drink pursuant to this Chapter or in programs regulating food and drink that are subject to rules adopted by the Commission. Authority under this section shall not be delegated to individual environmental health specialists in local health departments otherwise authorized and carrying out laws and rules pursuant to G.S. 130A-4. When any action is taken pursuant to this section, the Department of Environment and Natural Resources or the local health director shall immediately notify the Department of Agriculture and Consumer Services. For the purposes of this subsection, all duties and procedures in G.S. 106-125 shall be carried out by the Secretary of the Department of Environment and Natural Resources or the local health director and shall not be required to be carried out by the Department of Agriculture and Consumer Services. It shall be unlawful for any person to remove or dispose of the food or drink by sale or otherwise without the permission of a Department of Environment and Natural Resources regional environmental health specialist, the Director of the Division of Environmental Health or the Director's designee, the local health director, or a duly authorized agent of the Department of Agriculture and Consumer Services, or by the court in accordance with the provisions of G.S. 106-125.

(b) If the Secretary of Environment and Natural Resources or a local health director has probable cause to believe that any milk designated as Grade "A" milk is misbranded or does not satisfy the milk sanitation rules adopted pursuant to G.S. 130A-275, the Secretary of Environment and Natural Resources or a local health director may detain or embargo the milk by affixing a tag to it and warning all persons not to remove or dispose of the milk until permission for removal or disposal is given by the official by whom the milk was detained or embargoed or by the court. It shall be unlawful for any person to remove or dispose of the detained or embargoed milk without that permission.

The official by whom the milk was detained or embargoed shall petition a judge of the district or superior court in whose jurisdiction the milk is detained or embargoed for an order for condemnation of the article. If the court finds that the milk is misbranded or that it does not satisfy the milk sanitation rules adopted pursuant to G.S. 130A-275, either the milk shall be destroyed under the supervision of the petitioner or the petitioner shall ensure that the milk will not be used for human consumption as Grade "A" milk. All court costs and fees, storage, expenses of carrying out the court's order and other expense shall be taxed against the claimant of the milk. If, the milk, by proper labelling or processing, can be properly branded and will satisfy the milk sanitation rules adopted pursuant to G.S. 130A-275, the court, after the payment of all costs, fees, and expenses and after the claimant posts an adequate bond, may order that the milk be delivered to the claimant for proper labelling and processing under the supervision of the petitioner. The bond shall be returned to the claimant after the petitioner represents to the court either that the milk is no longer mislabelled or in violation of the milk sanitation rules adopted pursuant to G.S. 130A-275, or that the milk will not be used for human consumption, and that in either case the expenses of supervision have been paid.

(c) If the Secretary of Environment and Natural Resources or a local health director has probable cause to believe that any scallops, shellfish or crustacea is adulterated or misbranded, the Secretary of Environment and Natural Resources or a local health director may detain or embargo the article by affixing a tag to it and warning all persons not to remove or dispose of the article until permission for removal or disposal is given by the official by whom it was detained or embargoed or by the court. It shall be unlawful for any person to remove or dispose of the detained or embargoed article without that permission.

The official by whom the scallops, shellfish or crustacea was detained or embargoed shall petition a judge of the district or superior court in whose jurisdiction the article is detained or embargoed for an order for condemnation of the article. If the court finds that the article is adulterated or misbranded, that article shall be destroyed under the supervision of the petitioner. All court costs and fees, storage and other expense shall be taxed against the claimant of the article. If, the article, by proper labelling can be properly branded, the court, after the payment of all costs, fees, expenses, and an adequate bond, may order that the article be delivered to the claimant for proper labelling under the supervision of the petitioner. The bond shall be returned to the claimant after the petitioner represents to the court that the article is no longer mislabelled and that the expenses of supervision have been paid.

(d) Nothing in this section is intended to limit the embargo authority of the Department of Agriculture and Consumer Services. The Department of Environment and Natural Resources and the Department of Agriculture and Consumer Services are authorized to enter agreements respecting the duties and responsibilities of each agency in the exercise of their embargo authority.

(e) For the purpose of this section, a food or drink is adulterated if the food or drink is deemed adulterated under G.S. 106-129; and food or drink is misbranded if it is deemed misbranded under G.S. 106-130. (1983, c. 891, s. 2; 1997-261, s. 109; 1997-443, s. 11A.63A; 2006-80, s. 1; 2007-7, s. 1.)

Effect of Amendments. — Session Laws 2006-80, s. 1, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote subsection (a).

Session Laws 2007-7, s. 1, effective April 4, 2007, in subsection (a), inserted "that is subject to rules adopted by the Commission" in the first sentence, substituted "the Director of the Division of Environmental Health or the Director's designee" for "their superiors" and inserted "or in programs regulating food and drink that are subject to rules adopted by the Commission" in the second sentence, and inserted "the Director of the Division of Environmental Health or the Director's designee, the local health director" in the last sentence.

§ 130A-22. Administrative penalties.

(a) The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who violates Article 9 of this Chapter, rules adopted by the Commission pursuant to Article 9, or any term or condition of a permit or order issued under Article 9. Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed fifteen thousand dollars ($15,000) per day in the case of a violation involving nonhazardous waste. The penalty shall not exceed thirty-two thousand five hundred dollars ($32,500) per day in the case of a first violation involving hazardous waste as defined in G.S. 130A-290 or involving the disposal of medical waste as defined in G.S. 130A-290 in or upon water in a manner that results in medical waste entering waters or lands of the State; and shall not exceed fifty thousand dollars ($50,000) per day for a second or further violation involving the disposal of medical waste as defined in G.S. 130A-290 in or upon water in a manner that results in medical waste entering waters or lands of the State. The penalty shall not exceed thirty-two thousand five hundred dollars ($32,500) per day for a violation involving a voluntary remedial action implemented pursuant to G.S. 130A-310.9(c) or a violation of the rules adopted pursuant to G.S. 130A-310.12(b). If a person fails to pay a civil penalty within 60 days after the final agency decision or court order has been served on the violator, the Secretary of Environment and Natural Resources shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.

(a1) Part 5 of Article 21A of Chapter 143 of the General Statutes shall apply to the determination of civil liability or penalty pursuant to subsection (a) of this section.

(b) The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who violates G.S. 130A-325. Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed twenty-five thousand dollars ($25,000) for each day the violation continues.

(b1) The Secretary may impose an administrative penalty on a person who violates Article 19 of this Chapter or a rule adopted pursuant to that Article. Except as provided in subsection (b2) of this section, the penalty shall not exceed one thousand dollars ($1,000) per day per violation. Until the Department has notified the person of the violation, a continuing violation shall be treated as one violation. Each day thereafter of a continuing violation shall be treated as a separate violation.

In determining the amount of a penalty under this subsection or subsection (b2) of this section, the Secretary shall consider all of the following factors:

(1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation.
(2) The duration and gravity of the violation.
(3) The effect on air quality.
(4) The cost of rectifying the damage.
(5) The amount of money the violator saved by noncompliance.
(6) The prior record of the violator in complying or failing to comply with Article 19 of this Chapter or a rule adopted pursuant to that Article.
(7) The cost to the State of the enforcement procedures.
(8) If applicable, the size of the renovation and demolition involved in the violation.

(b2) The penalty for violations of the asbestos NESHAP for demolition and renovation, as defined in G.S. 130A-444, shall not exceed ten thousand dollars ($10,000) per day per violation. Until the Department has provided the person with written notification of the violation of the asbestos NESHAP for demolition and renovation that describes the violation, recommends a general course of action, and establishes a time frame in which to correct the violations, a continuing violation shall be treated as one violation. Each day thereafter of a continuing violation shall be treated as a separate violation. A violation of the asbestos NESHAP for demolition and renovation is not considered to continue during the period a person who has received the notice of violation is following the general course of action and complying with the time frame set forth in the notice of violation.

(b3) The Secretary may impose an administrative penalty on a person who violates Article 19A of this Chapter or any rules adopted pursuant to Article 19A of this Chapter. Each day of a continuing violation is a separate violation. The penalty shall not exceed one thousand dollars ($1,000) for each day the violation continues. The penalty authorized by this section does not apply to a person who is not required to be certified under this Article.

(c) The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who willfully violates Article 11 of this Chapter, rules adopted by the Commission pursuant to Article 11 or any condition imposed upon a permit issued under Article 11. An administrative penalty may not be imposed upon a person who establishes that neither the site nor the system may be improved or a new system installed so as to comply with Article 11 of this Chapter. Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed fifty dollars ($50.00) per day in the case of a wastewater collection, treatment and disposal system with a design daily flow of no more than 480 gallons or in the case of any system serving a single one-family dwelling. The penalty shall not exceed three hundred dollars ($300.00) per day in the case of a wastewater collection, treatment and disposal system with a design daily flow of more than 480 gallons which does not serve a single one-family dwelling.

(c1) The Secretary may impose a monetary penalty on a vendor who violates rules adopted by the Commission pursuant to Article 13 of this Chapter when the Secretary determines that disqualification would result in hardship to participants in the Women, Infants, and Children (WIC) program. The penalty shall be calculated using the following formula: multiply five percent (5%) times the average dollar amount of the vendor's monthly redemptions of WIC food instruments for the 12-month period immediately preceding disqualification, then multiply that product by the number of months of the disqualification period determined by the Secretary.

(d) In determining the amount of the penalty in subsections (a), (b) and (c), the Secretary and the Secretary of Environment and Natural Resources shall consider the degree and extent of the harm caused by the violation and the cost of rectifying the damage.

(e) A person contesting a penalty shall, by filing a petition pursuant to G.S. 150B-23(a) not later than 30 days after receipt by the petitioner of the document which constitutes agency action, be entitled to an administrative hearing and judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act.

(f) The Commission shall adopt rules concerning the imposition of administrative penalties under this section.

(g) The Secretary or the Secretary of Environment and Natural Resources may bring a civil action in the superior court of the county where the violation occurred or where the defendant resides to recover the amount of an administrative penalty authorized under this section whenever a person:

(1) Who has not requested an administrative hearing in accordance with subsection (e) of this section fails to pay the penalty within 60 days after being notified of the penalty; or

(2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the final agency decision.

(h) A local health director may impose an administrative penalty on any person who willfully violates the wastewater collection, treatment, and disposal rules of the local board of health adopted pursuant to G.S. 130A-335(c) or who willfully violates a condition imposed upon a permit issued under the approved local rules. An administrative penalty may not be imposed upon a person who establishes that neither the site nor the system may be improved or a new system installed so as to comply with Article 11 of this Chapter. The local health director shall establish and recover the amount of the administrative penalty in accordance with subsections (d) and (g). Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed fifty dollars ($50.00) per day in the case of a wastewater collection, treatment and disposal system with a design daily flow of no more than 480 gallons or in the case of any system serving a single one-family dwelling. The penalty shall not exceed three hundred dollars ($300.00) per day in the case of a wastewater collection, treatment and disposal system with a design daily flow of more than 480 gallons which does not serve a single one-family dwelling. A person contesting a penalty imposed under this subsection shall be entitled to an administrative hearing and judicial review in accordance with

G.S. 130A-24. A local board of health shall adopt rules concerning the imposition of administrative penalties under this subsection.

(i) The clear proceeds of penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(j) The Secretary of Environment and Natural Resources may also assess the reasonable costs of any investigation, inspection, or monitoring associated with the assessment of the civil penalty against any person who is assessed a civil penalty under this section. (1983, c. 891, s. 2; 1987, c. 269, s. 2; c. 656; c. 704, s. 1; c. 827, s. 247; 1989, c. 742, s. 4; 1991, c. 691, s. 1; c. 725, s. 8; 1991 (Reg. Sess., 1992), c. 944, s. 11; 1993 (Reg. Sess., 1994), c. 686, s. 1; 1995, c. 504, s. 8; 1997-443, s. 11A.64; 1997-523, s. 2; 1998-215, s. 54(a); 2001-474, s. 21; 2002-154, s. 1; 2007-550, ss. 3(a), 4(a).)

Editor's Note. — Session Laws 1997-523, s. 3 provides that G.S. 130A-453.11, as enacted by that act, and section 3 of the act are effective when they become law. The remainder of that act becomes effective 1 July 1998 unless, as of that date, Subpart L of Part 745 of Title 40 of the Code of Federal Regulations (40 C.F.R. G.S. 745.220, et seq., as set out in the Federal Register of 29 August 1996) is scheduled to become effective later than 1 September 1998, in which case the remainder of the act becomes effective when Subpart L of Part 745 of Title 40 of the Code of Federal Regulations becomes effective. Subpart L of Part 745 of Title 40 of the Code of Federal Regulations became effective August 29, 1996, and thus subsection (b3) became effective July 1, 1998.

Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, ss. 3(a) and 4(a), effective August 1, 2007, and applicable to violations that occur on or after that date, in subsection (a), inserted “term or condition of a permit or‘ in the first sentence, substituted “fifteen thousand dollars ($15,000)” for “five thousand dollars ($5,000)” in the third sentence, substituted “thirty-two thousand five hundred dollars ($32,500)” for “twenty five thousand dollars ($25,000)” in the fourth and fifth sentences; and added subsection (j).

Legal Periodicals. — For article, “Coastal Management Law in North Carolina: 1974-1994,” see 72 N.C.L. Rev. 1413 (1994).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

The burden is placed upon a person who generates a solid waste to make a determination whether that waste is hazardous or not and whether the person will be subject to special rules and regulations governing hazardous wastes, thus, petitioner had the burden of determining whether its solid waste shipped to North Carolina in drums was hazardous or not by either testing the material or by applying knowledge of the processes used, and failure to do so could result in the assessment of a penalty against petitioner under subsection (a). Air-A-Plane Corp. v. North Carolina Dep't of Env't, 118 N.C. App. 118, 454 S.E.2d 297 (1995).

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores, and the extent State law applies to such events and what departments are responsible for enforcing such laws, see opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-23. Suspension and revocation of permits and program participation.

(a) The Secretary may suspend or revoke a permit issued under this

Chapter upon a finding that a violation of the applicable provisions of this Chapter, the rules of the Commission or a condition imposed upon the permit has occurred. A permit may also be suspended or revoked upon a finding that its issuance was based upon incorrect or inadequate information that materially affected the decision to issue the permit.

(b) The Secretary may suspend or revoke a person's participation in a program administered under this Chapter upon a finding that a violation of the applicable provisions of this Chapter or the rules of the Commission has occurred. Program participation may also be suspended or revoked upon a finding that participation was based upon incorrect or inadequate information that materially affected the decision to grant program participation.

(c) A person shall be given notice that there has been a tentative decision to suspend or revoke the permit or program participation and that an administrative hearing will be held in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act, at which time the person may challenge the tentative decision.

(d) A permit shall be suspended or revoked immediately if a violation of the Chapter, the rules or a condition imposed upon the permit presents an imminent hazard. An operation permit issued pursuant to G.S. 130A-281 shall be immediately suspended for failure of a public swimming pool to maintain minimum water quality or safety standards or design and construction standards pertaining to the abatement of suction hazards which result in an unsafe condition. A permit issued pursuant to G.S. 130A-248 shall be revoked immediately for failure of an establishment to maintain a minimum grade of C. The Secretary of Environment and Natural Resources shall immediately give notice of the suspension or revocation and the right of the permit holder or program participant to appeal the suspension or revocation under G.S. 150B-23.

(e) The Secretary of Environment and Natural Resources shall have all of the applicable rights enumerated in this section to enforce the provisions of Articles 8, 9, 10, 11, and 12 of this Chapter. (1983, c. 891, s. 2; 1987, c. 827, s. 1; c. 438, s. 3; 1993, c. 211, s. 2; 1993 (Reg. Sess., 1994), c. 732, s. 2; 1995, c. 123, s. 15; 1997-443, s. 11A.65.)

§ 130A-24. Appeals procedure.

(a) Appeals concerning the enforcement of rules adopted by the Commission, concerning the suspension and revocation of permits and program participation by the Secretary and concerning the imposition of administrative penalties by the Secretary shall be governed by Chapter 150B of the General Statutes, the Administrative Procedure Act.

(a1) Any person appealing an action taken by the Department pursuant to this Chapter or rules of the Commission shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a). The petition shall be filed not later than 30 days after notice of the action which confers the right of appeal unless a federal statute or regulation provides for a different time limitation. The time limitation imposed under this subsection shall commence when notice of the agency decision is given to all persons aggrieved. Such notice shall be provided to all persons known to the agency by personal delivery or by the placing of notice in an official depository of the United States Postal Service addressed to the person at the latest address provided to the agency by the person.

(b) Appeals concerning the enforcement of rules adopted by the local board of health and concerning the imposition of administrative penalties by a local health director shall be conducted in accordance with this subsection and subsections (c) and (d) of this section. The aggrieved person shall give written notice of appeal to the local health director within 30 days of the challenged action. The notice shall contain the name and address of the aggrieved person, a description of the challenged action and a statement of the reasons why the challenged action is incorrect. Upon filing of the notice, the local health director shall, within five working days, transmit to the local board of health the notice of appeal and the papers and materials upon which the challenged action was taken.

(c) The local board of health shall hold a hearing within 15 days of the receipt of the notice of appeal. The board shall give the person not less than 10 days' notice of the date, time and place of the hearing. On appeal, the board shall have authority to affirm, modify or reverse the challenged action. The local board of health shall issue a written decision based on the evidence presented at the hearing. The decision shall contain a concise statement of the reasons for the decision.

(d) A person who wishes to contest a decision of the local board of health under subsection (b) of this section shall have a right of appeal to the district court having jurisdiction within 30 days after the date of the decision by the board. The scope of review in district court shall be the same as in G.S. 150B-51.

(e) The appeals procedures enumerated in this section shall apply to appeals concerning the enforcement of rules, the imposition of administrative penalties, or any other action taken by the Department of Environment and Natural Resources pursuant to Articles 8, 9, 10, 11, and 12 of this Chapter. (1983, c. 891, s. 2; 1987, c. 482; c. 827, s. 248; 1993, c. 211, s. 1; 1997-443, s. 11A.66; 1998-217, s. 33.)

CASE NOTES

Subject Matter Jurisdiction. — Trial court was without subject matter jurisdiction to enter findings or conclusions regarding an animal rights organization's claim against a private agency for alleged violations by the agency of G.S. 130A-192, as enforcement of the statute was proper against the local board of health in the Office of Administrative Hearings under G.S. 130A-4(a) and G.S. 130A-24. Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005).

Letter to an employee after her termination while on medical leave that expressed sympathy for her medical condition and reiterated facts regarding the employee's termination did not constitute sufficient notice of the decision or action regarding the grievance filed by the employee, which triggered the right to appeal for purposes of G.S. 126-38; because the employer, the Department of Social Services (DSS), failed to provide the notice required under G.S. 150B-23(f) as to appealing her termination, an administrative law judge properly denied the DSS' motion to dismiss the appeal as untimely. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

"Aggrieved person." — G.S. 19A-1 and G.S. 19A-2 express the General Assembly's intent that the broadest category of persons or organizations be deemed "[a] real party in interest" when contesting cruelty to animals; thus, animal welfare advocates who filed an action challenging an animal control facility's euthanasia procedures and record-keeping were "aggrieved persons" entitled to proceed under G.S. 130A-24 where, under G.S. 19A-1, the General Assembly viewed "persons" such as the advocates to be real parties in interest for the purpose of litigation in court and where the claims concerned the enforcement of rules adopted by the local board of health. Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 2004 N.C. App. LEXIS 813 (2004).

§ 130A-25. Misdemeanor.

(a) A person who violates a provision of this Chapter or the rules adopted by the Commission or a local board of health shall be guilty of a misdemeanor.

(b) A person convicted under this section for violation of G.S. 130A-144(f) or G.S. 130A-145 shall not be sentenced under Article 81B of Chapter 15A of the

General Statutes but shall instead be sentenced to a term of imprisonment of no more than two years and shall serve any prison sentence in McCain Hospital, Division of Prisons, Department of Correction, McCain, North Carolina; the North Carolina Correctional Center for Women, Division of Prisons, Department of Correction, Raleigh, North Carolina; or any other confinement facility designated for this purpose by the Secretary of Correction after consultation with the State Health Director. The Secretary of Correction shall consult with the State Health Director concerning the medical management of these persons.

(c) Notwithstanding G.S. 148-4.1, G.S. 148-13, or any other contrary provision of law, a person imprisoned for violation of G.S. 130A-144(f) or G.S. 130A-145 shall not be released prior to the completion of the person's term of imprisonment unless and until a determination has been made by the District Court that release of the person would not create a danger to the public health. This determination shall be made only after the medical consultant of the confinement facility and the State Health Director, in consultation with the local health director of the person's county of residence, have made recommendations to the Court. (1983, c. 891, s. 2; 1987, c. 782, s. 19; 1991, c. 187, s. 1; 1993, c. 539, s. 946; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 18.)

CASE NOTES

Sufficient Evidence of a Nuisance. — Evidence that a stable is within four feet of a dwelling house, and because of its filthy condition those occupying the house were unable to eat, and the health officer has given notice to abate the nuisance, was sufficient to convict under former G.S. 130-20. State v. Wilkes, 170 N.C. 735, 87 S.E. 48 (1915), decided under prior law.

§ 130A-26: Repealed by Session Laws 1995, c. 311, s. 1.

§ 130A-26.1. Criminal violation of Article 9.

(a) The definition of "person" set out in G.S. 130A-290 shall apply to this section. In addition, for purposes of this section, the term "person" shall also include any responsible corporate or public officer or employee.

(b) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(c) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(d) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God which could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department of Environment and Natural Resources. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to the public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department of Environment and Natural Resources at the time, including but not limited to, guidelines for the pretreatment permit civil penalties. This subdivision shall not be construed to require the Department of Environment and Natural Resources to develop or use written civil enforcement guidelines.

(e) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(f) Any person who knowingly and willfully does any of the following shall be guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues:

(1) Transports or causes to be transported any hazardous waste identified or listed under G.S. 130A-294(c) to a facility which does not have a permit or interim status under G.S. 130A-294(c) or 42 U.S.C. § 6921, et seq.

(2) Transports or causes to be transported such hazardous waste with the intent of delivery to a facility without a permit.

(3) Treats, stores, or disposes of such hazardous waste without a permit or interim status under G.S. 130A-294(c) or 42 U.S.C. § 6921, et seq., or in knowing violation of any material condition or requirement or such permit or applicable interim status rules.

(g) Any person who knowingly and willfully does any of the following shall be guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that the fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues:

(1) Transports or causes to be transported hazardous waste without a manifest as required under G.S. 130A-294(c).

(2) Transports hazardous waste without a United States Environmental Protection Agency identification number as required by rules promulgated under G.S. 130A-294(c).

(3) Omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with rules promulgated under G.S. 130A-294(c).

(4) Generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil burned for energy recovery and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required

to be maintained or filed for purposes of compliance with rules promulgated under G.S. 130A-294(c).

(5) Provides false information or fails to provide information relevant to a decision by the Department as to whether or not to enter into a brownfields agreement under Part 5 of Article 9 of this Chapter.

(6) Provides false information or fails to provide information required by a brownfields agreement under Part 5 of Article 9 of this Chapter.

(7) Provides false information relevant to a decision by the Department pursuant to:
  a. G.S. 130A-308(b).
  b. G.S. 130A-310.7(c).
  c. G.S. 143-215.3(f).
  d. G.S. 143-215.84(e).

(h) For the purposes of subsections (f) and (g) of this section, the phrase "knowingly and willfully" shall mean intentionally and consciously as the courts of this State, according to the principles of common law interpret the phrase in the light of reason and experience.

(i)(1) Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste or used oil regulated under G.S. 130A-294(c) in violation of subsection (f) or (g) of this section, who knows at the time that he thereby places another person in imminent danger of death or personal bodily injury shall be guilty of a Class C felony which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which a violation continues.

(2) For the purposes of this subsection, a person's state of mind is knowing with respect to:
  a. His conduct, if he is aware of the nature of his conduct;
  b. An existing circumstance, if he is aware or believes that the circumstance exists; or
  c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:
  a. The person is responsible only for actual awareness or actual belief that he possessed; and
  b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or of medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(j) Any person convicted of an offense under subsection (f), (g), or (h) of this section following a previous conviction under this section shall be subject to a fine, or imprisonment, or both, not exceeding twice the amount of the fine, or twice the term of imprisonment provided in the subsection under which the second or subsequent conviction occurs. (1989 (Reg. Sess., 1990), c. 1045, s. 9; 1993, c. 539, ss. 1303-1305; 1994, Ex. Sess., c. 24, s. 14(c); 1997-357, s. 3; 1997-443, s. 11A.67.)

Editor's Note. — Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

§ 130A-26.2. Penalty for false reporting under Article 9.

Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under Article 9 of this Chapter or rules adopted under Article 9 of this Chapter; or who knowingly makes a false statement of a material fact in a rule-making proceeding or contested case under Article 9 of this Chapter; or who falsifies, tampers with, or knowingly renders inaccurate any recording or monitoring device or method required to be operated or maintained under Article 9 of this Chapter or rules adopted under Article 9 of this Chapter is guilty of a Class 2 misdemeanor. The maximum fine that may be imposed for an offense under this section is ten thousand dollars ($10,000). (1993 (Reg. Sess., 1994), c. 598, s. 3.)

§ 130A-26A. Violations of Article 4.

(a) A person who commits any of the following acts shall be guilty of a Class 1 misdemeanor:

(1) Willfully and knowingly makes any false statement in a certificate, record, or report required by Article 4 of this Chapter;

(2) Removes or permits the removal of a dead body of a human being without authorization provided in Article 4 of this Chapter;

(3) Refuses or fails to furnish correctly any information in the person's possession or furnishes false information affecting a certificate or record required by Article 4 of this Chapter;

(4) Fails, neglects, or refuses to perform any act or duty required by Article 4 of this Chapter or by the instructions of the State Registrar prepared under authority of the Article.

(5) Charges a fee for performing any act or duty required by Article 4 of this Chapter or by the State Registrar pursuant to Article 4 of this Chapter, other than fees specifically authorized by law.

(b) A person who commits any of the following acts shall be guilty of a Class I felony:

(1) Willfully and knowingly makes any false statement in an application for a certified copy of a vital record, or who willfully and knowingly supplies false information intending that the information be used in the obtaining of any copy of a vital record;

(2) Without lawful authority and with the intent to deceive makes, counterfeits, alters, amends, or mutilates a certificate, record, or report required by Article 4 of this Chapter or a certified copy of the certificate, record, or report;

(3) Willfully and knowingly obtains, possesses, sells, furnishes, uses, or attempts to use for any purpose of deception, a certificate, record, or report required by Article 4 of this Chapter or a certified copy of the certificate, record, or report, which is counterfeited, altered, amended, or mutilated, or which is false in whole or in part or which relates to the birth of another person, whether living or deceased;

(4) When employed by the Vital Records Section of the Department or designated under Article 4 of this Chapter, willfully and knowingly furnishes or processes a certificate of birth, death, marriage, or divorce, or certified copy of a certificate of birth, death, marriage, or

divorce with the knowledge or intention that it be used for the purposes of deception;

(5) Without lawful authority possesses a certificate, record, or report required by Article 4 of this Chapter or a certified copy of the certificate, record, or report knowing that it was stolen or otherwise unlawfully obtained;

(6) Willfully alters, except as provided by G.S. 130A-118, or falsifies a certificate or record required by Article 4 of this Chapter; or willfully alters, falsifies, or changes a photocopy, certified copy, extract copy, or any document containing information obtained from an original or copy of a certificate or record required by Article 4 of this Chapter; or willfully makes, creates, or uses any altered, falsified or changed record, reproduction, copy or document for the purpose of attempting to prove or establish for any purpose whatsoever any matter purported to be shown on it;

(7) Without lawful authority, manufactures or possesses the seal of: (i) the Vital Records Section, (ii) a county register of deeds, or (iii) a county health department, or without lawful authority, manufactures or possesses a reproduction or a counterfeit copy of the seal;

(8) Without lawful authority prepares or issues any certificate which purports to be an official certified copy of a vital record;

(9) Without lawful authority, manufactures or possesses Vital Records Section, county register of deeds, or county health department vital records forms or safety paper used to certify births, deaths, marriages, and divorces, or reproductions or counterfeit copies of the forms or safety paper; or

(10) Willfully and knowingly furnishes a certificate of birth or certified copy of a record of birth with the intention that it be used by an unauthorized person or for an unauthorized purpose. (1995, c. 311, s. 2.)

§ 130A-27. Recovery of money.

The Secretary or the Secretary of Environment and Natural Resources may institute an action in the county where the action arose or the county where the defendant resides to recover any money, other property or interest in property or the monetary value of goods or services provided or paid for by the Department or the Secretary of Environment and Natural Resources which are wrongfully paid or transferred to a person under a program administered by the Department or the Secretary of Environment and Natural Resources pursuant to this Chapter. (1983, c. 891, s. 2; 1997-443, s. 11A.68.)

§ 130A-28. Forfeiture of gain.

In the case of a violation of this Chapter or the rules adopted by the Commission, money or other property or interest in property so acquired shall be forfeited to the State unless ownership by an innocent person may be established. An action may be instituted by the Attorney General or a district attorney pursuant to G.S. 1-532. (1983, c. 891, s. 2.)

Article 1A.

Commission for Public Health.

§ 130A-29. Commission for Public Health — Creation, powers and duties.

(a) The Commission for Public Health is created with the authority and duty to adopt rules to protect and promote the public health.

(b) The Commission is authorized to adopt rules necessary to implement the public health programs administered by the Department as provided in this Chapter.

(c) The Commission shall adopt rules:

(1) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1022, s. 5.

(2) Establishing standards for approving sewage-treatment devices and holding tanks for marine toilets as provided in G.S. 75A-6(o).

(3) Establishing specifications for sanitary privies for schools where water-carried sewage facilities are unavailable as provided in G.S. 115C-522.

(4) Establishing requirements for the sanitation of local confinement facilities as provided in Part 2 of Article 10 of Chapter 153A of the General Statutes.

(5) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1075, s. 1.

(5a) Establishing eligibility standards for participation in Department reimbursement programs.

(6) Requiring proper treatment and disposal of sewage and other waste from chemical and portable toilets.

(7) Establishing statewide health outcome objectives and delivery standards.

(8) Establishing permit requirements for the sanitation of premises, utensils, equipment, and procedures to be used by a person engaged in tattooing, as provided in Part 11 of Article 8 of this Chapter.

(9) Implementing immunization requirements for adult care homes as provided in G.S. 131D-9 and for nursing homes as provided in G.S. 131E-113.

(10) Pertaining to the biological agents registry in accordance with G.S. 130A-479.

(d) The Commission is authorized to create:

(1) Metropolitan water districts as provided in G.S. 162A-33;

(2) Sanitary districts as provided in Part 2 of Article 2 of this Chapter; and

(3) Mosquito control districts as provided in Part 2 of Article 12 of this Chapter.

(e) Rules adopted by the Commission shall be enforced by the Department. (1973, c. 476, s. 123; 1975, c. 19, s. 57; c. 694, s. 6; 1979, c. 41, s. 1; 1981, c. 614, s. 9; 1983, c. 891, s. 15; 1983 (Reg. Sess., 1984), c. 1022, s. 5; 1989, c. 727, ss. 175, 176; 1989 (Reg. Sess., 1990), c. 1004, s. 50; c. 1075, s. 1; 1991, c. 548, s. 2; 1993, c. 321, s. 274; 1993 (Reg. Sess., 1994), c. 670, s. 3; 2000-112, s. 6; 2001-469, s. 2; 2002-179, s. 2(b); 2007-182, s. 2.)

Administrative Rules Governing Sanitation of Hospitals, Nursing Homes, Rest Homes, and Other Institutions. — Session Laws 2002-160, ss. 1-6, with respect to certain administrative rules governing sanitation of hospitals, nursing homes, rest homes, and other institutions, (1) delayed the effective date for the rules, (2) provided for a field test of those rules, (3) authorized the Commission for Health Services [now the Commission for Public Health] to adopt temporary and permanent rules to amend those rules, and (4) authorized the Medical Care Commission to adopt temporary and permanent rules governing licensing of family care homes and homes for the aged and infirm.

Editor's Note. — This Article is former Part 3 of Article 3 of Chapter 143B, G.S. 143B-142 to 143B-146, as rewritten and recodified by Session Laws 1989, c. 727, ss. 175 to 178. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Article as rewritten and recodified.

Session Laws 1997-225, s. 5 provides the North Carolina Commission for Health Services [now the Commission for Public Health] shall develop voluntary standards or guidelines for diabetes outpatient self-management training and educational services based on clinical practice recommendations and guidelines established by the Center for Disease Control and the American Diabetes Association. These standards or guidelines are not subject to Article 2A of Chapter 150B of the General Statutes.

Session Laws 1997-374, s. 1 provides: "The

Commission for Health Services [now the Commission for Public Health] shall adopt a rule regarding design criteria for municipal solid waste landfills that complies with 40 C.F.R. Part 258.40 (1 July 1996 Edition) and that provides for alternate landfill liners that are at least as protective as the liner currently authorized under the rules of the Commission for Health Services [now the Commission for Public Health]."

Session Laws 1997-374, s. 2, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Commission for Health Services shall [now the Commission for Public Health] adopt the rule required by Section 1 of this act as a temporary rule no later than 1 July 1998."

Session Laws 2000-112, s. 5, directs the Department of Health and Human Services to make available to nursing homes and adult care homes educational and informational materials pertaining to vaccinations required under the act.

Session Laws 2007-182, s. 2, effective July 5, 2007, rewrote the Article heading, which formerly read "Commission for Health Services."

Session Laws 2007-550, s. 15, provides: "(a) The Commission for Health Services shall review rules governing the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of solid waste management facilities to determine whether changes are required to protect public health, safety, welfare, and the environment; to improve the performance of solid waste management facilities; to take advantage of technological advances in landfill design, construction, operation, maintenance, and closure; and to provide additional protection to environmentally sensitive areas of the State. The Commission shall adopt rules necessary to minimize impacts from solid waste management facilities on public health, safety, welfare, and the environment. These rules shall:

"(1) Establish standards for the collection, control, and utilization or destruction of landfill gases at municipal solid waste landfills.

"(2) Establish standards for the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of bioreactor landfills.

"(3) Establish criteria for development of bird and wildlife management plans.

"(4) Incorporate measures necessary to minimize impacts to natural, historic, and cultural resources, including, but not limited to, wetlands, critical fisheries habitats, parks, recreation areas, cultural and historic sites, and potential water supplies.

"(b) This section is effective when it becomes law [August 31, 2007]."

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the section heading, and in subsection (a).

§ 130A-30. Commission for Public Health — Members; selection; quorum; compensation.

(a) The Commission for Public Health shall consist of 13 members, four of whom shall be elected by the North Carolina Medical Society and nine of whom shall be appointed by the Governor.

(b) One of the members appointed by the Governor shall be a licensed pharmacist, one a registered engineer experienced in sanitary engineering or a soil scientist, one a licensed veterinarian, one a licensed optometrist, one a licensed dentist, and one a registered nurse. The initial members of the Commission shall be the members of the State Board of Health who shall serve for a period equal to the remainder of their current terms on the State Board of Health, three of whose appointments expire May 1, 1973, and two of whose appointments expire May 1, 1975. At the end of the respective terms of office of initial members of the Commission, their successors shall be appointed for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(c) The North Carolina Medical Society shall have the right to remove any member elected by it for misfeasance, malfeasance, or nonfeasance, and the Governor shall have the right to remove any member appointed by him for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13. Vacancies on said Commission among the membership elected by the North Carolina Medical Society shall be filled by the executive committee of the Medical Society until the next meeting of the Medical Society, when the Medical Society shall fill the vacancy for the unexpired term. Vacancies on said Commission among the membership appointed by the Governor shall be filled by the Governor for the unexpired term.

(d) A majority of the members of the Commission shall constitute a quorum for the transaction of business.

(e) The members of the Commission shall receive per diem and necessary traveling and subsistence expenses in accordance with the provisions of G.S. 138-5. (1973, c. 476, s. 124; c. 1367, ss. 1, 2; 1981, c. 553; 1989, c. 727, ss. 175, 177; 1989 (Reg. Sess., 1990), c. 1004, s. 51; 1995, c. 507, s. 26.8(d); 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the section heading and in subsection (a).

CASE NOTES

Cited in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 130A-31. Commission for Public Health — Officers.

The Commission for Public Health shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 125; 1989, c. 727, s. 175; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the section heading and in the section text.

Legal Periodicals. — For note, "Preemption Hogwash: North Carolina's Judicial Repeal of Local Authority to Regulate Hog Farms in Craig v. County of Chatham," see 80 N.C.L. Rev. 2121 (2002).

§ 130A-32. Commission for Public Health — Election meetings.

The meeting of the Commission for Public Health for the election of vice-chairman shall be at the first regular meeting after the joint session of the Commission for Public Health and the North Carolina Medical Society at the annual meeting of the North Carolina Medical Society each odd-numbered year. (1973, c. 476, s. 126; 1989, c. 727, s. 175; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the section heading and twice in the section text.

§ 130A-33. Commission for Public Health — Regular and special meetings.

Each year there shall be four regular meetings of the Commission for Public Health, one of which shall be held conjointly with a general session of the annual meeting of the North Carolina Medical Society. The State Health Director shall submit an annual report on public health at this meeting. The other three meetings shall be at such times and places as the chairman of the Commission shall designate. Special meetings of the Commission may be called by the chairman, or by a majority of the members of the Commission. (1973, c. 476, s. 127; 1989, c. 727, ss. 175, 178; 1993, c. 513, s. 6; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the section heading and in the section text.

§§ 130A-33.1 through 130A-33.29: Reserved for future codification purposes.

Article 1B.

Commissions and Councils.

Part 1. Commission of Anatomy.

§ 130A-33.30. Commission of Anatomy — Creation; powers and duties.

There is created the Commission of Anatomy in the Department with the power and duty to adopt rules for the distribution of dead human bodies and parts thereof for the purpose of promoting the study of anatomy in the State of North Carolina. The Commission is authorized to receive dead bodies pursuant to G.S. 130A-412.13 and to be a donee of a body or parts thereof pursuant to Part 3A, Article 16 of Chapter 130A of the General Statutes known as the Revised Uniform Anatomical Gift Act and to distribute such bodies or parts thereof pursuant to the rules adopted by the Commission. (1975, c. 694, s. 2; 1989, c. 727, ss. 182(a), 183; 1989 (Reg. Sess., 1990), c. 1024, s. 29; 1997-443, s. 11A.69; 2007-538, s. 9.)

Editor's Note. — This Part 1 of Article 1B is former Part 20 of Article 3 of Chapter 143B, G.S. 143B-204 to 143B-206, as rewritten and recodified by Session Laws 1989, c. 727, ss. 182 through 185. Where appropriate, the historical citations to the sections in the former Part have been added to corresponding sections in the Part as rewritten and recodified.

Session Laws 2007-538, s. 11, provides: "The North Carolina Department of Transportation, Division of Motor Vehicles, in cooperation with the License to Give Trust Fund Commission, shall use available grant-in-aid funds from the State and federal governments and other sources to enhance online access such that donors and prospective donors may update, amend, or revoke information on the donor's or prospective donor's drivers license or donor card."

Effect of Amendments. — Session Laws 2007-538, s. 9, effective October 1, 2007, in the last sentence, substituted "G.S. 130A-412.13" for "G.S. 130A-415", "Part 3A" for "Part 3" and inserted "Revised" preceding "Uniform Anatomical Gift Act."

§ 130A-33.31. Commission of Anatomy — Members; selection; term; chairman; quorum; meetings.

(a) The Commission of Anatomy shall consist of five members, one representative from the field of mortuary science, and one each from The University of North Carolina School of Medicine, East Carolina University School of Medicine, Duke University School of Medicine, and Bowman Gray School of Medicine. The dean of each school shall make recommendations and the

Secretary shall appoint from such recommendations a member to the Commission. The president of the State Board of Funeral Service shall appoint the representative from the field of mortuary science to the Commission. The members shall serve terms of four years except two of the original members shall serve a term of one year, one shall serve a term of two years, one shall serve a term of three years, and one shall serve a term of four years. The Secretary shall determine the terms of the original members.

(b) Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(c) The Secretary shall remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance.

(d) The Commission shall elect a chair annually from its own membership.

(e) A majority of the Commission shall constitute a quorum for the transaction of business.

(f) The Commission shall meet at any time and place within the State at the call of the chair or upon the written request of three members.

(g) All clerical and other services required by the Commission shall be supplied by the Secretary. (1975, c. 694, s. 2; 1989, c. 727, ss. 182(a), 184; 1995, c. 123, s. 5; 1997-443, s. 11A.70; 2003-420, s. 1.)

§ 130A-33.32. Commission of Anatomy — Reference to former Board of Anatomy in testamentary disposition.

A testamentary disposition of a body or part thereof to the former Board of Anatomy shall be deemed in all respects to be a disposition to the Commission of Anatomy. (1975, c. 694, s. 2; 1989, c. 727, ss. 182(a), 185.)

§§ 130A-33.33 through 130A-33.39: Reserved for future codification purposes.

Part 2. Governor's Council on Physical Fitness and Health.

§ 130A-33.40. Governor's Council on Physical Fitness and Health — Creation; powers; duties.

There is hereby created the Governor's Council on Physical Fitness and Health in the Department. The Council shall have the following functions and duties:

(1) To promote interest in the area of physical fitness; to consider the need for new State programs in the field of physical fitness; to enlist the active support of individual citizens, professional and civic groups, amateur and professional athletes, voluntary organizations, State and local government agencies, private industry and business, and community recreation programs in efforts to improve the physical fitness and the health of the citizens of North Carolina;

(2) To examine current programs of physical fitness available to the people of North Carolina, and to make recommendations to the Governor for coordination of programs to prevent duplication of such services; to support programs of physical fitness in the public school systems; to develop cooperative programs with medical, dental, and other groups; to maintain a liaison with government, private and other agencies concerning physical fitness programs; to stimulate

research in the area of physical fitness; to sponsor physical fitness workshops, clinics, conferences, and other related activities pertaining to physical fitness throughout the State;

(3) To serve as an agency for recognizing outstanding developments, contributions, and achievements in physical fitness in North Carolina;

(3a) To serve as the North Carolina sanctioning body for the State Games and for other competitive athletic events for which sanctioning by the State is required; and

(4) To make an annual report to the Governor and to the Secretary, including suggestions and recommendations for the furtherance of the physical fitness of the people of North Carolina. (1979, c. 634; 1989, c. 727, ss. 186, 187; 1991, c. 96, s. 1; 1997-443, s. 11A.71.)

Editor's Note. — This Part 2 of Article 1B is former Part 26 of Article 3 of Chapter 143B, as rewritten and recodified by Session Laws 1989, c. 727, ss. 186 through 188. Where appropriate, the historical citations to the sections in the former Part have been added to corresponding sections in the Part as rewritten and recodified.

§ 130A-33.41. The Governor's Council on Physical Fitness and Health — Members; selection; quorum; compensation.

The Governor's Council on Physical Fitness in the Department shall consist of 10 members, including a chair.

(1) The composition of the Council shall be as follows: one member of the Senate appointed by the President Pro Tempore of the Senate, and one member of the House of Representatives appointed by the Speaker of the House of Representatives, and eight persons from the health care professions, the fields of business and industry, physical education, recreation, sports and the general public. The eight nonlegislative members of the Council shall be appointed by the Governor to serve at the Governor's pleasure.

(2) The eight initial nonlegislative members of the Council shall be appointed as follows: two for a term of one year, two for a term of two years, two for a term of three years, two for a term of four years. At the end of the respective terms of office of these initial members, all succeeding appointments of nonlegislative members shall be for terms of four years; nonlegislative members shall serve no more than two consecutive four-year terms; all unexpired terms due to resignation, death, disability, removal or refusal to serve shall be filled by a qualified person appointed by the Governor for the balance of the unexpired term.

(3) Legislative members of the Council shall serve two-year terms beginning and ending on July 1 of odd-numbered years, and shall serve no more than two consecutive terms.

(4) Members of the Governor's Council shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 or 138-6, or travel and subsistence expenses under G.S. 120-3.1, as appropriate.

(5) The Council shall meet no more than quarterly.

(6) A majority of the Governor's Council shall constitute a quorum for the transaction of business. (1979, c. 634; 1989, c. 727, ss. 186, 188; 1991, c. 739, s. 20; 1997-443, s. 11A.72.)

§ 130A-33.42: Reserved for future codification purposes.

Part 3. Minority Health Advisory Council.

§ 130A-33.43. Minority Health Advisory Council.

There is established the Minority Health Advisory Council in the Department. The Council shall have the following duties and responsibilities:

(1) To make recommendations to the Governor and the Secretary aimed at improving the health status of North Carolina's minority populations;

(2) To identify and examine the limitations and problems associated with existing laws, regulations, programs and services related to the health status of North Carolina's minority populations;

(3) To examine the financing and access to health services for North Carolina's minority populations;

(4) To identify and review health promotion and disease prevention strategies relating to the leading causes of death and disability among minority populations; and

(5) To advise the Governor and the Secretary upon any matter which the Governor or Secretary may refer to it. (1991 (Reg. Sess., 1992), c. 900, s. 166; 1997-443, s. 11A.73.)

Editor's Note. — This section and G.S. 130A-33.44 were codified as Part 3 of this Article at the direction of the Revisor of Statutes.

§ 130A-33.44. Minority Health Advisory Council — members; selection; quorum; compensation.

(a) The Minority Health Advisory Council in the Department shall consist of 15 members to be appointed as follows:

(1) Five members shall be appointed by the Governor. Members appointed by the Governor shall be representatives of the following: health care providers, public health, health related public and private agencies and organizations, community-based organizations, and human services agencies and organizations.

(2) Five members shall be appointed by the Speaker of the House of Representatives, two of whom shall be members of the House of Representatives, and at least one of whom shall be a public member. The remainder of the Speaker's appointees shall be representative of any of the entities named in subdivision (1) of this subsection.

(3) Five members shall be appointed by the President Pro Tempore of the Senate, two of whom shall be members of the Senate, and at least one of whom shall be a public member. The remainder of the President Pro Tempore's appointees shall be representative of any of the entities named in subdivision (1) of this subsection.

(4) Of the members appointed by the Governor, two shall serve initial terms of one year, two shall serve initial terms of two years, and one shall serve an initial term of three years. Thereafter, the Governor's appointees shall serve terms of four years.

(5) Of the nonlegislative members appointed by the Speaker of the House of Representatives, two shall serve initial terms of two years, and one shall serve an initial term of three years. Thereafter, nonlegislative members appointed by the Speaker of the House of Representatives shall serve terms of four years. Of the nonlegislative members appointed by the President Pro Tempore of the Senate, two shall serve initial terms of two years, and one shall serve an initial term of three years. Thereafter, nonlegislative members appointed by the President

Pro Tempore of the Senate shall serve terms of four years. Legislative members of the Council shall serve two-year terms.

(b) The Chairperson of the Council shall be elected by the Council from among its membership.

(c) The majority of the Council shall constitute a quorum for the transaction of business.

(d) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 or G.S. 138-6, or travel and subsistence expenses in accordance with the provisions of G.S. 120-3.1, as applicable.

(e) All clerical support and other services required by the Council shall be provided by the Department. (1991 (Reg. Sess., 1992), c. 900, s. 166; 1997-443, s. 11A.74.)

§§ 130A-33.45 through 130A-33.49: Reserved for future codification purposes.

Part 4. Advisory Committee on Cancer Coordination and Control.

§ 130A-33.50. Advisory Committee on Cancer Coordination and Control established; membership, compensation.

(a) The Advisory Committee on Cancer Coordination and Control is established in the Department.

(b) The Committee shall have up to 34 members, including the Secretary of the Department or the Secretary's designee. The members of the Committee shall elect a chair and vice-chair from among the Committee membership. The Committee shall meet at the call of the chair. Six of the members shall be legislators, three of whom shall be appointed by the Speaker of the House of Representatives, and three of whom shall be appointed by the President Pro Tempore of the Senate. Four of the members shall be cancer survivors, two of whom shall be appointed by the Speaker of the House of Representatives, and two of whom shall be appointed by the President Pro Tempore of the Senate. The remainder of the members shall be appointed by the Governor as follows:

(1) One member from the Department of Environment and Natural Resources;

(2) Three members, one from each of the following: the Department, the Department of Public Instruction, and the North Carolina Community College System;

(3) Four members representing the cancer control programs at North Carolina medical schools, one from each of the following: the University of North Carolina at Chapel Hill School of Medicine, the Bowman Gray School of Medicine, the Duke University School of Medicine, and the East Carolina University School of Medicine;

(4) One member who is an oncology nurse representing the North Carolina Nurses Association;

(5) One member representing the Cancer Committee of the North Carolina Medical Society;

(6) One member representing the Old North State Medical Society;

(7) One member representing the American Cancer Society, North Carolina Division, Inc.;

(8) One member representing the North Carolina Hospital Association;

(9) One member representing the North Carolina Association of Local Health Directors;
(10) One member who is a primary care physician licensed to practice medicine in North Carolina;
(11) One member representing the American College of Surgeons;
(12) One member representing the North Carolina Oncology Society;
(13) One member representing the Association of North Carolina Cancer Registrars;
(14) One member representing the Medical Directors of the North Carolina Association of Health Plans; and
(15) Up to four additional members at large.

Except for the Secretary, the members shall be appointed for staggered four-year terms and until their successors are appointed and qualify. The Governor may remove any member of the Committee from office in accordance with the provisions of G.S. 143B-13. Members may succeed themselves for one term and may be appointed again after being off the Committee for one term.

(c) The Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Governor shall make their appointments to the Committee not later than 30 days after the adjournment of the 1993 Regular Session of the General Assembly. A vacancy on the Committee shall be filled by the original appointing authority, using the criteria set out in this section for the original appointment.

(d) To the extent that funds are made available, members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5.

(e) A majority of the Committee shall constitute a quorum for the transaction of its business.

(f) The Committee may use funds allocated to it to employ an administrative staff person to assist the Committee in carrying out its duties. The Secretary shall provide clerical and other support staff services needed by the Committee. (1993, c. 321, s. 288; 1997-443, s. 11A.75; 1998-212, s. 12.48(a).)

Cervical Cancer Elimination Task Force. — Session Laws 2003-176, ss. 1(a) through (k), provide: "A standing ad hoc task force on cervical cancer elimination is established pursuant to this act to serve the Advisory Committee on Cancer Coordination and Control. The ad hoc task force shall be called the Cervical Cancer Elimination Task Force (Task Force). The Task Force shall perform the duties specified in subsection (j) of this section.

"The Task Force shall have 24 members. The Chair and Vice-Chair of the Advisory Committee on Cancer Coordination and Control, the Director of the Division of Public Health in the Department of Health and Human Services, the Director of the Division of Medical Assistance in the Department of Health and Human Services, and the Chair and Vice-Chair of the North Carolina's Legislative Women's Caucus, or their designees, shall be members of the Task Force. The following additional members shall be appointed:

"(1) By the President Pro Tempore of the Senate, as follows:

"a. One member of the Senate;

"b. Two representatives from the North Carolina's Legislative Women's Caucus;

"c. A representative of a women's health organization;

"d. A representative from the American Academy of Pediatrics; and

"e. A certified schoolteacher.

"(2) By the Speaker(s) of the House of Representatives, as follows:

"a. One member of the House;

"b. Two representatives from the North Carolina's Legislative Women's Caucus;

"c. A member of the American Cancer Society who is an oncologist;

"d. A member of the health insurance industry; and

"e. A member from the American College of Obstetrics and Gynecology.

"(3) By the Governor, as follows:

"a. A member of the American Academy of Family Physicians;

"b. The State Epidemiologist;

"c. Two members at large;

"d. A news director of a newspaper or television or radio station; and

"e. A licensed registered nurse.

"The Governor shall choose a Chair from among the members of the Task Force. The

Task Force shall elect a Vice-Chair from its members.

"Each appointing authority shall assure, insofar as possible, that its appointees to the Task Force reflect the composition of the North Carolina population with regard to ethnic, racial, age, and religious composition.

"The General Assembly and the Governor shall make their appointments to the Task Force not later than 30 days after the adjournment of the 2003 Regular Session of the General Assembly. The original appointing authority, using the criteria set out in this section for the original appointment, shall fill a vacancy on the Task Force.

"The Task Force shall meet at least quarterly or more frequently at the call of the Chair.

"The Task Force Chair may establish committees for the purpose of making special studies pursuant to its duties and may appoint non-Task-Force members to serve on each committee as resource persons. Resource persons shall be voting members of the committees. Committees may meet with the frequency needed to accomplish the purposes of this section.

"Members of the Task Force shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 120-3.1, 138-5, and 138-6, as applicable.

"A majority of the Task Force shall constitute a quorum for the transaction of its business.

"The Task Force shall have the following duties:

"(1) To obtain from the Division of Public Health the Division's review of statistical and qualitative data on the prevalence and burden of cervical cancer.

"(2) In collaboration with the Advisory Committee on Cancer Coordination and Control and the Division of Public Health of the Department of Health and Human Services, raise public awareness on the causes and nature of cervical cancer, personal risk factors, value of prevention, early detection, options for testing, treatment costs, new technology, medical care reimbursement, and physician education.

"(3) To identify priority strategies, new technologies, or newly introduced vaccines which are effective in preventing and controlling the risk of cervical cancer.

"(4) To identify and examine the limitations of existing laws, regulations, programs, and services with regard to coverage and awareness issues for cervical cancer, including amending G.S. 58-51-57 to require every policy or contract of accident or health insurance, and every preferred provider benefit plan under G.S. 58-50-56, that is issued, renewed, or amended on or after January 1, 2004, to provide coverage for PAP smears and mammograms in accordance with the most recently published American Cancer Society guidelines.

"(5) To develop a statewide comprehensive Cervical Cancer Prevention Plan and strategies for Plan implementation and for promoting the Plan to the general public, State and local elected officials, and various public and private organizations, associations, businesses, industries, and agencies.

"(6) To identify strategies to facilitate specific commitments to help implement the Plan from the entities listed in subdivision (8) of this subsection.

"(7) To facilitate coordination of and communication among State and local agencies and organizations regarding current or future involvement in achieving the aims of the Cervical Cancer Task Force Plan.

"(8) To receive and to consider reports and testimony from individuals, local health departments, community-based organizations, voluntary health organizations, and other public and private organizations statewide to learn more about their contributions to cervical cancer diagnosis, prevention, and treatment and more about their ideas for improving cervical cancer prevention, diagnosis, and treatment in North Carolina.

"Beginning April 1, 2004, and on April 1 each year thereafter, the Task Force shall submit a report to the Advisory Committee on Cancer Coordination and Control. At the time the Task Force submits its report to the Advisory Committee, the Task Force shall also present its report to the North Carolina's Legislative Women's Caucus, the Governor, and the Joint Legislative Commission on Governmental Operations. Each annual report shall address:

"(1) Progress being made in fulfilling the duties of the Task Force and in developing the Cervical Cancer Plan.

"(2) The anticipated time frame for completion of the Prevention Plan.

"(3) Recommended strategies or actions to reduce the occurrence of and burdens suffered from cervical cancer by citizens of the State.

"The Task Force shall expire on April 1, 2008, or upon submission of the Task Force's final report to the Advisory Committee on Cancer Coordination and Control, to the Governor, and to the 2008 Regular Session of the 2007 General Assembly, whichever occurs earlier."

Session Laws 2003-176, s. 2, provides: "The Department of Health and Human Services, Division of Public Health, shall use funds appropriated to it for the 2003-2004 fiscal year to implement this act."

§ 130A-33.51. Advisory Committee on Cancer Coordination and Control; responsibilities.

(a) The Advisory Committee on Cancer Coordination and Control has the following responsibilities:

(1) To recommend to the Secretary a plan for the statewide implementation of an interagency comprehensive coordinated cancer control program;

(2) To identify and examine the limitations and problems associated with existing laws, regulations, programs, and services related to cancer control;

(3) To examine the financing and access to cancer control services for North Carolina's citizens, and advise the Secretary on a coordinated and efficient use of resources;

(4) To identify and review health promotion and disease prevention strategies relating to the leading causes of cancer mortality and morbidity;

(5) To recommend standards for:
  a. Oversight and development of cancer control services;
  b. Development and maintenance of interagency training and technical assistance in the provision of cancer control services;
  c. Program monitoring and data collection;
  d. Statewide evaluation of locally based cancer control programs;
  e. Coordination of funding sources for cancer control programs; and
  f. Procedures for awarding grants to local agencies providing cancer control services.

(b) The Committee shall submit a written report not later than May 1, 1994, and not later than October 1 of each subsequent year, to the Governor and to the Joint Legislative Commission on Governmental Operations. The report shall address the progress in implementation of a cancer control program. The report shall include an accounting of funds expended and anticipated funding needs for full implementation of recommended programs. (1993, c. 321, s. 288.)

ARTICLE 2.

Local Administration.

Part 1. Local Health Departments.

§ 130A-34. Provision of local public health services.

(a) A county shall provide public health services.

(b) A county shall operate a county health department, establish a consolidated human services agency pursuant to G.S. 153A-77, participate in a district health department, or contract with the State for the provision of public health services. (1901, c. 245, s. 3; Rev., s. 4444; 1911, c. 62, s. 9; C.S., s. 7604; 1931, c. 149; 1941, c. 185; 1945, c. 99; c. 1030, s. 2; 1947, c. 474, s. 3; 1951, c. 92; 1957, c. 1357, s. 1; 1963, c. 359; 1967, c. 1224, s. 1; 1969, c. 719, s. 1; 1971, c. 175, s. 1; 1973, c. 137, s. 1; c. 1151; 1975, c. 272; 1979, c. 621; 1983, c. 891, s. 2; 1995 (Reg. Sess., 1996), c. 690, s. 13.)

Local Modification to Former G.S. 130-13 and Former Similar Provisions. — Caldwell: 1939, c. 366; Cumberland: 1935, c. 159; 1943, c. 91; Edgecombe: 1969, c. 422; Moore: 1943, c. 326, s. 2; Nash: 1949, c. 6, s. 1.

Pilot Process for Local Health Departments. — Session Laws 2004-124, ss. 10.28B(a)-(g), provides: "(a) The Department of

Health and Human Services shall expand the pilot accreditation process for local health departments to include additional counties.

"(b) The Pilot Accreditation Advisory Board (hereafter 'Advisory Board') is established within the North Carolina Institute for Public Health. The Advisory Board shall be composed of 15 members appointed by the Secretary of Health and Human Services as follows:

"(1) Four shall be county commissioners recommended by the North Carolina Association of County Commissioners, and four shall be members of a local board of health as recommended by the North Carolina Association of Local Boards of Health.

"(2) Two local health directors.

"(3) One staff member from the Department of Health and Human Services, Division of Public Health.

"(4) Three members at large.

"(5) One recommended by the Secretary of Environment and Natural Resources, from the Division of Environmental Health.

"(c) Members of the Advisory Board who are not officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Advisory Board who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6.

"(d) The Advisory Board shall evaluate the Department's pilot accreditation process for local health departments, including the following:

"(1) The standards by which the pilot local health departments are judged.

"(2) The self-assessment process used by the pilot counties.

"(3) The process for local site reviews and appeals.

"(4) The makeup of the proposed State accrediting entity and its relationship to the Department.

"(5) The cost of meeting the accreditation standards in the pilot counties.

"(e) Of the funds appropriated in this act to the Department of Health and Human Services the sum of fifty thousand dollars ($50,000) for the 2004-2005 fiscal year shall be allocated for administrative costs and for activities of the Pilot Accreditation Advisory Board for the accreditation of additional local health departments. The Department shall contract with the Institute for Public Health, which shall be responsible for implementation of the pilot accreditation process.

"(f) Not later than April 1, 2005, the Pilot Accreditation Advisory Board shall report its findings to the Director of the Institute for Public Health, the Secretary of the Department of Health and Human Services, and the cochairs of the House and Senate Appropriations Committees for Health and Human Services.

"(g) The North Carolina Public Health Task Force 2004 shall continue its work on the Public Health Improvement Plan and in its final report to the General Assembly shall include comparisons of the recommendations of the Task Force with the Model State Public Health Act, Public Health Statute Modernization National Excellence Collaborative, September 2003."

School-Based Child and Family Team Initiative. — Session Laws 2005-276, s. 6.24, provides for the development and implementation of a School-Based Child and Family Team Initiative. See note at G.S. 115C-105.20.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

CASE NOTES

A board of health acts within its rule making powers when it enacts a regulation which (1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

§ 130A-34.1. Accreditation of local health departments; board established.

(a) The Local Health Department Accreditation Board is established within the North Carolina Institute for Public Health. The Board shall be composed of 17 members appointed by the Secretary of the Department of Health and Human Services as follows:

(1) Four shall be county commissioners recommended by the North Carolina Association of County Commissioners, and four shall be members of a local board of health as recommended by the Association of North Carolina Boards of Health.
(2) Three local health directors.
(3) Two staff members from the Division of Public Health, Department of Health and Human Services.
(4) One staff member from the Division of Environmental Health, recommended by the Secretary of Environment and Natural Resources.
(5) Three at large.

(b) Members shall serve four-year terms except that initial terms shall be staggered such that three members are appointed for one year, four members are appointed for two years, four members are appointed for three years, and six members are appointed for four years. An appointment to fill a vacancy on the Board created by the resignation, dismissal, ineligibility, death, or disability of any member shall be made for the balance of the unexpired term. The Secretary may remove any member for misfeasance, malfeasance, or nonfeasance. The chair shall be designated by the Secretary and shall designate the times and places at which the Board shall meet. The Board shall meet as often as necessary to carry out its duty to develop and review periodically accreditation standards, to engage in activities necessary to assign accreditation status to local health departments, and to engage in other activities necessary to implement this section.

(c) Members of the Board who are not officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Board who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6.

(d) The Board shall assign an accreditation status to each local health department that applies for initial accreditation, reaccreditation, or relief from conditional accreditation. The Board shall assign the appropriate accreditation status, as follows:

(1) Accredited, which means that the local health department has satisfied the accreditation standards adopted by the Board and applicable rules adopted by the Commission.
(2) Conditionally accredited, which means that the local health department has failed to meet one or more accreditation standards and has therefore been granted short-term accreditation subject to conditions specified by the Board.
(3) Unaccredited, which means that the local health department has continued to fail to meet one or more accreditation standards after a period of conditional accreditation.

(e) The Commission shall, after reviewing standards developed by and consulting with the Board, adopt rules establishing accreditation standards for local health departments. The accreditation standards shall include at least all of the following:

(1) An accreditation process that consists of the following components:
    a. A self-assessment conducted by the local health department seeking accreditation.
    b. A site visit by a team of experts to clarify, verify, and amplify the information in the self-assessment.
    c. Final action by the Board on the local health department's accreditation status.

(2) The local health department's capacity to provide the essential public health services, as follows:
  a. Monitoring health status to identify community health problems.
  b. Diagnosing and investigating health hazards in the community.
  c. Informing, educating, and empowering people about health issues.
  d. Mobilizing community partnerships to identify and solve health problems.
  e. Developing policies and plans that support individual and community health efforts.
  f. Enforcing laws and regulations that protect health and ensure safety.
  g. Linking people to needed personal health care services and assuring the provision of health care when otherwise unavailable.
  h. Assuring a competent public health workforce and personal health care workforce.
  i. Evaluating effectiveness, accessibility, and quality of personal and population-based health services.
  j. Conducting research.
(3) The local health department's facilities and administration.
(4) The local health department's staff competencies and training procedures or programs.
(5) The local health department's governance and fiscal management; and
(6) Informal procedures for reviewing Board decisions.

(f) All local health departments shall obtain and maintain accreditation in accordance with this section. The Board shall implement accreditation over a period of eight years, beginning January 1, 2006. The Board shall establish a schedule specifying when each local health department shall apply for initial accreditation and ensuring that all local health departments have applied for initial accreditation by December 1, 2014.

(g) The Board shall assign the following accreditation status, as applicable:
(1) "Accredited" to a local health department that satisfies the accreditation standards. The initial period of accreditation shall expire four calendar years after initial accreditation is granted.
(2) "Conditionally accredited" to a local health department that, in its initial accreditation application, fails to satisfy the accreditation standards. The period of conditional accreditation shall expire two calendar years after conditional accreditation is granted. The Board shall provide to the local health department a written statement of the conditions that must be satisfied in order for the local health department to be accredited. At any time during the two-year period, the local health department may request that its status be reviewed and changed from "conditionally accredited" to "accredited." If the Board finds that the conditions have been met, the Board shall change the local health department's status to "accredited" with the accreditation period to expire four calendar years after the conditional accreditation was initially granted. If the Board finds that the conditions have not been satisfied, the local health department shall continue under its grant of conditional accreditation. During the conditional accreditation period, the local health department may apply again for accreditation in accordance with rules adopted by the Commission.

(h) Each accredited local health department shall apply for reaccreditation in accordance with rules adopted by the Commission.

(i) When the Board assigns the status "unaccredited" to a local health department, the Board shall send written notification of that status to the local health department and to the Secretary.

(j) The Commission shall adopt rules to implement this section. (2005-369, s. 1(b).)

§ 130A-35. County board of health; appointment; terms.

(a) A county board of health shall be the policy-making, rule-making and adjudicatory body for a county health department.

(b) The members of a county board of health shall be appointed by the county board of commissioners. The board shall be composed of 11 members. The composition of the board shall reasonably reflect the population makeup of the county and shall include: one physician licensed to practice medicine in this State, one licensed dentist, one licensed optometrist, one licensed veterinarian, one registered nurse, one licensed pharmacist, one county commissioner, one professional engineer, and three representatives of the general public. All members shall be residents of the county. If there is not a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer available for appointment, an additional representative of the general public shall be appointed. If however, one of the designated professions has only one person residing in the county, the county commissioners shall have the option of appointing that person or a member of the general public.

(c) Except as provided in this subsection, members of a county board of health shall serve three-year terms. No member may serve more than three consecutive three-year terms unless the member is the only person residing in the county who represents one of the professions designated in subsection (b) of this section. The county commissioner member shall serve only as long as the member is a county commissioner. When a representative of the general public is appointed due to the unavailability of a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer, that member shall serve only until a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer becomes available for appointment. In order to establish a uniform staggered term structure for the board, a member may be appointed for less than a three-year term.

(d) Vacancies shall be filled for any unexpired portion of a term.

(e) A chairperson shall be elected annually by a county board of health. The local health director shall serve as secretary to the board.

(f) A majority of the members shall constitute a quorum.

(g) A member may be removed from office by the county board of commissioners for:

(1) Commission of a felony or other crime involving moral turpitude;
(2) Violation of a State law governing conflict of interest;
(3) Violation of a written policy adopted by the county board of commissioners;
(4) Habitual failure to attend meetings;
(5) Conduct that tends to bring the office into disrepute; or
(6) Failure to maintain qualifications for appointment required under subsection (b) of this section.

A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

(h) A member may receive a per diem in an amount established by the county board of commissioners. Reimbursement for subsistence and travel shall be in accordance with a policy set by the county board of commissioners.

(i) The board shall meet at least quarterly. The chairperson or three of the members may call a special meeting. (1901, c. 245, s. 3; Rev., s. 4444; 1911, c.

62, s. 9; C.S., s. 7604; 1931, c. 149; 1941, c. 185; 1945, c. 99; c. 1030, s. 2; 1947, c. 474, s. 3; 1951, c. 92; 1957, c. 1357, s. 1; 1963, c. 359; 1967, c. 1224, s. 1; 1969, c. 719, s. 1; 1971, c. 175, s. 1; c. 940, s. 1; 1973, c. 137, s. 1; c. 1151; 1975, c. 272; 1979, c. 621; 1981, c. 104; 1983, c. 891, s. 2; 1985, c. 418, s. 1; 1987, c. 84, s. 1; 1989, c. 764, s. 2; 1995, c. 264, s. 1.)

Local Modification to Former G.S. 130-13 and Former Similar Provisions. — Caldwell: 1939, c. 366; Cumberland: 1935, c. 159; 1943, c. 91; Edgecombe: 1969, c. 422; Moore: 1943, c. 326, s. 2; Nash: 1949, c. 6, s. 1.

CASE NOTES

Rule-Making Powers. — A board of health acts within its rule-making powers when it enacts a regulation which (1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

Powers Exceeded. — Enactment of county smoking rules exceeded the general limitations imposed upon rule-making powers of boards of health. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

§ 130A-36. Creation of district health department.

(a) A district health department including more than one county may be formed in lieu of county health departments upon agreement of the county boards of commissioners and local boards of health having jurisdiction over each of the counties involved. A county may join a district health department upon agreement of the boards of commissioners and local boards of health having jurisdiction over each of the counties involved. A district health department shall be a public authority as defined in G.S. 159-7(b)(10).

(b) Upon creation of or addition to a district health department, the existing rules of the former board or boards of health shall continue in effect until amended or repealed by the district board of health. (1957, c. 1357, s. 1; 1969, c. 719, s. 2; 1971, c. 175, s. 2; 1973, c. 143, ss. 1-4; c. 476, s. 128; 1975, c. 396, s. 1; 1981, c. 238; c. 408; 1983, c. 891, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Department Authorized to Operate Public Transport. — The Pasquotank-Perquimans-Camden-Chowan District Health Department has the authority to operate public transit on a fare paying basis, without establishment of a Transportation Authority. Section 62-260 (a)(1) specifically exempts political subdivisions of this State from regulation by the North Carolina Utilities Commission. See opinion of Attorney General to Mr. David D. King, Director of Division of Public Transportation, North Carolina Department of Transportation, 55 N.C.A.G. 76 (1986).

§ 130A-37. District board of health.

(a) A district board of health shall be the policy-making, rule-making and adjudicatory body for a district health department and shall be composed of 15 members; provided, a district board of health may be increased up to a maximum number of 18 members by agreement of the boards of county commissioners in all counties that comprise the district. The agreement shall be evidenced by concurrent resolutions adopted by the affected boards of county commissioners.

(b) The county board of commissioners of each county in the district shall appoint one county commissioner to the district board of health. The county commissioner members of the district board of health shall appoint the other members of the board, including at least one physician licensed to practice medicine in this State, one licensed dentist, one licensed optometrist, one licensed veterinarian, one registered nurse, one licensed pharmacist, and one professional engineer. The composition of the board shall reasonably reflect the population makeup of the entire district and provide equitable district-wide representation. All members shall be residents of the district. If there is not a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer available for appointment, an additional representative of the general public shall be appointed. If however, one of the designated professions has only one person residing in the district, the county commissioner members shall have the option of appointing that person or a member of the general public.

(c) Except as provided in this subsection, members of a district board of health shall serve terms of three years. Two of the original members shall serve terms of one year and two of the original members shall serve terms of two years. No member shall serve more than three consecutive three-year terms unless the member is the only person residing in the district who represents one of the professions designated in subsection (b) of this section. County commissioner members shall serve only as long as the member is a county commissioner. When a representative of the general public is appointed due to the unavailability of a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer that member shall serve only until a licensed physician, a licensed dentist, a licensed optometrist, a licensed veterinarian, a registered nurse, a licensed pharmacist, or a professional engineer becomes available for appointment. The county commissioner members may appoint a member for less than a three-year term to achieve a staggered term structure.

(d) Whenever a county shall join or withdraw from an existing district health department, the district board of health shall be dissolved and a new board shall be appointed as provided in subsection (c).

(e) Vacancies shall be filled for any unexpired portion of a term.

(f) A chairperson shall be elected annually by a district board of health. The local health director shall serve as secretary to the board.

(g) A majority of the members shall constitute a quorum.

(h) A member may be removed from office by the district board of health for:

(1) Commission of a felony or other crime involving moral turpitude;
(2) Violation of a State law governing conflict of interest;
(3) Violation of a written policy adopted by the county board of commissioners of each county in the district;
(4) Habitual failure to attend meetings;
(5) Conduct that tends to bring the office into disrepute; or
(6) Failure to maintain qualifications for appointment required under subsection (b) of this section.

A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

(i) A member may receive a per diem in an amount established by the county commissioner members of the district board of health. Reimbursement for subsistence and travel shall be in accordance with a policy set by the county commissioner members of the district board of health.

(j) The board shall meet at least quarterly. The chairperson or three of the members may call a special meeting.

(k) A district board of health is authorized to provide liability insurance for the members of the board and the employees of the district health department.

A district board of health is also authorized to contract for the services of an attorney to represent the board, the district health department and its employees, as appropriate. The purchase of liability insurance pursuant to this subsection waives both the district board of health's and the district health department's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. By entering into a liability insurance contract with the district board of health, an insurer waives any defense based upon the governmental immunity of the district board of health or the district health department. (1957, c. 1357, s. 1; 1969, c. 719, s. 2; 1971, c. 175, s. 2; c. 940, s. 1; 1973, c. 143, ss. 1-4; c. 476, s. 128; 1975, c. 396, s. 1; 1981, cc. 104, 238, 408; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1077; 1985, c. 418, s. 2; 1987, c. 84, s. 2; 1989, c. 764, s. 3; 1995, c. 264, s. 2.)

CASE NOTES

A district board of health is a creature of the legislature and has only such powers and authority as are given it by the legislature. State v. Curtis, 230 N.C. 169, 52 S.E.2d 364 (1949), decided under former statutory provisions.

Cited in Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

OPINIONS OF ATTORNEY GENERAL

A county commissioner member of a district board of health may serve more than three consecutive three-year terms on the board and is not subject to the same term limitations as other members of the board. See opinion of Attorney General to Hal G. Harrison Mitchell County Attorney, 1998 N.C.A.G. 40 (10/8/98).

§ 130A-38. Dissolution of a district health department.

(a) Whenever the board of commissioners of each county constituting a district health department determines that the district health department is not operating in the best health interests of the respective counties, they may direct that the district health department be dissolved. In addition, whenever a board of commissioners of a county which is a member of a district health department determines that the district health department is not operating in the best health interests of that county, it may withdraw from the district health department. Dissolution of a district health department or withdrawal from the district health department by a county shall be effective only at the end of the fiscal year in which the action of dissolution or withdrawal transpired.

(b) Notwithstanding the provisions of subsection (a), no district health department shall be dissolved without prior written notification to the Department.

(c) Any budgetary surplus available to a district health department at the time of its dissolution shall be distributed to those counties comprising the district on the same pro rata basis that the counties appropriated and contributed funds to the district health department budget during the current fiscal year. Distribution to the counties shall be determined on the basis of an audit of the financial record of the district health department. The district board of health shall select a certified public accountant or an accountant who is subsequently certified by the Local Government Commission to conduct the audit. The audit shall be performed in accordance with G.S. 159-34. The same method of distribution of funds described above shall apply when one or more counties of a district health department withdraw from a district.

(d) Upon dissolution or withdrawal, all rules adopted by a district board of health shall continue in effect until amended or repealed by the new board or boards of health. (1971, c. 858; 1975, c. 396, s. 2; c. 403; 1983, c. 891, s. 2.)

§ 130A-39. Powers and duties of a local board of health.

(a) A local board of health shall have the responsibility to protect and promote the public health. The board shall have the authority to adopt rules necessary for that purpose.

(b) A local board of health may adopt a more stringent rule in an area regulated by the Commission for Public Health or the Environmental Management Commission where, in the opinion of the local board of health, a more stringent rule is required to protect the public health; otherwise, the rules of the Commission for Public Health or the rules of the Environmental Management Commission shall prevail over local board of health rules. However, a local board of health may not adopt a rule concerning the grading, operating, and permitting of food and lodging facilities as listed in Part 6 of Article 8 of this Chapter and as defined in G.S. 130A-247(1), and a local board of health may adopt rules concerning wastewater collection, treatment and disposal systems which are not designed to discharge effluent to the land surface or surface waters only in accordance with G.S. 130A-335(c).

(c) The rules of a local board of health shall apply to all municipalities within the local board's jurisdiction.

(d) Not less than 10 days before the adoption, amendment or repeal of any local board of health rule, the proposed rule shall be made available at the office of each county clerk within the board's jurisdiction, and a notice shall be published in a newspaper having general circulation within the area of the board's jurisdiction. The notice shall contain a statement of the substance of the proposed rule or a description of the subjects and issues involved, the proposed effective date of the rule and a statement that copies of the proposed rule are available at the local health department. A local board of health rule shall become effective upon adoption unless a later effective date is specified in the rule.

(e) Copies of all rules shall be filed with the secretary of the local board of health.

(f) A local board of health may, in its rules, adopt by reference any code, standard, rule or regulation which has been adopted by any agency of this State, another state, any agency of the United States or by a generally recognized association. Copies of any material adopted by reference shall be filed with the rules.

(g) A local board of health may impose a fee for services to be rendered by a local health department, except where the imposition of a fee is prohibited by statute or where an employee of the local health department is performing the services as an agent of the State. Notwithstanding any other provisions of law, a local board of health may impose cost-related fees for services performed pursuant to Article 11 of this Chapter, "Wastewater Systems," for services performed pursuant to Part 10, Article 8 of this Chapter, "Public Swimming Pools", for services performed pursuant to Part 11, Article 8 of this Chapter, "Tattooing", and for services performed pursuant to G.S. 87-97. Fees shall be based upon a plan recommended by the local health director and approved by the local board of health and the appropriate county board or boards of commissioners. The fees collected under the authority of this subsection are to be deposited to the account of the local health department so that they may be expended for public health purposes in accordance with the provisions of the Local Government Budget and Fiscal Control Act. (1901, c. 245, s. 3; Rev., s. 4444; 1911, c. 62, s. 9; C.S., s. 7065; 1957, c. 1357, s. 1; 1959, c. 1024, s. 1; 1963,

c. 1087; 1973, c. 476, s. 128; c. 508; 1977, c. 857, s. 2; 1981, c. 130, s. 2; c. 281; c. 949, s. 4; 1983, c. 891, s. 2; 1985, c. 175, s. 1; 1989, c. 577, s. 2; 1991 (Reg. Sess., 1992), c. 944, s. 10; 1993 (Reg. Sess., 1994), c. 670, s. 2; 1995, c. 507, s. 26.8(c); 2006-202, s. 6; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2006-202, s. 6, effective August 7, 2006, added "and for services performed pursuant to G.S. 87-97" and made a minor stylistic change at the end of the second sentence of subsection (g).

Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" twice in subsection (b).

Legal Periodicals. — For note, "Preemption Hogwash: North Carolina's Judicial Repeal of Local Authority to Regulate Hog Farms in Craig v. County of Chatham," see 80 N.C.L. Rev. 2121 (2002).

CASE NOTES

Rule-Making Powers. — A board of health acts within its rule-making powers when it enacts a regulation which (1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

Although the county board of health could adopt rules more strict than those adopted at the state level to protect the public health, under G.S. 130A-39(b), its rules attempting to regulate swine farms more strictly than the state could not stand because they insufficiently expressed a rationale for the county's stricter regulation. Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

Limited Powers. — County boards of health and other administrative agencies, being creatures of statute, have only such powers as are conferred upon them by statute, either expressly or by necessary implication. Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942), decided under former statutory provisions.

Powers Exceeded. — Enactment of county smoking rules exceeded the general limitations imposed upon rule-making powers of boards of health. City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

Findings of Board Not Final. — The finding of the county board of health that the maintenance of a cemetery upon the watershed is a nuisance to the public health has not the same force as the positive declarations of statute, and it may be shown in answer to a notice to show cause why an injunction should not be continued to the final hearing that the particular cemetery, as maintained, was not a nuisance entitling the plaintiff to injunctive relief. Board of Health v. Lewis, 196 N.C. 641, 146 S.E. 592 (1929), decided under former statutory provisions.

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994); Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001), cert. granted, 354 N.C. 68, 553 S.E.2d 37 (2001).

OPINIONS OF ATTORNEY GENERAL

For opinion that a local board of health may not regulate the production, processing and distribution of "Grade A" fluid milk and milk products, see opinion of Attorney General to Stacy Covil, Head, Sanitation Branch, Division of Health Services, 50 N.C.A.G. 42 (1980), rendered under former G.S. 130-17.

§ 130A-40. Appointment of local health director.

(a) A local board of health, after consulting with the appropriate county board or boards of commissioners, shall appoint a local health director. All persons who are appointed to the position of local health director on or after January 1, 1992, must possess minimum education and experience requirements for that position, as follows:

(1) A medical doctorate; or
(2) A masters degree in Public Health Administration, and at least one year of employment experience in health programs or health services; or
(3) A masters degree in a public health discipline other than public health administration, and at least three years of employment experience in health programs or health services; or
(4) A masters degree in public administration, and at least two years of experience in health programs or health services; or
(5) A masters degree in a field related to public health, and at least three years of experience in health programs or health services; or
(6) A bachelors degree in public health administration or public administration and at least three years of experience in health programs or health services.

(b) Before appointing a person to the position of local health director under subsection (a)(5) of this section, the local board of health shall forward the application and other pertinent materials of such candidate to the State Health Director. If the State Health Director determines that the candidate's masters degree is in a field not related to public health, the State Health Director shall so notify the local board of health in writing within 15 days of the State Health Director's receipt of the application and materials, and such candidate shall be deemed not to meet the education requirements of subsection (a)(5) of this section. If the State Health Director fails to act upon the application within 15 days of receipt of the application and materials from the local board of health, the application shall be deemed approved with respect to the education requirements of subsection (a)(5) of this section, and the local board of health may proceed with appointment process.

(c) The State Health Director shall review requests of educational institutions to determine whether a particular masters degree offered by the requesting institution is related to public health for the purposes of subsection (a)(5) of this section. The State Health Director shall act upon such requests within 90 days of receipt of the request and pertinent materials from the institution, and shall notify the institution of its determination in writing within the 90-day review period. If the State Health Director determines that an institution's particular masters degree is not related to public health, the State Health Director shall include the reasons therefor in his written determination to the institution.

(d) When a local board of health fails to appoint a local health director within 60 days of the creation of a vacancy, the State Health Director may appoint a local health director to serve until the local board of health appoints a local health director in accordance with this section. (1957, c. 1357, s. 1; 1973, c. 152; c. 476, s. 128; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 75; 1991, c. 612, s. 1.)

CASE NOTES

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

OPINIONS OF ATTORNEY GENERAL

Employment and termination of local health director are subject to the provisions of Chapter 126, the State Personnel Act, and termination or discharge of a health director must comply with all statutory provisions and regulations duly adopted by the State Personnel Commission pursuant to Chapter 126. See opinion of Attorney General to Mr. Michael S. Kennedy, Esquire, Attorney for Cleveland County Board of Health, and Mr. Robert W.

Yelton, Esquire, Attorney for Cleveland County, 55 N.C.A.G. 113 (1986).

The discharge of a local health director must comply with Chapter 126. See opinion of Attorney General to Mr. Robert W. Yelton, Attorney for Cleveland County Board of Health, 55 N.C.A.G. 113 (1986).

§ 130A-40.1. Pilot program for nurse as health director.

(a) Notwithstanding G.S. 130A-40, a local board of health, after consulting with the appropriate county board of commissioners, and with the approval of the Secretary of Health and Human Services, may appoint a local health director who meets the following education and experience requirements for that position:

(1) Graduation from a four-year college or university with a Bachelor of Science in Nursing degree that includes a public health nursing rotation; or

(2) A candidate with an RN but not a bachelors degree if the candidate has at least 10 years' experience, at least seven years of which must be in an administrative or supervisory role, and of this seven years, at least five years must be at the agency at which the candidate is an applicant for employment as local health director.

(b) The Secretary of Health and Human Services may approve only one request under subsection (a) of this section, this section being designed as a pilot program concerning alternative qualifications for a local health director. The Secretary of Health and Human Services shall report any approval under this section to the Public Health Study Commission.

(c) All bachelors level candidates appointed under this section shall have a total of 10 years' public health experience, at least five years of which must be in a supervisory capacity at the agency at which the candidate is an applicant for employment as a local health director. Bachelor of Science in Nursing candidates with a public health rotation may use this BSN degree as credit for one year's public health experience.

(d) In addition to possessing the qualifications required in this section, all Bachelor of Science, Bachelor of Arts, or Registered Nurse candidates must complete at least six contact hours of continuing education annually on the subject of local and State government finance, organization, or budgeting. The training must be in a formal setting offered through the State or local government or through an accredited educational institution. This training is in addition to any other required training for local health director or other continuing education required to maintain other professional credentials. If during the course of employment as local health director the employee meets the requirements of this subsection, the additional training requirements of this section are waived. (2003-284, s. 10.33C.)

§ 130A-41. Powers and duties of local health director.

(a) A local health director shall be the administrative head of the local health department, shall perform public health duties prescribed by and under the supervision of the local board of health and the Department and shall be employed full time in the field of public health.

(b) A local health director shall have the following powers and duties:

(1) To administer programs as directed by the local board of health;

(2) To enforce the rules of the local board of health;

(3) To investigate the causes of infectious, communicable and other diseases;

(4) To exercise quarantine authority and isolation authority pursuant to G.S. 130A-145;

(5) To disseminate public health information and to promote the benefits of good health;
(6) To advise local officials concerning public health matters;
(7) To enforce the immunization requirements of Part 2 of Article 6 of this Chapter;
(8) To examine and investigate cases of venereal disease pursuant to Parts 3 and 4 of Article 6 of this Chapter;
(9) To examine and investigate cases of tuberculosis pursuant to Part 5 of Article 6 of this Chapter;
(10) To examine, investigate and control rabies pursuant to Part 6 of Article 6 of this Chapter;
(11) To abate public health nuisances and imminent hazards pursuant to G.S. 130A-19 and G.S. 130A-20;
(12) To employ and dismiss employees of the local health department in accordance with Chapter 126 of the General Statutes;
(13) To enter contracts, in accordance with The Local Government Finance Act, G.S. Chapter 159, on behalf of the local health department. Nothing in this paragraph shall be construed to abrogate the authority of the board of county commissioners.

(c) Authority conferred upon a local health director may be exercised only within the county or counties comprising the local health department. (1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1985, c. 175, s. 2; 1999-110, s. 1.)

CASE NOTES

Personal Liability of Environmental Health Personnel. — who may be liable for the negligent performance of their duties. Block v. County of Person, 141 N.C. App. 273, 540 S.E.2d 415, 2000 N.C. App. LEXIS 1396 (2000).

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994); Gray v. Laws, 915 F. Supp. 747 (E.D.N.C. 1994).

§ 130A-42. Personnel records of district health departments.

Employee personnel records of a district health department shall have the same protections from disclosure as county employee personnel records under G.S. 153A-98. For the purposes of this section, the local health director shall perform the duties assigned to the county manager pursuant to G.S. 153A-98 and the district board of health shall perform the duties assigned to the county board of commissioners pursuant to G.S. 153A-98. (1983, c. 891, s. 2.)

Part 1A. Consolidated Human Services Agency.

§ 130A-43. Consolidated human services agency; board; director.

(a) Except as otherwise provided by this section and subject to any limitations that may be imposed by the board of county commissioners under G.S. 153A-77, a consolidated human services agency created pursuant to G.S. 153A-77 shall have the responsibility to carry out the duties of a local health department and the authority to administer the local public health programs established in this Chapter in the same manner as a local health department.

(b) In addition to the powers conferred by G.S. 153A-77(d), a consolidated human services board shall have all the powers and duties of a local board of health as provided by G.S. 130A-39, except that the consolidated human services board may not:

(1) Appoint the human services director.

(2) Transmit or present the budget for local health programs.

(c) In addition to the powers conferred by G.S. 153A-77(e), a human services director shall have all the powers and duties of a local health director provided by G.S. 130A-41, except that the human services director may:

(1) Serve as the executive officer of the consolidated human services agency only to the extent and in the manner authorized by the county manager.

(2) Appoint staff of the consolidated human services agency only upon the approval of the county manager. (1995 (Reg. Sess., 1996), c. 690, s. 14.)

Legal Periodicals. — For 1997 Legislative Survey, see 20 Campbell L. Rev. 469.

§ 130A-44: Reserved for future codification purposes.

Part 1B. Public Health Authorities Authorized.

§ 130A-45. Title and purpose.

(a) This Part shall be known and may be cited as the "Public Health Authorities Act".

(b) The purpose of this Part is to provide an alternative method for counties to provide public health services. This Part shall not be regarded as repealing any powers now existing under any other law, either general, special, or local.

(c) It is the policy of the General Assembly that Public Health Authorities should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. (1997-502, s. 1.)

Editor's Note. — Session Laws 1997-502, s. 1, enacted this part as Part 1A, G.S. 130A-43 through 130A-45.11. It has been redesignated as Part 1B, G.S. 130A-45 through 130A-45.11 at the direction of the Revisor of Statutes.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 130A-45.01. Definitions.

As used in this Part, unless otherwise specified:

(1) "Authority service area" means the area within the boundaries of the authority as provided for in G.S. 130A-45.4.

(2) "Board" means a public health authority board created under this Part.

(3) "County" means the county which is, or is about to be, included in the territorial boundaries of a public health authority when created hereunder.

(4) "County board of commissioners" means the legislative body charged with governing the county.

(5) "Department" means the Department of Health and Human Services.

(6) "Federal government" means the United States of America, or any agency, instrumentality, corporate or otherwise, of the United States of America.

(7) "Government" means the State and federal governments and any subdivision, agency, or instrumentality, corporate or otherwise, of either of them.

(8) "Public health authority" means a public body and a body corporate and politic organized under the provisions of this Part.

(9) "Public health facility" means any one or more buildings, structures, additions, extensions, improvements, or other facilities, whether or not located on the same site or sites, machinery, equipment, furnishings or other real or personal property suitable for providing public health services; and includes, without limitation, local public health departments or centers; public health clinics and outpatient facilities; nursing homes, including skilled nursing facilities and intermediate care facilities, adult care homes for the aged and disabled; public health laboratories; administration buildings, central service and other administrative facilities; communication, computer and other electronic facilities; pharmaceutical facilities; storage space; vehicular parking lots and other such public health facilities, customarily under the jurisdiction of or provided by public health departments, or any combination of the foregoing, with all necessary, convenient or related interests in land, machinery, apparatus, appliances, equipment, furnishings, appurtenances, site preparation, landscaping, and physical amenities.

(10) "Real property" means lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(11) "State" means the State of North Carolina. (1997-502, s. 1.)

Editor's Note. — Session Laws 1997-502, s. 1, enacted this section as G.S. 130A-44. It has been redesignated as this section at the direction of the Revisor of Statutes.

§ 130A-45.02. Creation of a public health authority.

(a) A public health authority may be created upon joint resolution of the county board of commissioners and the local board of health that it is in the interest of the public health and welfare to create a public health authority to provide public health services as required under G.S. 130A-34.

(b) A public health authority including more than one county may be formed upon joint resolution of the county boards of commissioners and local boards of health having jurisdiction over each of the counties involved.

(c) After the adoption of a resolution creating a public health authority, a public health authority board shall be appointed in accordance with G.S. 130A-45.1.

(d) A county may join a public health authority upon joint resolution of the boards of commissioners and local boards of health having jurisdiction over each of the counties involved.

(e) A public health authority board shall govern the public health authority. All powers, duties, functions, rights, privileges, or immunities conferred on the public health authority may be exercised by the authority board.

(f) The public health authority board shall absorb the functions, assets, and liabilities of the county or district boards of health, and that board is dissolved.

(g) For the purpose of Chapter 159 of the General Statutes, a public health authority is a public authority as defined in G.S. 159-7(b)(10).

(h) Before adopting a resolution creating a public health authority, the county board of commissioners shall hold a public hearing with notice published at least 10 days before the hearing.

(i) For the purposes of Article 9 of Chapter 131E of the General Statutes, a public health authority is a person as defined in G.S. 131E-176(19). (1997-502, s. 1; 2001-92, s. 3.)

Editor's Note. — Session Laws 1997-502, s. 1, enacted this section as G.S. 130A-45. It has been redesignated as this section at the direction of the Revisor of Statutes.

§ 130A-45.1. Membership of the public health authority board.

(a) A public health authority board shall be the policy-making, rule-making, and adjudicatory body for a public health authority and shall be composed of no fewer than seven members and no more than nine members; except that in an authority comprising two or more counties, the board shall be composed of no more than 11 members. Boards which intend to pursue federally qualified health center (or look-alike) status may have no fewer than nine and no more than 25 members.

(b) In a single county authority, the county board of commissioners shall appoint the members of the board; in an authority comprising two or more counties, the chair of the county board of commissioners of each county in the authority shall appoint one county commissioner, or the commissioner's express designee, to the authority board and these members shall jointly appoint the other members of the board.

(c) The members of the board shall include:

(1) At least one physician licensed under Chapter 90 of the General Statutes to practice medicine in this State, and at least one dentist licensed under Article 2 of Chapter 90 of the General Statutes to practice dentistry in this State;

(2) At least one county commissioner or the commissioner's express designee from each county in the authority;

(3) At least two licensed or registered professionals from any of the following professions: optometry, veterinary science, nursing, pharmacy, engineering, or accounting;

(4) At least one member from the administrative staff of a hospital serving the authority service area; and

(5) At least one member from the general public.

(d) Except as provided in this subsection, members of the board shall serve terms of three years. In order to establish a uniform staggered term structure for the Board, a member may be appointed for less than a three-year term.

(e) Any member who is a county commissioner serves on the board in an ex officio capacity.

(f) Whenever a county shall join or withdraw from an existing public health authority, the board shall be dissolved and a new board shall be appointed as provided in subsection (b) of this section.

(g) Vacancies shall be filled within 120 days for any unexpired portion of a term.

(h) A chair shall be elected annually by a board. The authority director shall serve as secretary to the board.

(i) A majority of the members shall constitute a quorum.

(j) A member may be removed from office by the board for any of the following:

(1) Commission of a felony or other crime involving moral turpitude.

(2) Violation of a State law governing conflict of interest.

(3) Violation of a written policy adopted by the county board of commissioners of each county in the authority.

(4) Habitual failure to attend meetings.

(5) Conduct that tends to bring the office into disrepute.

(6) Failure to maintain qualifications for appointment required under subsection (c) of this section.

A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

(k) Board members may receive per diem in an amount established by the county commissioner members of the Public Health Authority Board. Reimbursement for subsistence and travel shall be in accordance with a policy set by the county commissioner members of the Public Health Authority Board.

(*l*) The board shall meet at least quarterly. The chair or three of the members may call a special meeting. (1997-502, s. 1; 2005-459, s. 2; 2007-229, s. 1.)

Effect of Amendments. — Session Laws 2007-229, s. 1, effective July 18, 2007, rewrote subsection (k).

§ 130A-45.2. Dissolution of a public health authority.

(a) Whenever the board of commissioners of each county constituting a public health authority determines that the authority is not operating in the best health interests of the authority service area, they may direct that the authority be dissolved. In addition, whenever a board of commissioners of a county which is a member of an authority determines that the authority is not operating in the best health interests of that county, it may withdraw from the authority. Dissolution of an authority or withdrawal from the authority by a county shall be effective only at the end of the fiscal year in which the action of dissolution or withdrawal transpired.

(b) Notwithstanding the provisions of subsection (a) of this section, no public health authority shall be dissolved without prior written notification to the Department.

(c) Any budgetary surplus available to a public health authority at the time of its dissolution shall be distributed to those counties comprising the authority on the same pro rata basis that the counties appropriated and contributed funds to the authority's budget during the current fiscal year. Distribution to the counties shall be determined on the basis of an audit of the financial record of the authority. The public health authority board shall select a certified public accountant or an accountant who is subsequently certified by the Local Government Commission to conduct the audit. The audit shall be performed in accordance with G.S. 159-34. The same method of distribution of funds described above shall apply when one or more counties of an authority withdraw from the authority.

(d) Upon dissolution or withdrawal, all rules adopted by the board continue in effect until amended or repealed by the new authority board or boards of health. (1997-502, s. 1.)

§ 130A-45.3. Powers and duties of authority board.

(a) A public health authority shall have all the powers necessary or convenient to carry out the purposes of this Part, including the following powers to:

(1) Protect and promote the public health. The board shall have the authority to adopt rules necessary for that purpose.
(2) Construct, equip, operate, and maintain public health facilities.
(3) Use property owned or controlled by the authority.
(4) Acquire real or personal property, including existing public health facilities, by purchase, grant, gift, devise, lease or, with the permission of the county commissioners, condemnation.
(5) Establish a fee schedule for services received from public health facilities and make services available regardless of ability to pay.
(6) Appoint a public health authority director to serve at the pleasure of the authority board.

(7) Establish a salary plan which shall set the salaries for employees of the area authority.

(8) To adopt and enforce a professional reimbursement policy which may include the following provisions: (i) require that fees for the provision of services received directly under the supervision of the public health authority shall be paid to the authority, (ii) prohibit employees of the public health authority from providing services on a private basis which require the use of the resources and facilities of the public health authority, and (iii) provide that employees may not accept dual compensation and dual employment unless they have the written permission of the public health authority director.

(9) Delegate to its agents or employees any powers or duties as it may deem appropriate.

(10) Employ its own counsel and legal staff.

(11) Adopt, amend, and repeal bylaws for the conduct of its business.

(12) Enter into contracts for necessary supplies, equipment, or services for the operation of its business.

(13) Act as an agent for the federal, State, or local government in connection with the acquisition, construction, operation, or management of a public health facility, or any part thereof.

(14) Insure the property or the operations of the authority against risks as the authority may deem advisable.

(15) Sue and be sued.

(16) Accept donations or money, personal property, or real estate for the benefit of the authority and to take title to the same from any person, firm, corporation, or society.

(17) Appoint advisory boards, committees, and councils composed of qualified and interested residents of the authority service area to study, interpret, and advise the public health authority board.

(18) To purchase or finance real or personal property in the manner provided for cities and counties under G.S. 160A-20.

(b) A public health authority shall have the power to establish and operate health care networks and may contract with or enter into any arrangement with other public health authorities or local health departments of this or other states, federal, or other public agencies, or with any person, private organization, or nonprofit corporation or association for the provision of public health services, including managed health care activities; provided, however, that for the purposes of this subsection only, a public health authority shall be permitted to and shall comply with the requirements of Article 67 of Chapter 58 of the General Statutes to the extent that such requirements apply to the activities undertaken by the public health authority pursuant to this subsection. The public health authority may pay for or contribute its share of the cost of any such contract or arrangement from revenues available for these purposes, including revenues arising from the provision of public health services.

(c) A public health authority may lease any public health facility, or part, to a nonprofit association on terms and conditions consistent with the purposes of this Part. The authority will determine the length of the lease. No lease executed under this subsection shall be deemed to convey a freehold interest.

(d) A public health authority shall neither sell nor convey any rights of ownership the county has in any public health facility, including the buildings, land, and equipment associated with the facility, to any corporation or other business entity operated for profit, except that nothing herein shall prohibit the sale of surplus buildings, surplus land, or surplus equipment by an authority to any corporation or other business entity operated for profit. For purposes of this subsection, "surplus" means any building, land, or equipment which is not required for use in the delivery of public health care services by a public health facility at the time of the sale or conveyance of ownership rights.

(e) A public health authority may lease any public health facility, or part, to any corporation, foreign or domestic, authorized to do business in North Carolina on terms and conditions consistent with the purposes of this Part and with G.S. 160A-272.

(f) A public health authority may exercise any or all of the powers conferred upon it by this Part, either generally or with respect to any specific public health facility or facilities, through or by designated agents, including any corporation or corporations which are or shall be formed under the laws of this State.

(g) An authority may contract to insure itself and any of its board members, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the authority or of any of its board members, agents, or employees when acting within the scope of their authority and the course of their employment. The board shall determine what liabilities and what members, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

Purchase of insurance pursuant to this subsection waives the authority's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 23 of Chapter 58 of the General Statutes shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the authority, an insurer waives any defense based upon the governmental immunity of the authority.

(h) If an authority has waived its governmental immunity pursuant to subsection (g) of this section, any person, or in the event of death, their personal representative, sustaining damages as a result of an act or omission of the authority or any of its board members, agents, or employees, occurring in the exercise of a governmental function, may sue the authority for recovery of damages. To the extent of the coverage of insurance purchased pursuant to subsection (g) of this section, governmental immunity may not be a defense to the action. Otherwise, however, the authority has all defenses available to private litigants in any action brought pursuant to this section without restriction, limitation, or other effect, whether the defense arises from common law or by virtue of a statute.

Despite the purchase of insurance as authorized by subsection (g) of this section, the liability of an authority for acts or omissions occurring in the exercise of governmental functions does not attach unless the plaintiff waives the right to have all issues of law or fact relating to insurance in the action determined by a jury. The judge shall hear and determine these issues without resort to a jury, and the jury shall be absent during any motion, argument, testimony, or announcement of findings of fact or conclusions of law relating to these issues unless the defendant requests a jury trial on them. (1997-502, s. 1; 2007-229, s. 2.)

Effect of Amendments. — Session Laws 2007-229, s. 2, effective July 18, 2007, added subdivision (a)(18).

§ 130A-45.4. Appointment of a public health authority director.

(a) A public health authority board, after consulting with the appropriate county board or boards of commissioners, shall appoint a public health authority director.

(b) All persons who are appointed to the position of public health authority director must possess minimum education and experience requirements for that position, as follows:

(1) A medical doctorate; or
(2) A masters degree in Public Health Administration, and at least one year of employment experience in health programs or health services; or
(3) A masters degree in a public health discipline other than public health administration, and at least three years of employment experience in health programs or health services; or
(4) A masters degree in public administration, and at least two years of experience in health programs or health services; or
(5) A masters degree in a field related to public health, and at least three years of experience in health programs or health services; or
(6) A bachelors degree in public health administration or public administration and at least three years of experience in health programs or health services.

(c) Before appointing a person to the position of public health authority director under subdivision (a)(5) of this section, the authority board shall forward the application and other pertinent materials of such candidate to the State Health Director. If the State Health Director determines that the candidate's masters degree is in a field not related to public health, the State Health Director shall so notify the authority board in writing within 15 days of the State Health Director's receipt of the application and materials, and such candidate shall be deemed not to meet the education requirements of subdivision (a)(5) of this section. If the State Health Director fails to act upon the application within 15 days of receipt of the application and materials from the authority board, the application shall be deemed approved with respect to the education requirements of subdivision (a)(5) of this section, and the authority board may proceed with the appointment process.

(d) The State Health Director shall review requests of educational institutions to determine whether a particular masters degree offered by the requesting institution is related to public health for the purposes of subdivision (a)(5) of this section. The State Health Director shall act upon such requests within 90 days of receipt of the request and pertinent materials from the institution, and shall notify the institution of its determination in writing within the 90-day review period. If the State Health Director determines that an institution's particular masters degree is not related to public health, the State Health Director shall include the reasons therefor in his written determination to the institution.

(e) When an authority board fails to appoint a public health authority director within 60 days of the creation of a vacancy, the State Health Director may appoint an authority director to serve until the authority board appoints an authority director in accordance with this section. (1997-502, s. 1.)

§ 130A-45.5. Powers and duties of a public health authority director.

(a) The public health authority director is an employee of the authority board and shall serve at the pleasure of the authority board.

(b) An authority health director shall perform public health duties prescribed by and under the supervision of the public health authority board and the Department and shall be employed full time in the field of public health.

(c) An authority health director shall have the following powers and duties:

(1) To administer programs as directed by the public health authority board;
(2) To enforce the rules of the public health authority board;
(3) To investigate the causes of infectious, communicable, and other diseases;
(4) To exercise quarantine authority and isolation authority pursuant to G.S. 130A-145;
(5) To disseminate public health information and to promote the benefits of good health;
(6) To advise local officials concerning public health matters;
(7) To enforce the immunization requirements of Part 2 of Article 7 of this Chapter;
(8) To examine and investigate cases of venereal disease pursuant to Parts 3 and 4 of Article 6 of this Chapter;
(9) To examine and investigate cases of tuberculosis pursuant to Part 5 of Article 6 of this Chapter;
(10) To examine, investigate, and control rabies pursuant to Part 6 of Article 6 of this Chapter;
(11) To abate public health nuisances and imminent hazards pursuant to G.S. 130A-19 and G.S. 130A-20; and
(12) To employ, discipline, and dismiss employees of the public health authority.

(d) Authority conferred upon a public health authority director may be exercised only within the county or counties comprising the public health authority. (1997-502, s. 1.)

§ 130A-45.6. Boundaries of the authority.

A public health authority may provide or contract to provide public health services and to acquire, construct, establish, enlarge, improve, maintain, own, or operate, and contract for the operation of any public health facilities outside the territorial limits, within reasonable limitation, of the county or counties creating the authority, but in no case shall a public health authority be held liable for damages to those outside the territorial limits of the county or counties creating the authority for failure to provide any public health service. (1997-502, s. 1.)

§ 130A-45.7. Medical review committee.

(a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a public health authority or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings. (1997-502, s. 1.)

CASE NOTES

Cited in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

§ 130A-45.8. Confidentiality of patient information.

(a) Medical records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

(b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes. (1997-502, s. 1.)

§ 130A-45.9. Confidentiality of personnel information.

(a) Except as provided in subsection (b) of this section, the personnel files of employees or former employees and the files of applicants for employment maintained by a public health authority are not public records as defined by Chapter 132 of the General Statutes.

(b) The following information with respect to each employee of a public health authority is a matter of public record: name; age; date of original employment or appointment; beginning and ending dates, position title, position descriptions, and total compensation of current and former positions; the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the authority has the written contract or a record of the oral contract in its possession, and date of the most recent promotion, demotion, transfer, suspension, separation, or other change in position classification. In addition, the following information with respect to each licensed medical provider employed by or having privileges to practice in a public health facility shall be a matter of public record: educational history and qualifications, date and jurisdiction or original and current licensure; and information relating to medical board certifications or other qualifications of medical specialists. For the purposes of this subsection, the term "total compensation" includes pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid by the employing entity.

(c) Information regarding the qualifications, competence, performance, character, fitness, or conditions of appointment of an independent contractor who provides health care services under a contract with a public health authority is not a public record as defined by Chapter 132 of the General Statutes. Information regarding a hearing or investigation of a complaint, charge, or grievance by or against an independent contractor who provides health care services under a contract with a public health authority is not a public record as defined by Chapter 132 of the General Statutes. Final action making an appointment or discharge or removal by a public health authority having final authority for the appointment or discharge or removal shall be taken in an open meeting, unless otherwise exempted by law. The following information with respect to each independent contractor of health care services of a public health authority is a matter of public record: name; age; date of original contract; beginning and ending dates; position title; position descriptions; and total compensation of current and former positions; and the date of the most recent promotion, demotion, transfer, suspension, separation, or other change in position classification. (1997-502, s. 1; 2007-508, s. 5.)

Effect of Amendments. — Session Laws 2007-508, s. 5, effective August 30, 2007, in subsection (b), inserted "the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the authority has the written contract or a record of the oral contract in its possession" in the first sentence, and added the last sentence.

§ 130A-45.10. Confidentiality of credentialing information.

Information acquired by a public health authority or by persons acting for or on behalf of a public health authority in connection with the credentialing and peer review of persons having or applying for privileges to practice in a public health facility is confidential and is not a public record under Chapter 132 of the General Statutes; provided that information otherwise available to the public shall not become confidential merely because it was acquired by the authority or by persons acting for or on behalf of the authority. (1997-502, s. 1.)

§ 130A-45.11. Confidentiality of competitive health care information.

Information relating to competitive health care activities by or on behalf of public health authorities shall be confidential and not a public record under Chapter 132 of the General Statutes; provided that any contract entered into by or on behalf of a public health authority shall be a public record unless otherwise exempted by law. (1997-502, s. 1.)

§ 130A-45.12. Personnel.

Employees under the supervision of the public health authority director are employees of the public health authority and shall be exempt from Chapter 126 of the General Statutes, unless otherwise provided in this Part. (2001-92, s. 1.)

§ 130A-45.13. Authority to contract directly with private providers to operate billing system for county Medicaid claims.

A public health authority board may contract directly with private vendors to operate the authority's Medicaid billing system as an alternative to the State-operated health services information system. The contract may provide for the private vendor to bill directly the State Medicaid billing system (MMIS), thereby bypassing the State health services information system (HSIS). The public health authority shall issue a "request for proposal" to solicit private vendor bids for contracts authorized under this section. Information systems authorized under this section shall be consistent with and interface with relevant statewide public health data systems to address State cost containment and service reporting needs. (2005-459, s. 1.)

Editor's Note. — The preamble to Session Laws 2005-459, provides: "Whereas, the county share of the nonfederal share of Medicaid costs has a significant impact on county resources and cash flow; and

"Whereas, more timely reimbursement of county Medicaid claims would improve county cash flow; and

"Whereas, the current process for Medicaid billing is more complicated than necessary; and

"Whereas, contracting with a private vendor to interface directly with the State Medicaid billing system would make the billing process for county Medicaid claims much simpler than it now is; and

"Whereas, county public health authorities would benefit from private vendor-operated Medicaid billing by enabling the authorities to optimize revenue through efficiencies that are currently not in place through the State billing system; Now, therefore, The General Assembly of North Carolina enacts."

Session Laws 2005-459, s. 3, made this section effective October 2, 2005 and applicable to county Medicaid claims arising on or after that date.

§ 130A-46: Reserved for future codification purposes.

Part 2. Sanitary Districts.

§ 130A-47. Creation by Commission.

(a) For the purpose of preserving and promoting the public health and welfare, the Commission may create sanitary districts without regard for county, township or municipal lines. However, no municipal corporation or any part of the territory in a municipal corporation shall be included in a sanitary district except at the request of the governing board of the municipal corporation. If the municipal corporation has not levied any tax nor performed any official act nor held any elections within a period of four years preceding the date of the petition for the sanitary district, a request of the governing board shall not be required.

(b) For the purposes of this Part, the term "Department" means the Department of Environment and Natural Resources, and the term "Secretary" means the Secretary of Environment and Natural Resources. (1927, c. 100, s. 1; 1955, c. 1307; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 2007-187, s. 1.)

Local Modification to Former Similar Provisions. — Caswell: 1939, c. 3, ss. 1, 2; 1941, c. 89; 1943, c. 287; Moore: 1939, c. 3, s. 3.

Editor's Note. — Session Laws 2007-323, s. 13.13A(a)-(p), provided for the allocation of funds for local government water and sewer improvement grants. See the Editor's note at G.S. 160A-311 for details.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-187, s. 1, effective July 8, 2007, added the subsection (a) designation to the previously existing provisions; and added subsection (b).

CASE NOTES

As to validity of former statutory provisions regarding sanitary districts, see Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928).

When Sanitary District May Occupy Same Territory as City. — A sanitary district may with, but only with, the consent of a municipality, occupy the same territory as the city. State ex rel. East Lenoir San. Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958), decided under former statutory provisions.

Infringement of Franchise. — The holder of a nonexclusive franchise has no monopoly, and cannot complain of competition from a publicly created utility system. Phrased another way, the creation by a state of a competing public utility does not amount to a "taking" compensable under U.S. Const., Amend. XIV. Hence, a water company had no cause of action for damages against the State, the Utilities Commission, or a sanitary district for infringement of its franchise. Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968), decided under former statutory provisions.

§ 130A-48. Procedure for incorporating district.

A sanitary district shall be incorporated as follows. Either fifty-one percent (51%) or more of the resident freeholders within a proposed sanitary district or fifty-one percent (51%) or more of the freeholders within a proposed sanitary district, whether or not the freeholders are residents of the proposed sanitary district, may petition the county board of commissioners of the county in which all or the largest portion of the land of the proposed district is located. This petition shall set forth the boundaries of the proposed sanitary district and the objectives of the proposed district. For the purposes of this Part, the term "freeholder" shall mean a person holding a deed to a tract of land within the district or proposed district, and also shall mean a person who has entered into a contract to purchase a tract of land within the district or proposed district, is making payments pursuant to a contract and will receive a deed upon completion of the contractual payments. The contracting purchaser, rather than the contracting seller, shall be deemed to be the freeholder. The county tax office shall be responsible for checking the freeholder status of those persons signing the petition. That office shall also be responsible for confirming the location of the property owned by those persons. Upon receipt of the petition, the county board of commissioners, through its chairperson, shall notify the Department and the chairperson of the county board of commissioners of any other county or counties in which any portion of the proposed district lies of the receipt of the petition. The chairperson shall request that the Department hold a joint public hearing with the county commissioners of all the counties in which a portion of the district lies concerning the creation of the proposed sanitary district. The Secretary and the chairperson of the county board of commissioners shall name a time and place within the proposed district to hold the public hearing. The chairperson of the county board of commissioners shall give prior notice of the hearing by posting a notice at the courthouse door of the county and also by publication at least once a week for four successive weeks in a newspaper published in the county. In the event the hearing is to be before a joint meeting of the county boards of commissioners of more than one county, or in the event the land to be affected lies in more than one county, publication and notice shall be made in each of the affected counties. In the event that all matters pertaining to the creation of this sanitary district cannot be concluded at the hearing, the hearing may be continued at a time and place within the proposed district named by the Department. (1927, c. 100, ss. 2-4; 1951, c. 178, s. 1; 1957, c. 1357, s. 1; 1959, c. 1189, s. 1; 1965, c. 135; 1967, c. 24, s. 21; 1973, c. 476, s. 128; 1975, c. 536; 1983, c. 891, s. 2; 2002-159, s. 55(f).)

Local Modification to Former G.S. 130-124. — Guilford: 1973, c. 263.

CASE NOTES

Withdrawal of Names from Petition. — Signers of a petition for the creation of a sanitary district are entitled as a matter of right to withdraw their names from the petition at any time before action is taken on the petition by the county commissioners on the question of approval, and when their withdrawal reduces the number of signers to less than 51% of the resident freeholders within the proposed district the board of county commissioners is without jurisdiction and its approval of the petition may be enjoined. Idol v. Hanes, 219 N.C. 723, 14 S.E.2d 801 (1941); Deal v. Enon San. Dist., 245 N.C. 74, 95 S.E.2d 362 (1956), decided under former statutory provisions.

Right to Be Heard. — The required public hearing contemplates that every interested person has a right to be heard. Deal v. Enon San. Dist., 245 N.C. 74, 95 S.E.2d 362 (1956), decided under former statutory provisions.

§ 130A-49. Declaration that district exists; status of industrial villages within boundaries of district.

(a) If, after the required public hearing, the Commission and the county commissioners determine that a district shall be created for the purposes stated in the petition, the Commission shall adopt a resolution defining the boundaries of the district and declaring the territory within the boundaries to be a sanitary district. The Commission may make minor deviation in defining the boundaries from those prescribed in the petition when it determines the change to be in the interest of the public health.

(b) The owner or controller of an industrial plant may make application requesting that the plant or the plant and its contiguous village be included within or excluded from the sanitary district. The application shall be filed with the Commission on or before the date of the public hearing. If an application is properly filed, the Commission shall include or exclude the industrial plant and contiguous village in accordance with the application.

(c) Each district when created shall be identified by a name or number assigned by the Commission. (1927, c. 100, s. 5; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

CASE NOTES

The validity of former statutory provisions relating to sanitary districts were not affected by the provision that certain industrial enterprises and villages situate therein could be excluded upon application of the owners. Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928).

No sanitary district exists unless legally created and established. Deal v. Enon San. Dist., 245 N.C. 74, 95 S.E.2d 362 (1956), decided under former statutory provisions.

As to establishing of territory different from that described in petition, see Deal v. Enon San. Dist., 245 N.C. 74, 95 S.E.2d 362 (1956), decided under former statutory provisions.

§ 130A-50. Election and terms of office of sanitary district boards.

(a) The Department shall send a copy of the resolution creating the sanitary district to the board or boards of county commissioners of the county or counties in which all or part of the district is located. The Department shall file or cause to be filed with the county board or boards of elections in the same county or counties a map of the district. With the map it shall include supporting documents. That map and documents shall be filed within 10 business days after the creation of the district and amended within 10 days after any change to the boundaries of the district. The board or boards of commissioners shall hold a meeting or joint meeting for the purpose of electing the members of the sanitary district board.

(b) The sanitary district board shall be composed of either three or five members as the county commissioners in their discretion shall determine. The members first appointed shall serve as the governing body of the sanitary district until the next regular election for municipal and special district officers as provided in G.S. 163-279, which occurs more than 90 days after their appointment. At that election, their successors shall be elected. The terms of the members shall be for two years or four years and may be staggered as determined by the county board of commissioners so that some members are elected at each biennial election. The members of the sanitary district board shall be residents of the district. The county board of commissioners shall notify the county board of elections of any decision made under this subsection.

If the sanitary district board consists of three members, the county commissioners may at any time increase the sanitary district board to five members.

The increase shall become effective with respect to any election where the filing period for candidacy opens at least 30 days after approval of the expansion to five members. The effective date of the expansion is the organizational meeting of the sanitary district board after the election.

The county commissioners may provide for staggering terms of an existing sanitary district board whose members serve two-year terms by providing for some of the members to be elected at the next election to be for four-year terms. The change shall become effective with respect to any election where the filing period for candidacy opens at least 30 days after approval of the staggering of terms.

The sanitary district board may provide for staggering its terms if its members serve unstaggered four-year terms by providing for some of the members to be elected at the next election for two-year terms. The change shall become effective with respect to any election where the filing period for candidacy opens at least 30 days after approval of the staggering of terms.

The county commissioners may provide for changing a sanitary district board from two-year terms to unstaggered four-year terms. This may be done either by providing that at the next election, all members shall be elected for four-year terms, or by extending the terms of existing members from two years to four years. The change shall become effective with respect to any election where the filing period for candidacy opens at least 30 days after approval of the change of length of terms.

(b1) If a sanitary district:

1. Does not share territory with any city as defined by G.S. 160A-1(2), and
2. The sanitary district is in more than one county,

the boards of county commissioners in all counties with territory in the sanitary district may set the sanitary district elections to be held on the same date as general elections in even-numbered years under G.S. 163-1 and may extend the terms of any sanitary district board members who are in office at the ratification of this act until the next even-year general election can been [be] held and successors qualified.

(b2) If a sanitary district:

(1) Is located entirely within a county which has no incorporated city as defined by G.S. 160A-1(2) located within that county; and

(2) Has a sanitary district board whose members serve four-year terms which are not staggered and which next expire in 1991,

the board of commissioners of that county may, by resolution adopted prior to December 31, 1989, set the sanitary district election to be held on the same date as general elections in even-numbered years under G.S. 163-1. Such resolution shall extend the terms of office of the then serving members of the sanitary district board by one year, so that they will expire on the first Monday in December following the 1992 general election. Other than as provided by this subsection, sanitary district elections shall continue to be conducted in accordance with this Article and Chapter 163 of the General Statutes.

(c) The election shall be nonpartisan and decided by simple plurality as provided in G.S. 163-292 and shall be held and conducted by the county board of elections in accordance with the applicable provisions of Articles 23 and 24 of Chapter 163 of the General Statutes. If the district is in more than one county, then the county board of elections of the county including the largest part of the district shall conduct the election for the entire district with the assistance and full cooperation of the boards of elections in the other counties.

(d) The board of elections shall certify the results of the election to the clerk of superior court. The clerk of superior court shall take and file the oaths of office of the board members elected.

(e) The elected members of the board shall take the oath of office on the first Monday in December following their election and shall serve for the term elected and until their successors are elected and qualified. (1927, c. 100, s. 6; 1943, c. 602; 1953, c. 798; 1955, c. 1073; 1957, c. 1357, s. 1; 1963, c. 644; 1973, c. 476, s. 128; 1981, c. 186, s. 1; 1983, c. 891, s. 2; 1987, c. 22, s. 1; 1989, c. 310; 1993 (Reg. Sess., 1994), c. 736, s. 1.1; 1997-117, s. 1; 2007-391, s. 15.)

Local Modification to Former G.S. 130-126. — Alamance: 1955, c. 588; West Smithfield Sanitary District Board: 1973, c. 367.

Editor's Note. — The bracketed word "be" in subdivision (b1) has been inserted to reflect the language apparently intended.

Session Laws 2007-391, s. 1(c), provides: "This act becomes effective December 1, 2007, and applies to offenses committed on or after that date."

Session Laws 2007-391, s. 39, provides: "Except as otherwise provided in this act, this act is effective when it becomes law."

Effect of Amendments. — Session Laws 2007-391, s. 15, in subsection (a), deleted "county" preceding "board or boards of county," and added the second through fourth sentences. For effective date, see Editor's notes.

§ 130A-51. City governing body acting as sanitary district board.

(a) When the General Assembly incorporates a city or town that includes within its territory fifty percent (50%) or more of the territory of a sanitary district, the governing body of the city or town shall become ex officio the governing board of the sanitary district if the General Assembly provides for this action in the incorporation act and if the existing sanitary district board adopts a final resolution pursuant to this section. The resolution may be adopted at any time within the period beginning on the day the incorporation act becomes law and ending 270 days after that date.

(b) To begin the process leading to the city or town board becoming ex officio the sanitary district board, the board of the sanitary district shall first adopt a preliminary resolution finding that the interests of the citizens of the sanitary district and of the city or town will be best served if both units of local government are governed by a single governing body. This resolution shall also set the time and place for a public hearing on the preliminary resolution.

(c) Upon adoption of this preliminary resolution, the chairperson of the sanitary district board shall publish a notice of the public hearing once at least 10 days before the hearing in a newspaper of general circulation within the sanitary district. This notice shall set forth the time and place of the hearing and shall briefly describe its purpose. At the hearing, the board shall hear any citizen of the sanitary district or of the city or town who wishes to speak to the subject of the preliminary resolution.

(d) Within 30 days after the day of the public hearing, the sanitary district board may adopt a final resolution finding that the interests of the citizens of the sanitary district and of the city or town will be best served if both units are governed by a single board. This resolution shall set the date on which the terms of office of the members of the sanitary district board end and that board is dissolved and service by the ex officio board begins. This date may be the effective date of the incorporation of the city or town or any date within one year after the effective date. At that time, the sanitary district board is dissolved and the mayor and members of the governing body of the city or town become ex officio the board of the sanitary district. The mayor shall act ex officio as chairperson of the sanitary district board.

(e) The chairperson of the sanitary district board that adopts a final resolution shall within 10 days after the day the resolution is adopted, send a copy of the resolution to the mayor and each member of the city or town governing board and to the Department. (1981, c. 201; 1983, c. 891, s. 2; 1995, c. 20, s. 15.)

Editor's Note. — Session Laws 1995, c. 20, s. 17, provides that sections 1 through 16 of this act shall become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 are approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 shall become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997. The proposed constitutional amendments have been approved by the voters.

§ 130A-52. Special election if election not held in November of 1981.

(a) If in a sanitary district, an election of board members was required to be held in November of 1981 under G.S. 130A-50 but was not held, the board of commissioners of the county or counties in which the district is located may by resolution order a special election of all the board members to be held at the same time as the General Election in November of 1982.

(b) The election shall be held under the procedures of Articles 23 and 24 of Chapter 163 of the General Statutes and in accordance with G.S. 130A-50, except that filing shall open at noon on Monday, August 9, 1982, and close at noon on Monday, August 23, 1982.

(c) In the election held under this section, all of the members of the board shall be elected. If the board of commissioners has provided for two- or four-year terms, the members elected in 1982 shall serve until the 1983 or 1985 election, respectively, and then their successors shall be elected for the two-or four-year terms provided by the county board or boards of commissioners.

(d) Any resolution adopted under subsection (a) of this section shall be filed with the Department. (1981 (Reg. Sess., 1982), c. 1271, s. 1; 1983, c. 891, s. 2.)

§ 130A-52.1. Action if 1983 election not held.

If any sanitary district held an election in 1982 under G.S. 130A-52, but failed to hold the 1983 election, then the persons elected in 1982 shall hold office until the terms that were to begin in 1983 have expired. (1983 (Reg. Sess., 1984), c. 1021, s. 1.)

§ 130A-53. Actions validated.

Any action of a sanitary district taken prior to July 1, 1984, shall not be invalidated by failure to hold an election for members of the board. (1981 (Reg. Sess., 1982), c. 1271, s. 1; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 1021, s. 2.)

§ 130A-54. Vacancy appointments to district boards.

Any vacancy in a sanitary district board shall be filled by the county commissioners until the next election for sanitary district board members. If the district is located in more than one county, the vacancy shall be filled by the county commissioners of the county from which the vacancy occurred. (1935, c. 357, s. 2; 1957, c. 1357, s. 1; 1981, c. 186, s. 2; 1983, c. 891, s. 2.)

§ 130A-55. Corporate Powers.

A sanitary district board shall be a body politic and corporate and may sue and be sued in matters relating to the sanitary district. Notwithstanding any limitation in the petition under G.S. 130A-48, but subject to the provisions of G.S. 130A-55(17)e, each sanitary district may exercise all of the powers granted to sanitary districts by this Article. In addition, the sanitary district board shall have the following powers:

(1) To acquire, construct, maintain and operate sewage collection, treatment and disposal systems of all types, including septic tank systems or other on-site collection, treatment or disposal facilities or systems; water supply systems; water purification or treatment plants and other utilities necessary for the preservation and promotion of the public health and sanitary welfare within the district. The utilities shall be constructed, operated and maintained in accordance with applicable statutes and rules.

(2) To acquire, construct, maintain and operate sewage collection, treatment and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems, water supply systems; water purification or treatment plants and other utilities, within and outside the corporate limits of the district, as may be necessary for the preservation of the public health and sanitary welfare outside the corporate limits of the district, within reasonable limitation. The utilities shall be constructed, operated and maintained in accordance with applicable statutes and rules.

  a. The authority granted to a sanitary district by the provisions of this subsection is supplemental to the authority granted to a sanitary district by other provisions of law.

  b. Actions taken by a sanitary district to acquire, construct, maintain and operate sewage collection, treatment and disposal systems of all types; water supply systems; water purification or treatment plants and other utilities within and outside the corporate limits to provide service outside the corporate limits are approved and validated.

  c. This subsection shall apply only in counties with a population of 70,000 or greater, as determined by the most recent decennial federal census.

(3) To levy taxes on property within the district in order to carry out the powers and duties conferred and imposed on the district by law, and to pay the principal of and interest on bonds and notes of the district.

(4) To acquire either by purchase, condemnation or otherwise and hold real and personal property, easements, rights-of-way and water rights in the name of the district within or without the corporate limits of the district, necessary or convenient for the construction or maintenance of the works of the district.

(5) To employ and compensate engineers, counsel and other persons as may be necessary to carry out projects.

(6) To negotiate and enter into agreements with the owners of existing water supplies, sewage systems or other utilities as may be necessary to carry out the intent of this Part.

(7) To adopt rules necessary for the proper functioning of the district. However, these rules shall not conflict with rules adopted by the Commission for Public Health, Environmental Management Commission, or the local board of health having jurisdiction over the area.

(8)a. To contract with any person within or outside the corporate limits of the district to supply raw water without charge to the person in return for an agreement to allow the district to discharge sewage in the person's previous water supply. The district may so contract and construct at its expense all improvements necessary or convenient for the delivery of the water when, in the opinion of the sanitary district board and the Department, it will be for the best of the district.

  b. To contract with any person within or outside the corporate limits of the district to supply raw or filtered water and sewer service to the person where the service is available. For service supplied outside the corporate limits of the district, the sanitary district board may fix a different rate from that charged within the corporate limits but shall not be liable for damages for failure to furnish a sufficient supply of water and adequate sewer service.

c. To contract with any person within or outside the corporate limits of the district for the treatment of the district's sewage in a sewage disposal or treatment plant owned and constructed or to be constructed by that person.

(9) After adoption of a plan as provided in G.S. 130A-60, the sanitary district board may, in its discretion, alter or modify the plan if the Department determines that the alteration or modification does not constitute a material deviation from the objective of the plan and is in the public health interest of the district. The alteration or modification must be approved by the Department. The sanitary district board may appropriate or reappropriate money of the district for carrying out the altered or modified plan.

(10) To take action, subject to the approval of the Department, for the prevention and eradication of diseases transmissible by vectors by instituting programs for the eradication of the mosquito.

(11) To collect and dispose of garbage, waste and other refuse by contract or otherwise.

(12) To establish a fire department, or to contract for firefighting apparatus and personnel for the protection of life and property within the district.

(13) To provide or contract for rescue service, ambulance service, rescue squad or other emergency medical services for use in the district. The sanitary district shall be subject to G.S. 153A-250.

(14) To have privileges and immunities granted to other governmental units in exercise of the governmental functions.

(15) To use the income of the district, and if necessary, to levy and collect taxes upon all the taxable property within the district sufficient to pay the costs of collecting and disposing of garbage, waste and other refuse, to provide fire protection and rescue services in the district, and to acquire, construct, maintain, operate, and regulate roads and streets within the district. Taxes shall be levied and collected at the same time and in the same manner as taxes for debt service as provided in G.S. 130A-62.

(16) To adopt rules for the promotion and protection of the public health and for these purposes to possess the following powers:

a. To require the owners of developed property on which there are situated one or more residential dwelling units or commercial establishments located within the jurisdiction of the district and within a reasonable distance of any waterline or sewer collection line owned, leased as lessee, or operated by the district to connect the property with the waterline, sewer connection line, or both and fix charges for the connections. The power granted by this subdivision may be exercised by a district only to the extent that the service, whether water, sewer, or a combination thereof, to be provided by the district is not then being provided to the improved property by any other political subdivision or by a public utility regulated by the North Carolina Utilities Commission pursuant to Chapter 62 of the General Statutes. In the case of improved property that would qualify for the issuance of a building permit for the construction of one or more residential dwelling units or commercial establishments and where the district has installed water or sewer lines or a combination thereof directly available to the property, the district may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.

b. To require any person owning, occupying or controlling improved real property within the district where the water or sewage systems of the district are not immediately available or it is impractical with the systems, to install sanitary toilets, septic tanks and other health equipment or installations in accordance with applicable statutes and rules.

c. To order a person to abate a public health nuisance of the district. If the person being ordered to abate the nuisance refuses to comply with the order, the sanitary district board may institute an action in the superior court of the county where the public health nuisance exists to enforce the order.

d. To abolish or regulate and control the use and occupancy of all pigsties and other animal stockyards or pens within the district and for an additional distance of 500 feet beyond the outer boundaries of the district, unless the 500 feet is within the corporate limits of a city or town.

e. Upon the noncompliance by a person of a rule adopted by the sanitary district board, the board shall notify the person of the rule being violated and the facts constituting the violation. The person shall have a reasonable time to comply with the rule as determined by the local health director of the person's residence. Upon failure to comply within the specified time or within a time extended by the sanitary district board, the person shall be guilty of a Class 1 misdemeanor.

f. The sanitary district board is authorized to enforce the rules adopted pursuant to this Part by criminal action or civil action, including injunctive relief.

(17) For the purpose of promoting and protecting the public health, safety and the general welfare of the State, a sanitary district board is authorized to establish as zoning units any portions of the sanitary district not under the control of the United States or this State or any agency or instrumentality of either, in accordance with the following:

a. No sanitary district board shall designate an area a zoning area until a petition signed by two-thirds of the qualified voters in the area, as shown by the registration books used in the last general election, and with a petition signed by two-thirds of the owners of real property in the area, as shown by the records in the office of the register of deeds for the county, is filed with the sanitary district board. The petition must be accompanied by a map of the proposed zoning area. The board shall hold a public hearing to obtain comment on the proposed creation of the zoning area. A notice of public hearing must be published in a newspaper of general circulation in the county at least two times, and a copy of the notice shall be posted at the county courthouse and in three other public places in the sanitary district.

b. When a zoning area is established within a sanitary district, the sanitary district board as to the zoning area shall have all rights, privileges, powers and duties granted to municipal corporations under Part 3, Article 19, Chapter 160A of the General Statutes. However, the sanitary district board shall not be required to appoint any zoning commission or board of adjustment. If neither a zoning commission nor board of adjustment is appointed, the sanitary district board shall have all rights.

c. A sanitary district board may enter into an agreement with any city, town or sanitary district for the establishment of a joint zoning commission.

d. A sanitary district board is authorized to use the income of the district and levy and collect taxes upon the taxable property within the district necessary to carry out and enforce the rules and provisions of this subsection.

e. This subsection shall apply only to sanitary districts which adjoin and are contiguous to an incorporated city or town and are located within three miles or less of the boundaries of two other cities or towns.

(18) To negotiate for and acquire by contract any distribution system located outside the district when the water for the distribution system is furnished by the district. If the distribution system is acquired by a district, the district may continue the operation of the system even though it remains outside the district.

(19) To accept gifts of real and personal property for the purpose of operating a nonprofit cemetery; to own, operate and maintain cemeteries with the donated property; and to establish perpetual care funds for the cemeteries in the manner provided by G.S. 160A-347.

(20) To dispose of real or personal property belonging to the district according to the procedures prescribed in Article 12 of Chapter 160A of the General Statutes. For purposes of this subsection, references in Article 12 of Chapter 160A to the "city," the "council," or a specific city official refer, respectively, to the sanitary district, the sanitary district board, and the sanitary district official who most nearly performs the same duties performed by the specified city official. For purposes of this subsection, references in G.S. 160A-266(c) to "one or more city officials" are deemed to refer to one or more sanitary district officials designated by the sanitary district board.

(21) To acquire, renovate property for or construct a medical clinic to serve the district, and to maintain real and personal property for a medical clinic to serve the district.

(22) To make special assessments against benefitted property within the corporate limits of the sanitary district and within the area served or to be served by the sanitary district for the purpose of constructing, reconstructing, extending, or otherwise improving water systems or sanitary collection, treatment, and sewage disposal systems, in the same manner that a county may make special assessments under authority of Article 9 of Chapter 153A of the General Statutes, except that the language appearing in G.S. 153A-185 reading as follows: "A county may not assess property within a city pursuant to subdivision (1) or (2) of this section unless the governing board of the city has by resolution approved the project," shall not apply to assessments levied by sanitary districts. For the purposes of this paragraph, references in Article 9 of Chapter 153A of the General Statutes, to the "county," the "board of county commissioners," "the board" or a specific county official or employee are deemed to refer respectively to the sanitary district and to the official or employee of the sanitary district who performs most nearly the same duties performed by the specified county official or employee.

Assessment rolls after being confirmed shall be filed for registration in the office of the Register of Deeds of the county in which the property being assessed is located, and the term "county tax collector" wherever used in G.S. 153A-195 and G.S. 153A-196, shall mean the officer designated by the sanitary district to perform the functions described in said sections of the statute. This subdivision applies only to sanitary districts with a population of 15,000 or over.

(23) To acquire (by purchase, lease, gift, or otherwise, but not by condemnation), construct, maintain, operate, and regulate roads and streets within the sanitary district which are not State-maintained. Not all of these powers need be exercised.

(24) Expired.

(25) To negotiate and enter into agreements with other municipal corporations or sanitary districts for the purpose of developing and implementing an economic development plan. The agreement may provide for the establishment of a special fund, in which monies not expended at the end of a fiscal year shall remain in the fund. The lead agency designated under the agreement shall be responsible for examination of the fund and compliance with sound accounting principles, including the annual independent audit under G.S. 159-34. The audit responsibilities of the other municipal corporations and sanitary districts extend only to the verification of the contribution to the fund created under the agreement. The procedural requirements of G.S. 158-7.1(c) shall apply to actions of a sanitary district under this subdivision as if it were a city. (1927, c. 100, s. 7; 1933, c. 8, ss. 1, 2; 1935, c. 287, ss. 1, 2; 1941, c. 116; 1945, c. 651, ss. 1, 2; 1947, c. 476; 1949, c. 880, s. 1; cc. 1130, 1145; 1951, c. 17, s. 1; c. 1035, s. 1; 1957, c. 1357, s. 1; 1961, cc. 669, 865, 1155; 1963, c. 1232; 1965, c. 496, s. 1; 1967, c. 632; c. 637, s. 1; c. 798, s. 2; 1969, cc. 478, 700, 944; 1971, c. 780, s. 29; 1973, c. 476, s. 128; 1979, c. 520, s. 2; c. 619, s. 7; 1981, cc. 629, 655; c. 820, ss. 1-3; c. 898, ss. 1-4; 1981 (Reg. Sess., 1982), c. 1237; 1983, c. 891, s. 2; c. 925, s. 2; 1993, c. 539, s. 948; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 422, ss. 1-4; 2001-221, s. 1; 2006-214, s. 1; 2007-182, s. 2.)

Local Modification. — Columbus: 1993, c. 266, s. 1 (Riegelwood Sanitary District therein).

Local Modification to Former G.S. 130-128 and Former Similar Provisions. — Caswell: 1939, c. 3; 1941, c. 89; 1943, c. 287; 1945, c. 20; Dare (and municipalities and sanitary districts therein): 1959, c. 1079; Moore: 1939, c. 3; Rockingham: 1947, cc. 565, 849.

Cross References. — As to counties in which the consent of the board of commissioners is required before land may be condemned or acquired by a local governmental unit outside the county, see G.S. 153A-15.

Editor's Note. — Subdivision (22) of this section is former G.S. 130-128(23), as added, effective July 22, 1983, by Session Laws 1983, c. 925, s. 1, and recodified by s. 2 of the act, effective Jan. 1, 1984.

Session Laws 1995, c. 422, s. 3, provided that subdivision (24) of this section, as added by Session Laws 1995, c. 422, s. 1, would expire July 1, 1997.

Effect of Amendments. — Session Laws 2006-214, s. 1, effective September 1, 2006, rewrote subdivision (16)a to require owners of certain property to connect to water and sewer systems.

Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the subdivision (7).

CASE NOTES

Services and Rates Not Subject to Control of Utilities Commission. — A sanitary district which, as a part of its functions, furnishes drinking water to the public and furnishes filtered water for industrial consumers is a quasi-municipal corporation, and is not under the control and supervision of the North Carolina Utilities Commission as to services or rates. Halifax Paper Co. v. Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950), decided under former statutory provisions.

Lease of Filter Plant. — Defendant sanitary district was unable to raise funds for the construction of a filter plant and, in order to carry out the purposes for which it was created, leased a cotton mill's filter plant under an agreement that the mill should get its water at the cost of filtering and should have priority over other industrial consumers. It was held that the lease contract was in the public interest and the district had authority to execute it, and the contract was valid since it did not impair the ability of the district to discharge its duties to the public nor unlawfully discriminate between commercial customers similarly circumstanced. Halifax Paper Co. v. Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950), decided under former statutory provisions.

Under the facts of the preceding paragraph, the district agreed with plaintiff paper mill to furnish it water from the surplus remaining after the needs of the district and lessor enterprise had been satisfied. It was held that upon increased demand by the lessor, resulting in a diminution of the surplus available for sale to other industrial consumers, the district had the power to reduce the amount of water furnished the paper mill proportionately, since the paper mill had no right to any water except out of surplus water remaining after the requirements of the district and the lessor enterprise had been satisfied, and since there was no discrimination in service to commercial users similarly circumstanced in regard to such surplus. Halifax Paper Co. v. Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950), decided under former statutory provisions.

§ **130A-55.1:** Repealed by Session Laws 1997-443, s. 11A.2.

§ 130A-56. Election of officers; board compensation.

(a) Upon election, a sanitary district board shall meet and elect one of its members as chairperson and another member as secretary.

(b) The board may employ a clerk or other assistants as necessary and may fix duties of and compensation for employees. A sanitary district board may remove employees and fill vacancies.

(c) The board may fix the compensation and allowances of the chairman and other members of the board by adoption of the annual budget ordinance, payable from the funds of the district, but no increase may become effective earlier than the first meeting of the board following the next election of board members after adoption of the ordinance. Until adoption of an ordinance under this subsection, each member of the board may receive compensation as provided for members of State boards under G.S. 138-5, payable from funds of the district. (1927, c. 100, s. 8; 1957, c. 1357, s. 1; 1967, c. 723; 1977, c. 183; 1983, c. 891, s. 2; 1985, c. 29, ss. 1, 2; 1995, c. 422, s. 5; 2003-185, s. 1.)

Local Modification to Former G.S. 130-129. — Halifax: 1961, c. 883; 1969, c. 345.

§ 130A-57. Power to condemn property.

A sanitary district board may purchase real estate, right-of-way or easement within or outside the corporate limits of the district for improvements authorized by this Part. If a purchase price cannot be agreed upon, the board may condemn the real estate, right-of-way or easement in accordance with Chapter 40A of the General Statutes. (1927, c. 100, s. 9; 1933, c. 8, s. 3; 1957, c. 1357, s. 1; 1981, c. 919, s. 13; 1983, c. 891, s. 2.)

Local Modification to Former G.S. 130-130. — Ashe: 1981, c. 283; 1981 (Reg. Sess., 1982), c. 1150; Bladen: 1981, c. 134; Brunswick: 1981, c. 283; (Reg. Sess., 1982), c. 1150; Caswell: 1981, c. 941; Columbus: 1981, c. 270; Franklin and Grandville: 1981, c. 941; Johnston: 1981, c. 459; Pender: 1981, c. 283; Person: 1981, c. 941; Sampson: 1981, c. 459; Vance and Warren: 1981, c. 941.

Cross References. — As to counties in which the consent of the board of commissioners is required before land may be condemned or acquired by a local governmental unit outside the county, see G.S. 153A-15.

CASE NOTES

Just Compensation to Be Paid for Damages. — When a sanitary district, in the exercise of its power of eminent domain, took easements and rights-of-way for sewer lines over the lands of defendants, it became obligated to pay to defendants just compensation for the damage done. North Asheboro-Central Falls San. Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960), decided under former statutory provisions.

Measure of Compensation. — Where a sanitary district condemns an easement for sewer lines, together with the perpetual right to enter upon the land for the purpose of inspecting its lines and making necessary repairs, replacements, additions and alterations thereon, with right of the landowners to use the land for all lawful purposes not inconsistent with the rights acquired by the district, the measure of compensation is the difference in the market value of the land free of the easement and the market value of the land subject to the easement. North Asheboro-Central Falls San. Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960), decided under former statutory provisions.

Proper Use of Easements. — A sanitary district acquiring easements to construct and maintain sanitary sewer lines can use the property taken for only the limited purpose described in the petition, and any other use by it or anyone else would require additional compensation. North Asheboro-Central Falls San. Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960), decided under former statutory provisions.

§ 130A-58. Construction of systems by corporations or individuals.

When it is inadvisable or impractical for the sanitary district to build a water supply, sewage system or part of either to serve an area within the sanitary district, a corporation or residents within the sanitary district may build and operate a system at its or their own expense. The system shall be constructed and operated under plans and specifications approved by the district board and by the Department. The system shall also be constructed and operated in accordance with applicable rules and statutes. (1927, c. 100, s. 10; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-59. Reports.

Upon the election of a sanitary district board, the board shall employ engineers licensed by this State to make a report on the problems of the sanitary district. The report shall be prepared and filed with the sanitary district board and shall include the following:

(1) Comprehensive maps showing the boundaries of the sanitary district and, in a general way, the location of the various parts of the work that is proposed to be done and information as may be useful for a thorough understanding of the proposed undertaking;
(2) A general description of existing facilities for carrying out the purposes of the district;
(3) A general description of the various plans which might be adopted for accomplishment of the purposes of the district;
(4) General plans and specifications for the work;
(5) General description of property proposed to be acquired or which may be damaged in carrying out the work;
(6) Comparative detail estimates of cost for the various construction plans; and
(7) Recommendations. (1927, c. 100, s. 11; 1957, c. 1357, s. 1; 1983, c. 891, s. 2.)

§ 130A-60. Consideration of reports and adoption of a plan.

(a) A report filed by the engineers pursuant to G.S. 130A-59 shall be given consideration by the sanitary district board and the board shall adopt a plan. Before adopting a plan the board may hold a public hearing for the purpose of considering objections to the plan. Once adopted, the sanitary district board shall submit the plan to the Department. The plan shall not become effective until it is approved by the Department.

(b) The provisions of this section and of G.S. 130A-58 shall apply when the sanitary district board determines that adoption of the plan requires the issuance of bonds. However, these provisions shall not apply to a proposed purchase of firefighting equipment and apparatus. Failure to observe or comply with these provisions shall not, however, affect the validity of the bonds of a sanitary district. (1927, c. 100, s. 12; 1949, c. 880, s. 1; 1951, c. 17, s. 1; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-61. Bonds and notes authorized.

A sanitary district is authorized to issue bonds and notes under the Local Government Finance Act. (1927, c. 100, s. 13; 1949, c. 880, s. 1; 1951, c. 17, s. 1; c. 846, s. 1; 1957, c. 1357, s. 1; 1963, c. 1247, s. 1; 1971, c. 780, s. 27; 1983, c. 891, s. 2.)

§ 130A-62. Annual budget; tax levy.

(a) A sanitary district shall operate under an annual balanced budget adopted in accordance with the Local Government Budget and Fiscal Control Act.

(b) A sanitary district has the option of either collecting its own taxes or having its taxes collected by the county or counties in which it is located. Unless a district takes affirmative action to collect its own taxes, taxes shall be collected by the county.

(c) For sanitary districts whose taxes are collected by the county, before May 1 of each year, the assessor of each county in which the district is located shall certify to the district board the total assessed value of property in the county subject to taxation by the district. By July 1 or upon adoption of its annual budget ordinance, the district board shall certify to the county board of commissioners the rate of ad valorem tax levied by the district on property in that county. Upon receiving the district's certification of its tax levy, the county commissioners shall compute the district tax for each taxpayer and shall separately state the district tax on the county tax receipts for the fiscal year. The county shall collect the district tax in the same manner that county taxes are collected and shall remit these collections to the district at least monthly. Partial payments shall be proportionately divided between the county and the district. The district budget ordinance may include an appropriation to the county for the cost to the county of computing, billing, and collecting the district tax. The amount of the appropriation shall be agreed upon by the county and the district, but may not exceed five percent (5%) of the district levy. Any agreement shall remain effective until modified by mutual agreement. The amount due the county for collecting the district tax may be deducted by the county from its monthly remittances to the district or may be paid to the county by the district.

(d) Sanitary districts electing to collect their own taxes shall be deemed cities for the purposes of the Machinery Act, Subchapter II of Chapter 105 of the General Statutes. (1927, c. 100, s. 17; 1935, c. 287, ss. 3, 4; 1949, c. 880, s. 1; 1951, c. 17, s. 1; 1957, c. 1357, s. 1; 1959, c. 994; 1963, c. 1226; 1965, c. 496, s. 3; 1971, c. 780, s. 29; 1983, c. 891, s. 2; 1987, c. 45, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 38.)

§ 130A-63. Engineers to provide plans and supervise work; bids.

(a) The sanitary district board shall retain engineers licensed by this State to provide detailed plans and specifications and to supervise the work undertaken by the district. The work or any portion of the work may be done by the sanitary district board by purchasing the material and letting a contract for the work or by letting a contract for furnishing all the materials and doing the work.

(b) All contracts for work performed for construction or repair and for the purchase of materials by sanitary districts shall be in accordance with the provisions of Article 8, Chapter 143 of the General Statutes which are applicable to counties and municipal corporations.

(c) All work done shall be in accordance with the plans and specifications prepared by the engineers in conformity with the plan adopted by the sanitary district board. (1927, c. 100, s. 19; 1957, c. 1357, s. 1; 1977, c. 544, s. 1; 1983, c. 891, s. 2.)

Local Modification to Former G.S. 130-143. — Bessemer Sanitary District: 1953, c. 729, s. 3.

§ 130A-64. Service charges and rates.

A sanitary district board shall apply service charges and rates based upon the exact benefits derived. These service charges and rates shall be sufficient to provide funds for the maintenance, adequate depreciation and operation of the work of the district. If reasonable, the service charges and rates may include an amount sufficient to pay the principal and interest maturing on the outstanding bonds and, to the extent not otherwise provided for, bond anticipation notes of the district. Any surplus from operating revenues shall be set aside as a separate fund to be applied to the payment of interest on or to the retirement of bonds or bond anticipation notes. The sanitary district board may modify and adjust these service charges and rates. (1927, c. 100, s. 20; 1933, c. 8, s. 5; 1957, c. 1357, s. 1; 1965, c. 496, s. 4; 1983, c. 891, s. 2.)

§ 130A-65. Liens for sewer service charges in sanitary districts not operating water distribution system; collection of charges; disconnection of sewer lines.

In sanitary districts which maintain and operate a sewage system but do not maintain and operate a water distribution system, the charges made for sewer service or for use of sewer service facilities shall be a lien upon the property served. If the charges are not paid within 15 days after they become due and payable, suit may be brought in the name of the sanitary district in the county in which the property served is located, or the property, subject to the lien, may be sold by the sanitary district under the same rules, rights of redemption and savings as are prescribed by law for the sale of land for unpaid ad valorem taxes. A sanitary district is authorized to adopt rules for the use of sewage works and the collection of charges. A sanitary district is authorized in accordance with its rules to enter upon the premises of any person using the sewage works and failing to pay the charges, and to disconnect the sewer line of that person from the district sewer line or disposal plant. A person who connects or reconnects with district sewer line or disposal plant without a permit from the sanitary district shall be guilty of a Class 1 misdemeanor.

(1965, c. 920, s. 1; 1983, c. 891, s. 2; 1993, c. 539, s. 949; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification to Former G.S. 130-144.1. — Burke, Chowan, Forsyth, Gaston and Onslow: 1965, c. 920, s. 1½.

§ 130A-66. Removal of member of board.

A petition with the signatures of twenty-five percent (25%) or more of the voters within a sanitary district which requests the removal from office of one or more members of a sanitary district board for malfeasance or nonfeasance in office may be filed with the board of commissioners of the county in which all or the greater portion of the voters of a sanitary district are located. Upon receipt of the petition, the county board of commissioners shall meet and adopt a resolution to hold an election on the question of removal. In the event that more than one member of a sanitary district board is subjected to recall in an election, the names of each member of the board subjected to recall shall appear upon separate ballots. If in a recall election, a majority of the votes within the sanitary district are cast for the removal of a member or members of the sanitary district board subject to recall, the member or members shall cease to be a member or members of the sanitary district board. A vacancy shall be immediately filled. The expenses of holding a recall election shall be paid from the funds of the sanitary district. (1927, c. 100, s. 21; 1957, c. 1357, s. 1; 1981, c. 186, s. 3; 1983, c. 891, s. 2.)

§ 130A-67. Rights-of-way granted.

A right-of-way in, along or across a county or State highway, street or property within a sanitary district is granted to a sanitary district in case the board finds it necessary or convenient for carrying out the work of the district. Any work done in, along or across a State highway shall be done in accordance with the rules of the Board of Transportation. (1927, c. 100, s. 22; 1933, c. 172, s. 17; 1957, c. 1357, s. 1; 1973, c. 507, s. 5; 1983, c. 891, s. 2.)

§ 130A-68. Returns of elections.

In all elections provided for in this Part, the board of elections shall file copies of the returns with the county boards of commissioners, sanitary district board and clerk of superior court in which the district is located. (1927, c. 100, s. 23; 1957, c. 1357, s. 1; 1981, c. 186, s. 4; 1983, c. 891, s. 2.)

§ 130A-69. Procedure for extension of district.

(a) If after a sanitary district has been created or the provisions of this Part have been made applicable to a sanitary district, a petition signed by not less than fifteen percent (15%) of the resident freeholders within any territory contiguous to and adjoining the sanitary district may be presented to the sanitary district board requesting annexation of territory described in the petition. The sanitary district board shall send a copy of the petition to the board of commissioners of the county or counties in which the district is located and to the Department. The sanitary district board shall request that the Department hold a joint public hearing with the sanitary district board on the question of annexation. The Secretary and the chairperson of the sanitary district board shall name a time and place for the public hearing. The chairperson of the sanitary district board shall publish a notice of public hearing once in a newspaper or newspapers published or circulating in the sanitary district and the territory proposed to be annexed. The notice shall be published not less than 15 days prior to the hearing. If after the hearing, the Commission approves the annexation of the territory described in the petition, the Department shall advise the board or boards of commissioners of the approval. The board or boards of commissioners shall order and provide for the holding of a special election upon the question of annexation within the territory proposed to be annexed.

(b) If at or prior to the public hearing, a petition is filed with the sanitary district board signed by not less than fifteen percent (15%) of the freeholders residing in the sanitary district requesting an election be held on the annexation question, the sanitary district board shall send a copy of the petition to the board or boards of commissioners who shall order and provide for the submission of the question to the voters within the sanitary district. This election may be held on the same day as the election in the territory proposed to be annexed, and both elections and registrations may be held pursuant to a single notice. A majority of the votes cast is necessary for a territory to be annexed to a sanitary district.

(c) The election shall be held by the county board or boards of elections as soon as possible after the board or boards of commissioners orders the election. The cost of the election shall be paid by the sanitary district. Registration in the area proposed for annexation shall be under the same procedure as G.S. 163-288.2.

(d) Notice of the election shall be given as required by G.S. 163-33(8) and shall include a statement that the boundary lines of the territory to be annexed and the boundary lines of the sanitary district have been prepared by the district board and may be examined. The notice shall also state that if a majority of the those voting in the election favor annexation, then the territory annexed shall be subject to all debts of the sanitary district.

(e) The ballot shall be substantially as follows:

"☐ FOR annexation to the ________ Sanitary District
☐ AGAINST annexation to the ________ Sanitary District."

The board or boards of elections shall certify the results of the election to the sanitary district board and the board or boards of commissioners of the county or counties in which the district is located.

(f) Notwithstanding any other provisions of this section, if a petition for extension of the boundaries of a sanitary district is signed by not less than fifty-one percent (51%) of the resident freeholders within the territory proposed to be annexed, it shall not be necessary to hold an election provided for by this section on the question of the extension of the boundaries of the sanitary district.

(g) Notwithstanding any other provisions of this section, if a petition for extension of the boundaries of a sanitary district is signed by the owners of all the real property within the territory proposed to be annexed, it shall not be necessary to hold any election or any hearings provided for by this section on the question of the extension of the boundaries of the sanitary district.

(h) No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court on any ground unless the action or proceeding is commenced within 30 days after the certification of the results by the board or boards of elections.

(i) When additional territory has been annexed to a sanitary district and the proposition of issuing bonds of the sanitary district after the annexation has been approved by the voters at an election held within one year subsequent to annexation, fifty-one percent (51%) or more of the resident freeholders within the annexed territory may petition the sanitary district board for the removal and exclusion of the territory from the sanitary district. No petition may be filed after bonds of the sanitary district have been approved in an election held at any time after annexation. If the sanitary district board approves the petition, it shall send a copy to the Department requesting that the petition be granted and shall send additional copies to the county board or boards of commissioners. A public hearing shall be conducted under the same procedure provided for the annexation of additional territory. If the Commission deems it advisable to comply with the request of the petition, the Commission shall adopt a resolution to that effect and shall redefine the boundaries of the sanitary district. (1927, c. 100, s. 24; 1943, c. 543; 1947, c. 463, s. 1; 1951, c. 897, s. 1; 1957, c. 1357, s. 1; 1959, c. 1189, s. 2; 1961, c. 732; 1973, c. 476, s. 128; 1981, c. 186, s. 5; 1983, c. 891, s. 2.)

§ 130A-70. District and municipality extending boundaries and corporate limits simultaneously.

(a) When the boundaries of a sanitary district lie entirely within or are coterminous with the corporate limits of a city or town and the sanitary district provides the only public water supply and sewage disposal system for the city or town, the boundaries of the sanitary district and the corporate limits of the city or town may be extended simultaneously as provided in this section.

(b) Twenty-five percent (25%) or more of the resident freeholders within the territory proposed to be annexed to the sanitary district and to the city or town may petition the sanitary district board and the governing board of the city or town setting forth the boundaries of the area proposed to be annexed and the objects annexation is proposed to accomplish. The petition may also include any area already within the corporate limits of the city or town but not already within the boundaries of the sanitary district. Upon receipt of the petition, the sanitary district board and the governing board of the city or town shall meet jointly and shall hold a public hearing prior to approval of the petition. Notice of the hearing shall be made by posting a notice at the courthouse door of the county or counties and by publishing a notice at least once a week for four consecutive weeks in a newspaper with a circulation in the county or counties. If at or after the public hearing the sanitary district board and the governing board of the city or town, acting jointly, shall each approve the petition, the petition shall be submitted to the Commission for approval. If the Commission approves the petition, the question shall be submitted to a vote of all voters in the area or areas proposed to be annexed voting as a whole. The election shall be held on a date approved by the sanitary district board and by the governing board of the city or town.

(c) The words "For Extension" and "Against Extension" shall be printed on the ballots for the election. A majority of all the votes cast is necessary for a district and municipality to extend boundaries and corporate limits simultaneously.

(d) After declaration of the extension, the territory and its citizens and property shall be subject to all debts, ordinances and rules in force in the sanitary district and in the city or town, and shall be entitled to the same privileges and benefits as other parts of the sanitary district and the city or town. The newly annexed territory shall be subject to the sanitary district and the city or town taxes levied for the fiscal year following the date of annexation.

(e) The costs of holding and conducting the election for annexation pursuant to this section, shall be shared equally by the sanitary district and by the city or town.

(f) The sanitary district board and the governing board of the city or town acting jointly, may order the board or boards of elections of the county or counties in which the sanitary district and the city or town are located, to call, hold, conduct and certify the result of the election, according to the provisions of Chapter 163 of the General Statutes.

(g) When the boundaries of a sanitary district and the corporate limits of a city or town are extended as provided in this section, and the proposition of issuing bonds of the sanitary district as enlarged has not been approved by the voters at an election held within one year subsequent to the extension, the annexed territory may be removed and excluded from the sanitary district in the manner provided in G.S. 130A-69. If the petition includes areas within the present corporate limits of the city or town but not within the present boundaries of the sanitary district, these areas shall not be removed or excluded from the city or town under the provisions of this section.

(h) The powers granted by this section shall be supplemental and additional to powers conferred by any other law and shall not be regarded as in derogation to any powers now existing. (1953, c. 977; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 186, s. 6; 1983, c. 891, s. 2.)

§ 130A-70.1. Satellite annexation in conjunction with municipal annexation in certain sanitary districts.

(a) This section only applies to a sanitary district where one or more municipalities lie within its boundaries.

(b) Whenever a municipality which lies within a sanitary district receives a petition for annexation under Part 4 of Article 4A of Chapter 160A of the General Statutes, the municipality may petition the sanitary district for that sanitary district to also annex the same area. In such case, the sanitary district may, by resolution, annex the same area, but the annexation shall only become effective if the territory is annexed by the requesting municipality.

(c) If G.S. 160A-58.5 allows the municipality to fix and enforce schedules of rents, rates, fees, charges, and penalties in excess of those fixed and enforced within the primary corporate limits, the sanitary district may do likewise as if G.S. 160A-58.5 applied to it.

(d) If the annexed area contains utility lines constructed or operated by the county and the sanitary district is to assume control, operation, or management of those lines, the sanitary district and county may by contract agree for the sanitary district to assume the pro rata or otherwise mutually agreeable portion of indebtedness incurred by the county for such purpose, or to contractually agree with the county to reimburse the county for any debt service. (2001-301, s. 1.)

Cross References. — For extension of corporate limits through annexation of noncontiguous areas, see G.S. 160A-5B et seq.

§ 130A-71. Procedure for withdrawing from district.

Fifty-one percent (51%) or more of the resident freeholders of a portion of a sanitary district which has no outstanding indebtedness, with the approval of the sanitary district board, may petition the county board of commissioners of the county in which a major portion of the petitioners reside, that the identified portion of the district be removed and excluded from the district. If the county board of commissioners approves the petition, an election shall be held in the entire district on the question of exclusion. A majority of all the votes cast is necessary for a district to be removed and excluded from a sanitary district. The county board of commissioners shall notify the Commission who shall remove and exclude the portion of the district, and redefine the limits accordingly. (1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-72. Dissolution of certain sanitary districts.

Fifty-one percent (51%) or more of the resident freeholders of a sanitary district which has no outstanding indebtedness may petition the board of commissioners of the county in which all or the greater portion of the resident freeholders of the district are located to dissolve the district. Upon receipt of the petition, the county board of commissioners shall notify the Department and the chairperson of the county board of commissioners of any other county or counties in which any portion of the district lies, of the receipt of the petition, and shall request that the Department hold a joint public hearing with the county commissioners concerning the dissolution of the district. The Secretary and the chairperson of the county board of commissioners shall name a time and place within the district for the public hearing. The county board of commissioners shall give prior notice of the hearing by posting a notice at the courthouse door of the county or counties and by publication in a newspaper or newspapers with circulation in the county or counties at least once a week for four consecutive weeks. If all matters pertaining to the dissolution of the sanitary district cannot be concluded at the hearing, the hearing may be continued to a time and place determined by the Department. If after the hearing, the Commission and the county board or boards of commissioners deem it advisable to comply with the request of the petition, the Commission shall adopt a resolution to dissolve the sanitary district. The sanitary district board of the dissolved district is authorized to convey all assets, including cash, to any county, municipality, or other governmental unit, or to any public utility company operating or to be operated under the authority of a certificate of public convenience and necessity granted by the North Carolina Utilities Commission in return for the assumption of the obligation to provide water and sewage services to the area served by the district at the time of dissolution. (1943, c. 620; 1951, c. 178, s. 2; 1957, c. 1357, s. 1; 1967, c. 4, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-73. Dissolution of sanitary districts having no outstanding indebtedness and located wholly within or coterminous with corporate limits of city or town.

When the boundaries of a sanitary district which has no outstanding indebtedness are entirely located within or coterminous with the corporate limits of a city or town, fifty-one percent (51%) or more of the resident freeholders within the district may petition the board of commissioners within the county in which all or the greater portion of the resident freeholders of the district are located to dissolve the district. Upon receipt of the petition, the board of commissioners shall notify the Department, the chairperson of the board of commissioners of any other county or counties in which any portion of the district lies and the governing body of the city or town within which the district lies of the receipt of the petition, and shall request that the Department hold a joint public hearing with the board or boards of commissioners and the governing body of the city or town. The Secretary, the chairperson of the board of commissioners of the county in which all or the greater portion of the resident freeholders are located and the presiding officer of the governing body of the city or town shall name a time and place within the boundaries of the district and the city or town for the public hearing. The county board of commissioners shall give notice of the hearing by posting prior notice at the courthouse door of the county or counties and also by publication in a newspaper or newspapers circulating in the district at least once a week for four consecutive weeks. If all matters pertaining to the dissolution of the sanitary district cannot be concluded at the hearing, the hearing may be continued to a time and place determined by the Department. If, after the hearing, the Commission, the county board or boards of commissioners and the governing body of the city or town shall deem it advisable to comply with the request of the petition, the Commission shall adopt a resolution dissolving the district. All taxes levied by the sanitary district which were levied prior to but which are collected after the dissolution shall vest in the city or town. All property held, owned, controlled or used by the sanitary district upon the dissolution or which may later be vested in the sanitary district, and all judgments, liens, rights and causes of actions in favor of the sanitary district shall vest in the city or town. At the dissolution, taxes owed to the sanitary district shall be collected by the city or town. (1963, c. 512, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-73.1. Dissolution of sanitary districts having no outstanding indebtedness and located wholly within or coterminous with corporate limits of city or town.

(a) When the boundaries of a sanitary district that (i) is located entirely within one county, (ii) has no outstanding indebtedness, (iii) at the time of its creation was not located entirely within or coterminous with the corporate limits of a city or town, (iv) has not provided any water or sewer service for at least five years, (v) did not levy any ad valorem tax in the current year, (vi) has been for at least five years entirely located within or coterminous with the corporate limits of a city or town, and (vii) at the time of the annexation of the area of the district by that city or town, the city or town assumed all assets and liabilities of the district, the board of that district by unanimous vote may petition the board of commissioners of the county in which the district is located to dissolve the district. Upon receipt of the petition, the board of commissioners shall notify the Department and the governing body of the city or town within which the district lies of the receipt of the petition. If the Commission, the county board of commissioners, and the governing body of the city or town shall deem it advisable to comply with the request of the petition, the Commission shall adopt a resolution dissolving the district. All taxes levied by the sanitary district that were levied prior to, but that are collected after, the dissolution shall vest in the city or town. All property held, owned, controlled, or used by the sanitary district upon the dissolution or that may later be vested in the sanitary district, and all judgments, liens, rights, and causes of actions in favor of the sanitary district shall vest in the city or town. At the dissolution, taxes owed to the sanitary district shall be collected by the city or town.

(b) The procedure for the dissolution of a sanitary district set out in this section is an alternative to the procedure set out in G.S. 130A-73 and any sanitary district to which both that section and this section apply may be dissolved under either section. (1998-123, s. 1.)

§ 130A-74. Validation of creation of districts.

All actions prior to June 6, 1961, taken by the county boards of commissioners[,] by the State Board of Health, by any officer or by any other agency, board or officer of the State in the formation and creation of sanitary districts in the State, and the formation and creation, or the attempted formation and creation of any sanitary districts are in all respects validated. These sanitary districts are declared lawfully formed and created and in all respects legal and valid sanitary districts. (1953, c. 596, s. 1; 1957, c. 1357, s. 1; 1961, c. 667, s. 1; 1983, c. 891, s. 2.)

§ 130A-75. Validation of extension of boundaries of districts.

(a) All actions prior to April 1, 1957, taken by the State Board of Health, a county board of commissioners, and a sanitary district board for the purpose of extending the boundaries of a sanitary district where the territory which was annexed contained no resident freeholders, and where the owner or owners of the real property annexed requested of the sanitary district board that the territory be annexed to the sanitary district, are validated, notwithstanding any lack of power to perform these acts or proceedings, and notwithstanding any defect or irregularity in the acts or proceedings.

(b) All actions and proceedings prior to April 1, 1979, taken by the State Board of Health, the Commission, a board of county commissioners and a sanitary district board for the purpose of annexing additional territory to a sanitary district or with respect to the annexation are validated notwithstanding any lack of power to perform these acts or proceedings or any defect or irregularity in any acts or proceedings; these sanitary districts are lawfully extended to include this additional territory. (1959, c. 415, s. 2; 1975, c. 712, s. 1; 1979, 2nd Sess., c. 1079, s. 1; 1983, c. 891, s. 2.)

§ 130A-76. Validation of dissolution of districts.

All actions prior to January 1, 1981, taken by a county board of commissioners, by the State Board of Health or Commission, by an officer or by any other agency, board or officer of the State in the dissolution of a sanitary district and the dissolution or attempted dissolution of a sanitary district are validated. (1953, c. 596, s. 2; 1957, c. 1357, s. 1; 1981, c. 20, ss. 1, 2; 1983, c. 891, s. 2.)

§ 130A-77. Validation of bonds of districts.

All actions and proceedings prior to April 1, 1979, taken, and all elections held in a sanitary district or in a district purporting to be a legal sanitary district by virtue of the purported authority and acts of a county board of commissioners, State Board of Health, Commission, or any other board, officer or agency for the purpose of authorizing, selling or issuing the bonds of the sanitary district, and all bonds at any time issued by or on behalf of a sanitary district, are in all respects validated. These bonds are declared to be the legal and binding obligations of the sanitary district. (1953, c. 596, s. 3; 1957, c. 1357, s. 1; 1979, 2nd Sess., c. 1079, s. 2; 1983, c. 891, s. 2.)

§ 130A-78. Tax levy for validated bonds.

Sanitary districts are authorized to make appropriations and to levy annually a tax on property having a situs in the district under the rules and according to the procedure prescribed in the Machinery Act for the purpose of paying the principal of and interest on bonds validated in G.S. 130A-77. The tax shall be sufficient for this purpose and shall be in addition to all other taxes which may be levied upon the taxable property in the sanitary district. (1945, c. 89, s. 3; 1957, c. 1357, s. 1; 1973, c. 803, s. 17; 1983, c. 891, s. 2.)

§ 130A-79. Validation of appointment or election of members of district boards.

(a) All actions and proceedings prior to June 6, 1961, taken in the appointment or election of members of a sanitary district board are validated.

Members of these boards shall have all the powers and may perform all the duties required or permitted of them to be pursuant to this Part.

(b) All actions and proceedings prior to May 1, 1959, taken in the appointment or election of members of a sanitary district board and the appointment or election of members are validated. Members of these boards shall have all the powers and may perform all the duties required or permitted of them pursuant to the provisions of this Part. (1953, c. 596, s. 4; 1957, c. 1357, s. 1; 1959, c. 415, s. 1; 1961, c. 667, s. 2; 1983, c. 891, s. 2.)

§ 130A-80. Merger of district with contiguous city or town; election.

A sanitary district may merge with a contiguous city or town in the following manner:

(1) The sanitary district board and the governing board of the city or town may resolve that it is advisable to call an election within both the sanitary district and the city or town to determine if the sanitary district and the city or town should merge;

(2) If the sanitary district board and the governing board of the city or town resolve that it is advisable to call for an election, both boards shall adopt a resolution requesting the board of commissioners in the county or counties in which the district and the town or city or any portion is located to hold an election on a date named by the sanitary district board and the governing board of the city or town after consultation with the appropriate board or boards of elections. The election shall be held within the sanitary district and the city or town on the question of merger;

(3) The county board or boards of commissioners shall request the appropriate board or boards of elections to hold and conduct the election. All voters of the city or town and the sanitary district shall be eligible to vote if the election is called in both areas as authorized in subsection (1);

(4) Notice of the election shall be given as required in G.S. 163-33(8). The board or boards of elections may use either method of registration set out in G.S. 163-288.2;

(5) If an election is called as provided in subsection (2), the board or boards of elections shall provide ballots for the election in substantially the following form:

"☐ FOR merger of the Town of ________ and the ________ Sanitary District, if a majority of the registered voters of both the Sanitary District and the Town vote in favor of merger, the combined territories to be known as the Town of ________ and to assume all of the obligations of the Sanitary District and to receive from the Sanitary District all the property rights of the District; from and after merger residents of the District would enjoy all of the benefits of the municipality and would assume their proportionate share of the obligations of the Town as merged.

☐ AGAINST merger."

(6) A majority of all the votes cast by voters of the sanitary district and a majority of all the votes cast by voters of the city or town is necessary for the merger of a sanitary district with the city or town. The merger shall be effective on July 1 following the election. If a majority of the votes cast in either the sanitary district or the city or town vote against the merger, any election on similar propositions of merger may not occur until one year from the date of the last election.

(7) Upon the merger of a sanitary district and a city or town pursuant to this section, the city or town shall assume all obligations of the

sanitary district and the sanitary district shall convey all property rights to the city or town. The vote for merger shall include a vote for the city or town to assume the obligations of the district. The sanitary district shall cease to exist as a political subdivision from and after the effective date of the merger. After the merger, the residents of the sanitary district enjoy all of the benefits of the municipality and shall assume their share of the obligations of the city or town. All taxes levied and collected by the city or town from and after the effective date of the merger shall be levied and collected uniformly in all the territory included in the enlarged municipality; and

(8) If merger is approved, the governing board of the city or town shall determine the proportion of the district's indebtedness, if any, which was incurred for the construction of water systems and the proportion which was incurred for construction of sewage disposal systems. The governing board shall send a certified copy of the determination to the local government commission in order that the Commission and the governing body of the merged municipality can determine the net debt of the merged municipality as required by G.S. 159-55. (1961, c. 866; 1981, c. 186, s. 7; 1983, c. 891, s. 2; 1987, c. 314, s. 1.)

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How Results of Election Determined. — In an election held pursuant to former G.S. 130-156.2 for the merger of a municipality and a sanitary district, the results of the election would be determined by a majority of the registered voters of both the sanitary district and the municipality involved who actually voted in the election. See opinion of the Attorney General to Mr. Archie L. Smith, Asheboro City Attorney, 40 N.C.A.G. 641 (1969).

§ 130A-80.1. Merger of district with coterminous city or town; election.

A sanitary district may merge with a coterminous city or town in the following manner:

(1) The sanitary district board and the governing board of the city or town may resolve that it is advisable to call an election within the area of the sanitary district and the city or town to determine if the sanitary district and the city or town should merge;

(2) If the sanitary district board and the governing board of the city or town resolve that it is advisable to call for an election, both boards shall adopt a resolution requesting the board of commissioners in the county or counties in which the district and the town or city or any portion is located to hold an election on a date named by the sanitary district board and the governing board of the city or town after consultation with the appropriate board or boards of elections. The election shall be held within the sanitary district and the city or town on the question of merger;

(3) The county board or boards of commissioners shall request the appropriate board or boards of elections to hold and conduct the election. All voters of the city or town and the sanitary district shall be eligible to vote;

(4) Notice of the election shall be given as required in G.S. 163-33(8);

(5) The board or boards of elections shall provide ballots for the election in substantially the following form:
"☐ FOR merger of the Town of ________ and the ________ Sanitary District, if a majority of the registered voters vote in favor of merger, the area to be known as the Town of ________ and to assume all of the

obligations of the Sanitary District and to receive from the Sanitary District all the property rights of the District.
☐ AGAINST merger."

(6) A majority of all the votes cast is necessary for the merger of a sanitary district with the city or town. The merger shall be effective on July 1 following the election. If a majority of the votes cast is not in favor of the merger, an election on merger may not occur until one year from the date of the last election.

(7) Upon the merger of a sanitary district and a city or town pursuant to this section, the city or town shall assume all obligations of the sanitary district and the sanitary district shall convey all property rights to the city or town. The vote for merger shall include a vote for the city or town to assume the obligations of the district. The sanitary district shall cease to exist as a political subdivision from and after the effective date of the merger; and

(8) If merger is approved, the governing board of the city or town shall determine the proportion of the district's indebtedness, if any, which was incurred for the construction of water systems and the proportion which was incurred for construction of sewage disposal systems. The governing board shall send a certified copy of the determination to the Local Government Commission in order that the Commission and the governing body of the merged municipality can determine the net debt of the merged municipality as required by G.S. 159-55. (1989, c. 194, s. 1.)

§ 130A-80.2. Merger of district with noncoterminous city or town it is contained wholly within; election.

A sanitary district may merge with a city or town which it is contained wholly within, but where the sanitary district and the city or town do not have coterminous boundaries, in the following manner:

(1) The sanitary district board and the governing board of the city or town may resolve that it is advisable to call an election within both the sanitary district and the city or town to determine if the sanitary district and the city or town should merge;

(2) If the sanitary district board and the governing board of the city or town resolve that it is advisable to call for an election, both boards shall adopt a resolution requesting the board of commissioners in the county or counties in which the district and the town or city or any portion is located to hold an election on a date named by the sanitary district board and the governing board of the city or town after consultation with the appropriate board or boards of elections. The election shall be held within the sanitary district and the city or town on the question of merger;

(3) The county board or boards of commissioners shall request the appropriate board or boards of elections to hold and conduct the election. All voters of the city or town and the sanitary district shall be eligible to vote if the election is called in both areas as authorized in subdivision (1);

(4) Notice of the election shall be given as required in G.S. 163-33(8). The board or boards of elections may use either method of registration set out in G.S. 163-288.2;

(5) If an election is called as provided in subsection (2), the board or boards of elections shall provide ballots for the election in substantially the following form:
"☐ FOR merger of the Town of ________ and the ________ Sanitary District, if a majority of the registered voters of both the Sanitary

District and the Town vote in favor of merger, the combined territories to be known as the Town of ________ and to assume all of the obligations of the Sanitary District and to receive from the Sanitary District all the property rights of the District; from and after merger residents of the District would enjoy all of the benefits of the municipality and would assume their proportionate share of the obligations of the Town as merged.

☐ AGAINST merger."

(6) A majority of all the votes cast by voters of the sanitary district and a majority of all the votes cast by voters of the city or town is necessary for the merger of a sanitary district with the city or town. The merger shall be effective on July 1 following the election. If a majority of the votes cast in either the sanitary district or the city or town vote against the merger, any election on similar propositions of merger may not occur until one year from the date of the last election.

(7) Upon the merger of a sanitary district and a city or town pursuant to this section, the city or town shall assume all obligations of the sanitary district and the sanitary district shall convey all property rights to the city or town. The vote for merger shall include a vote for the city or town to assume the obligations of the district. The sanitary district shall cease to exist as a political subdivision from and after the effective date of the merger. After the merger, the residents of the sanitary district enjoy all of the benefits of the municipality and shall assume their share of the obligations of the city or town. All taxes levied and collected by the city or town from and after the effective date of the merger shall be levied and collected uniformly in all the territory included in the enlarged municipality; and

(8) If merger is approved, the governing board of the city or town shall determine the proportion of the district's indebtedness, if any, which was incurred for the construction of water systems and the proportion which was incurred for construction of sewage disposal systems. The governing board shall send a certified copy of the determination to the Local Government Commission in order that the Commission and the governing body of the merged municipality can determine the net debt of the merged municipality as required by G.S. 159-55. (1989, c. 194, s. 2.)

Editor's Note. — Session Laws 1989, c. 194, s. 4, provided that if a sanitary district and a city or town were merged in any election conducted prior to January 1, 1989, under G.S. 130A-80, and the merger did not qualify under that section, but would have been permissible under this section, that that merger would be in all respects validated and confirmed.

§ 130A-80.3. Merger of district with contiguous metropolitan water district.

(a) A sanitary district may merge with a contiguous, but not coterminous, metropolitan water district organized under Article 4 of Chapter 162A of the General Statutes in the following manner, but only if the metropolitan water district has no outstanding indebtedness:

(1) The sanitary district board and the district board of the metropolitan water district shall resolve that it is advisable for the sanitary district and the metropolitan water district should merge;

(2) If the sanitary district board and the district board of the metropolitan water district resolve that it is advisable to merge, they shall call a public hearing on the merger. Each of such boards shall hold a public

hearing on the question of merger, and advertisement of the public hearing shall be published at least 10 days before the public hearing;

(3) After the public hearing, if the sanitary district board and the district board of the metropolitan water district by resolution approve the merger, the merger shall be effective on July 1 following the adoption of the resolution;

(4) Upon the merger of a sanitary district and a metropolitan water district pursuant to this section, the sanitary district shall assume all obligations of the metropolitan water district, and the metropolitan water district shall convey all property rights to the sanitary district. The metropolitan water district shall cease to exist as a political subdivision from and after the effective date of the merger. After the merger, the residents of the metropolitan water district enjoy all of the benefits of the sanitary district and shall assume their share of the obligations of the sanitary district. All taxes levied and collected by the sanitary district from and after the effective date of the merger shall be levied and collected uniformly in all the territory included in the enlarged sanitary district; and

(5) Certified copies of the merger resolutions shall be filed with the Commission for Public Health.

(b) At the same time as approving the resolution of merger, the district board of the metropolitan water district shall designate by resolution two of its members to serve on an expanded sanitary district board from and after the date of the merger.

(c) If the sanitary district board serves staggered four-year terms, the resolution shall designate one of those two persons to serve until the organizational meeting after the next election of a sanitary district board, and the other to serve until the organizational meeting after the second succeeding election of a sanitary district board. Successors shall be elected by the qualified voters of the sanitary district for four-year terms.

(d) If the sanitary district board serves nonstaggered four-year terms, or serves two-year terms, the two persons shall serve until the organizational meeting after the next election of a sanitary district board. Successors shall be elected by the qualified voters of the sanitary district for terms of the same length as other sanitary district board members.

(e) When a sanitary district and metropolitan water district are merged under this section, the sanitary district board may change the name of the sanitary district. Notice of such name change shall be filed with the Commission for Public Health. (1989, c. 194, s. 3; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subdivision (a)(5) and in subsection (e).

§ 130A-81. Incorporation of municipality and simultaneous dissolution of sanitary district, with transfer of assets and liabilities from the district to the municipality.

The General Assembly may incorporate a municipality, which includes within its boundaries or is coterminous with a sanitary district and provide for the simultaneous dissolution of the sanitary district and the transfer of the district's assets and liabilities to the municipality, in the following manner:

(1) The incorporation act shall define the boundaries of the proposed municipality; shall set the date for and provide for a referendum on the incorporation of the proposed municipality and dissolution of the

sanitary district; shall provide for registration of voters in the area of the proposed municipality in accordance with G.S. 163-288.2; shall set a proposed effective date for the incorporation of the municipality and the dissolution of the sanitary district; shall establish the form of government for the proposed municipality and the composition of its governing board, and provide for transitional arrangements for the sanitary district to the municipality; and may include any other matter appropriate to a municipal charter.

(1a) As an alternate to subdivision (1) of this section, the incorporation act shall define the boundaries of the proposed municipality; shall provide that the incorporation is not subject to referendum; shall set a proposed effective date for the incorporation of the municipality and the dissolution of the sanitary district; shall establish the form of government for the proposed municipality and the composition of its governing board, and provide for transitional arrangements for the sanitary district to the municipality, and may include any other matter appropriate to a municipal charter. If this subdivision is followed instead of subdivision (1), then the municipality shall be incorporated and the sanitary district simultaneously dissolved at 12 noon on the date set for incorporation in the incorporation act, and the provisions of paragraphs a through g of subdivision (5) of this section shall apply.

(2) The referendum shall be conducted by the board of elections of the county in which the proposed municipality is located. If the proposed municipality is located in more than one county, the board of elections of the county which has the greatest number of residents of the proposed municipality shall conduct the referendum. The board of election shall conduct the referendum in accordance with this section and the provisions of the incorporation act.

(3) The form of the ballot for a referendum under this section shall be substantially as follows:

"☐ FOR incorporation of the Town (City) of ________ and the simultaneous dissolution of the ________ Sanitary District, with transfer of the District's assets and liabilities to the Town (City), and assumption of the District's indebtedness by the Town (City).

☐ AGAINST incorporation of the Town (City) of ________ and the simultaneous dissolution of the ________ Sanitary District, with transfer of the District's assets and liabilities, to the Town (City), and assumption of the District's indebtedness by the Town (City)."

(4) If a majority of those voting in the referendum vote in favor of incorporating the proposed municipality and dissolving the sanitary district, the board of elections shall notify the Department and the Local Government Commission of the date on which the municipality will be incorporated and the sanitary district dissolved and shall state that all assets and liabilities of the sanitary district will be transferred to the municipality and that the municipality will assume the district's indebtedness.

(5) If a majority of those voting in the referendum vote in favor of incorporating the proposed municipality and dissolving the sanitary district, the municipality shall be incorporated and the sanitary district shall be simultaneously dissolved at 12 noon on the date set for incorporation in the incorporation act. At that time:

a. The sanitary district shall cease to exist as a body politic and corporate;

b. All property, real, personal and mixed, belonging to the sanitary district vests in and is the property of the municipality;

c. All judgments, liens, rights and courses of action in favor of the sanitary district vest in favor of the municipality;

d. All rentals, taxes, assessments and other funds, charges or fees owed to the sanitary district are owed to and may be collected by the municipality;

e. Any action, suit, or proceeding pending against, or instituted by the sanitary district shall not be abated by its dissolution, but shall be continued and completed in the same manner as if dissolution had not occurred. The municipality shall be a party to these actions, suits and proceedings in the place of the sanitary district and shall pay any judgment rendered against the sanitary district in any of these actions or proceedings. No new process need be served in any of the actions, suits or proceedings;

f. All obligations of the sanitary district, including outstanding indebtedness, are assumed by the municipality, and all the obligations and outstanding indebtedness are constituted obligations and indebtedness of the municipality. The full faith and credit of the municipality is deemed to be pledged for the payment of the principal of and interest on all general obligation bonds and bond anticipation notes of the sanitary district, and all the taxable property within the municipality shall remain subject to taxation for these payments; and

g. All rules of the sanitary district shall continue in effect until repealed or amended by the governing body of the municipality.

(6) The transition between the sanitary district and the municipality shall be provided for in the incorporation act of the municipality. (1971, c. 737, 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1985, c. 375.)

§ 130A-82. Dissolution of sanitary districts; referendum.

(a) A county board of commissioners in counties having a population in excess of 275,000 may dissolve a sanitary district by holding a referendum on the questions of dissolution and assumption by the county of any outstanding indebtedness of the district. The county board of commissioners may dissolve a sanitary district which has no outstanding indebtedness when the members of the district shall vote in favor of dissolution.

(b) Before the dissolution of any district shall be approved, a plan for continued operation and provision of all services and functions being performed or rendered by the district shall be adopted and approved by the board of county commissioners.

(c) No plan shall be adopted unless at the time of its adoption any water system or sanitary sewer system being operated by the district is in compliance with all local, State and federal rules and regulations, and if the system is to be serviced by a municipality, the municipality shall first approve the plan.

(d) When all actions relating to dissolution of the sanitary district have been completed, the chairperson of the county board of commissioners shall notify the Department. (1973, c. 476, s. 128; c. 951; 1983, c. 891, s. 2.)

§ 130A-83. Merger of two contiguous sanitary districts.

Two contiguous sanitary districts may merge in the following manner:

(1) The sanitary district board of each sanitary district must first adopt a common proposed plan of merger. The plan shall contain the name of the new or successor sanitary district, designate the members of the merging boards who shall serve as the interim sanitary district board for the new or successor district until the next election required by

G.S. 130A-50(b) and 163-279, and any other matters necessary to complete the merger.

(2) The merger may become effective only if approved by the voters of the two sanitary districts. In order to call an election, both boards shall adopt a resolution calling upon the board of county commissioners in the county or counties in which the districts are located to call for an election on a date named by the sanitary district boards after consultation with the appropriate boards of election. The board or boards of commissioners shall hold an election on the proposed merger of the sanitary districts.

(3) The county board or boards of commissioners shall request the appropriate board of elections to hold and conduct the elections. All voters of the two sanitary districts shall be eligible to vote.

(4) Notice of the elections shall be given as required in G.S. 163-33(8). The board of elections may use the method of registration set out in G.S. 163-288.2.

(5) If an election is called as provided in subsection (2), the board or boards of elections shall provide ballots for the election in substantially the following form:

"☐ FOR the merger of the ________ Sanitary District and the ________ Sanitary District into a single district to be known as the ________ Sanitary District, in which all the property, assets, liabilities, obligations, and indebtedness of the two districts become the property, assets, liabilities, obligations, and indebtedness of the ________ Sanitary District.

☐ AGAINST the merger of the ________ Sanitary District and the ________ Sanitary District into a single district to be known as the ________ Sanitary District, in which all the property, assets, liabilities, obligations, and indebtedness of the two districts become the property, assets, liabilities, obligations, and indebtedness of the ________ Sanitary District."

(6) If a majority of all the votes cast in each sanitary district vote in favor of the merger, the two sanitary districts shall be merged on July 1 following the election. Should the majority of the votes cast in either sanitary district be against the proposition, the sanitary districts shall not be merged. If a majority of the votes cast in either sanitary district are against the merger, any election on similar propositions of merger may not occur until one year from the date of the last election.

(7) Upon the merger of two sanitary districts pursuant to this section and the creation of a new district, the merger becomes effective at 12 noon on the following July 1. At that time:

a. The two sanitary districts shall cease to exist as bodies politic and corporate, and the new sanitary district exists as a body politic and corporate.

b. All property, real, personal and mixed, belonging to the sanitary districts vests in and is the property of the new sanitary district.

c. All judgments, liens, rights of liens and causes of action in favor of either sanitary district vest in the new sanitary district.

d. All rentals, taxes, assessments and other funds, charges or fees owed to either of the sanitary districts are owed to and may be collected by the new sanitary district.

e. Any action, suit, or proceeding pending against, or having been instituted by, either of the sanitary districts shall not be abated by its dissolution, but shall be continued and completed in the same manner as if dissolution had not occurred. The new sanitary district shall be a party to all these actions, suits and proceedings in the place of the dissolved sanitary district and shall pay any judgment rendered against either of the sanitary districts in any of these actions or proceedings. No new process need be served in any of the actions, suits or proceedings.

f. All obligations of either of the sanitary districts, including any outstanding indebtedness, are assumed by the new sanitary district and all the obligations and outstanding indebtedness are constituted obligations and indebtedness of the new sanitary district. The full faith and credit of the new sanitary district is deemed to be pledged for the punctual payment of the principal of and interest on all general obligation bonds and bond anticipation notes of either of the sanitary districts, and all the taxable property within the new sanitary district shall remain subject to taxation for these payments.

g. All rules of either of the sanitary districts shall continue in effect until repealed or amended by the governing body of the new sanitary district.

(8) Upon the merger of two sanitary districts pursuant to this section when one district is to be dissolved and the other district is to be a successor covering the territory of both, the merger becomes effective at 12 noon on the following July 1. At that time:

a. One sanitary district shall cease to exist as a body politic and corporate, and the successor sanitary district continues to exist as a body politic and corporate.

b. All property, real, personal and mixed, belonging to the sanitary districts vests in, and is the property of the successor sanitary district.

c. All judgments, liens, rights of liens and causes of action in favor of either sanitary district vest in the successor sanitary district.

d. All rentals, taxes, assessments and other funds, charges or fees owed either of the sanitary districts are owed to and may be collected by the successor sanitary district.

e. Any action, suit, or proceeding pending against, or instituted by either of the sanitary districts shall not be abated by its dissolution, but shall be continued and completed in the same manner as if dissolution had not occurred. The successor sanitary district shall be a party to all these actions, suits and proceedings in the place of the dissolved sanitary district and shall pay any judgment rendered against the sanitary district in any of these actions or proceedings. No new process need be served in any of the actions, suits or proceedings.

f. All obligations of either of the sanitary districts, including any outstanding indebtedness, are assumed by the successor sanitary district and all the obligations and outstanding indebtedness are constituted obligations and indebtedness of the successor sanitary district. The full faith and credit of the successor sanitary district is deemed to be pledged for the punctual payment of the principal of and interest on all general obligation bonds and bond anticipation notes of either of the sanitary districts, and all the taxable property within the successor sanitary district shall be and remain subject to taxation for these payments.

g. All rules of either of the sanitary districts shall continue in effect until repealed or amended by the governing body of the successor sanitary district. (1981, c. 951; 1983, c. 891, s. 2; 1987, c. 314, s. 2.)

§ 130A-84. Withdrawal of water.

A sanitary district is empowered to engage in litigation or to join with other parties in litigation opposing the withdrawal of water from a river or other water supply. (1983, c. 891, s. 2.)

§ 130A-85. Further dissolution procedures.

(a) The County Board of Commissioners may dissolve a Sanitary District located entirely within one county upon the following conditions:

(1) There are 500 or less resident freeholders residing within the District;
(2) The District has no outstanding bonded indebtedness;
(3) The Board of Commissioners agrees to assume and pay any other outstanding legal indebtedness of the District;
(4) The Board of Commissioners adopts a plan providing for continued operation and provision of all services previously being performed or rendered to the District. No plan shall be adopted unless at the time of its adoption any water and sewer or sanitary system being operated by the District is in compliance with all local, State, and federal rules and regulations; and
(5) The Board of Commissioners adopts a resolution finding that the interest of the citizens of the Sanitary District and the county will be best served if the operation and the services provided by the District were provided for by the Board of Commissioners.

(a1) The County Board of Commissioners may dissolve a Sanitary District located entirely within one county and for which no District Board members have been elected within eight years preceding dissolution, upon the following conditions:

(1) The District has no outstanding legal indebtedness;
(2) The Board of Commissioners adopts a plan providing for continued operation and provision of all services, if any, previously being performed or rendered to the District. No plan shall be adopted unless at the time of its adoption any water and sewer or sanitary system being operated by the District is in compliance with all local, State, and federal rules and regulations; and
(3) The Board of Commissioners adopts a resolution finding that the interest of the citizens of the Sanitary District and the county will be best served if the operation and the services provided by the District are provided for by the Board of Commissioners.

When all actions relating to dissolution of the sanitary district have been completed, the chairperson of the County Board of Commissioners shall notify the Department.

(b) Prior to taking action to dissolve a Sanitary District, the Board of Commissioners shall hold a public hearing concerning dissolution of the District. The County Board of Commissioners shall give notice of the hearing by publication of notice thereof in a newspaper or newspapers with general circulation in the county, once per week for three consecutive weeks. If, after the hearing, the Board of Commissioners deems it advisable to dissolve the District, they shall thereafter adopt the resolution and plan provided for herein.

During the period commencing with the first publication of notice of the public hearing as herein provided, and for a period of 60 days following the public hearing, the Board of Commissioners of the District may not enter into any contracts, incur any indebtedness or pledge, or encumber any of the District's assets except in the ordinary course of business.

(c) Upon adoption of the resolution provided for herein, all property, real, personal, and mixed, belonging to the District vests in and becomes the property of the county; all judgments, liens, rights of liens and causes of action in favor of the District vests in the county; and all rentals, taxes and assessments and other funds, charges or fees owed to the District may be collected by the county.

(d) Following dissolution of the District, the county may operate, maintain, and extend the services previously provided for by the District either:

(1) As a part of county government; or
(2) As a service district created on or after January 1, 1987, under Article 16 of Chapter 153A of the General Statutes to serve at least the area of the Sanitary District.

In lieu thereof, the services may be provided by any authority or district created after January 1, 1987, under this Article, or Articles 1, 4, 5 or 6 of Chapter 162A of the General Statutes to serve at least the area of the District. In such case, the county may convey the property, including all judgments, liens, rights of liens, causes of action, rentals, taxes and assessments mentioned in subsection (c) of this section, to that authority or District. (1987, c. 521; 1991, c. 417, s. 1.)

§§ 130A-86, 130A-87: Reserved for future codification purposes.

Article 3.

State Laboratory of Public Health.

§ 130A-88. Laboratory established.

(a) A State Laboratory of Public Health is established within the Department. The Department is authorized to make examinations, and provide consultation and technical assistance as the public health may require.

(b) The Commission shall adopt rules necessary for the operation of the State Laboratory of Public Health. (1905, c. 415; Rev., s. 3057; 1907, cc. 721, 884; 1911, c. 62, s. 36; C.S., s. 7056; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1979, c. 788, s. 3; 1983, c. 891, s. 2.)

§ 130A-89: Reserved for future codification purposes.

Article 4.

Vital Statistics.

§ 130A-90. Vital statistics program.

The Department shall maintain a Vital Statistics Program which shall operate the only system of vital records registration throughout this State. (1983, c. 891, s. 2.)

§ 130A-91. State Registrar.

The Secretary shall appoint a State Registrar of Vital Statistics. The State Registrar of Vital Statistics shall exercise all the authority conferred by this Article. (1913, c. 109, s. 2; C.S., s. 7088; 1955, c. 951, s. 5; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1977, c. 163, s. 1; 1983, c. 891, s. 2.)

§ 130A-92. Duties of the State Registrar.

(a) The State Registrar shall secure and maintain all vital records required under this Article and shall do all things necessary to carry out its provisions. The State Registrar shall:

(1) Examine vital records received from local registrars to determine if these records are complete and satisfactory, and require the provision of information necessary to make the records complete and satisfactory;

(2) Permanently preserve the information from the vital records in a systematic manner in adequate fireproof space which shall be provided in a State building by the Department of Administration, and maintain a comprehensive and continuous index of all vital records;

(3) Prepare and supply or approve all forms used in carrying out the provisions of this Article;

(4) Appoint local registrars as required by G.S. 130A-95 and exercise supervisory authority over local registrars, deputy local registrars and sub-registrars;

(5) Enforce the provisions of this Article, investigate cases of irregularity or violations and report violations to law-enforcement officials for prosecution under G.S. 130A-26;

(6) Conduct studies and research and recommend to the General Assembly any additional legislation necessary to carry out the purposes of this Article; and

(7) Adopt rules necessary to carry out the provisions of this Article.

(b) The State Registrar may retain payments made in excess of the fees established by this Article if the overpayment is in the amount of three dollars ($3.00) or less and the payor does not request a refund of the overpayment. The State Registrar is not required to notify the payor of any overpayment of three dollars ($3.00) or less. (1913, c. 109, s. 1; C.S., s. 7086; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1971, c. 444, s. 3; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1985, c. 366; 1993, c. 146, s. 2.)

Editor's Note. — G.S. 130A-26, referred to in this section was repealed by Session Laws, 1995, c. 311, s. 1.

§ 130A-93. Access to vital records; copies.

(a) Only the State Registrar shall have access to original vital records and to indices to the original vital records. County offices authorized to issue certificates and the North Carolina State Archives also shall have access to indices to these original vital records, when specifically authorized by the State Registrar.

(b) The following birth data, in any form and on any medium, in the possession of the Department, local health departments, or local register of deeds offices shall not be public records pursuant to Chapter 132 of the General Statutes: the names of children and parents, the addresses of parents (other than county of residence and postal code), and the social security numbers of parents. Access to copies and abstracts of these data shall be provided in accordance with G.S. 130A-99, Chapter 161 of the General Statutes, and this section. All other birth data shall be public records pursuant to Chapter 132 of the General Statutes. All birth records and data are State property and shall be managed only in accordance with official disposition instructions prepared by the Department of Cultural Resources. The application of this Chapter is subject to the provisions of Article 1 of Chapter 121 of the General Statutes, the North Carolina Archives and History Act. The State Registrar and other officials authorized to issue certified copies of vital records shall provide copies or abstracts of vital records, except those described in subsections (d), (e), (f) and (g) of this section, to any person upon request.

(c) The State Registrar and other officials authorized to issue certified copies of vital records shall provide certified copies of vital records, except those described in subsections (d), (e), (f), and (g) of this section, only to the following:

(1) A person requesting a copy of the person's own vital records or that of the person's spouse, sibling, direct ancestor or descendant, or stepparent or stepchild;

(2) A person seeking information for a legal determination of personal or property rights; or

(3) An authorized agent, attorney or legal representative of a person described above.

(c1) A funeral director or funeral service licensee shall be entitled upon request to a certified copy of a death certificate.

(d) Copies, certified copies or abstracts of birth certificates of adopted persons shall be provided in accordance with G.S. 48-9-107.

(e) Copies or abstracts of the health and medical information contained on birth certificates shall be provided only to a person requesting a copy of the health and medical information contained on the person's own birth certificate, a person authorized by that person, or a person who will use the information for medical research purposes. Copies of or abstracts from any computer or microform database which contains individual-specific health or medical birth data, whether the database is maintained by the Department, a local health department, or any other public official, shall be provided only to an individual requesting his or her own data, a person authorized by that individual, or a person who will use the information for medical research purposes. The State Registrar shall adopt rules providing for the use of this information for medical research purposes. The rules shall, at a minimum, require a written description of the proposed use of the data, including protocols for protecting confidentiality of the data.

(f) Copies, certified copies or abstracts of new birth certificates issued to persons in the federal witness protection program shall be provided only to a person requesting a copy of the person's own birth certificate and that person's supervising federal marshall.

(g) No copies, certified copies or abstracts of vital records shall be provided to a person purporting to request copies, certified copies or abstracts of that person's own vital records upon determination that the person whose vital records are being requested is deceased.

(h) A certified copy issued under the provisions of this section shall have the same evidentiary value as the original and shall be prima facie evidence of the facts stated in the document. The State Registrar may appoint agents who shall have the authority to issue certified copies under a facsimile signature of the State Registrar. These copies shall have the same evidentiary value as those issued by the State Registrar.

(i) Fees for issuing any copy of a vital record or for conducting a search of the files when no copy is made shall be as established in G.S. 130A-93.1 and G.S. 161-10.

(j) No person shall prepare or issue any certificate which purports to be an official certified copy of a vital record except as authorized in this Article or the rules. (1983, c. 891, s. 2; 1985, c. 325, s. 1; 1991, c. 343, s. 1; 1993, c. 146, s. 3; 1995, c. 457, s. 7; 1997-242, s. 1.)

CASE NOTES

The purpose of former G.S. 130-166 appeared to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death. State v. Hamilton, 16 N.C. App. 330, 192 S.E.2d 24 (1972); Spillman v. Forsyth Mem. Hosp., 30 N.C. App. 406, 227 S.E.2d 292 (1976), decided under former statutory provisions.

The death certificate, when properly certified, would be prima facie evidence of the cause of death. State v. Hamilton, 16 N.C. App. 330, 192 S.E.2d 24 (1972), decided under former statutory provisions.

While certified copies of records are admitted in evidence, the originals are not thereby made incompetent. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978), decided under former statutory provisions.

Admission of Death Certificate in Criminal Proceedings. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial were violated by the admission in evidence of hearsay and conclusory statement in victim's death certificate. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972), decided under former statutory provisions.

Statements Regarding Insured's Suicide Properly Excluded. — In case brought by widow of insured to recover under life insurance policy, statements listing suicide as the cause of death in the medical examiner's report were properly excluded at trial. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

In case brought by widow of insured to recover under life insurance policy, coroner's statement on death certificate that the gunshot wound killing the insured was intentionally self-inflicted was not based on personal knowledge of the events which took place and could only be described as hearsay and conclusory. The admission of such a statement would thwart the fairness of the trial and in essence shift the burden of proof on the issue of the cause of death from defendant to plaintiff. Therefore, the exclusion of this statement on the death certificate was proper. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

§ 130A-93.1. Fees for vital records copies or search; automation fund.

(a) The State Registrar shall collect, process, and utilize fees for services as follows:

(1) A fee not to exceed fifteen dollars ($15.00) shall be charged for issuing any copy of a vital record or for conducting a routine search of the files for the record when no copy is made. When certificates are issued or searches conducted by local agencies using databases maintained by the State Registrar, the local agency shall charge this fee and shall forward five dollars ($5.00) of this fee to the State Registrar for purposes established in subsection (b) of this section.

(2) A fee not to exceed fifteen dollars ($15.00) shall be charged in addition to the fee charged under subdivision (1) of this subsection and to all shipping and commercial charges when expedited service is specifically requested.

(2a) The fee for a copy of a computer or microform database shall not exceed the cost to the agency of making and providing the copy.

(3) Except as provided in subsection (b) of this section, fees collected under this subsection shall be used by the Department for public health purposes.

(b) The Vital Records Automation Account is established as a nonreverting account within the Department. Five dollars ($5.00) of each fee collected pursuant to subdivision (a)(1) shall be credited to this Account. The Department shall use the revenue in the Account to fully automate and maintain the vital records system. When funds sufficient to fully automate and maintain the system have accumulated in the Account, fees shall no longer be credited to the Account but shall be used as specified in subdivision (a)(3) of this section. (1991, c. 343, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 5; 1997-242, s. 2; 2002-126, s. 29A.18(a).)

§ 130A-94. Local registrar.

The local health director shall serve, ex officio, as the local registrar of each county within the jurisdiction of the local health department. (1983, c. 891, s. 2.)

§ 130A-95. Control of local registrar.

The State Registrar shall direct, control and supervise the activities of local registrars. (1913, c. 109, s. 4; 1915, c. 20; C.S., ss. 7089, 7090; 1955, c. 951, s. 6; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1983, c. 891, s. 2; 1985, c. 462, s. 14.)

§ 130A-96. Appointment of deputy and sub-registrars.

(a) Each local registrar shall immediately upon appointment, appoint a deputy whose duty shall be to assist the local registrar and to act as local registrar in case of absence, illness, disability or removal of the local registrar. The deputy shall be designated in writing and be subject to all rules and statutes governing local registrars. The local registrar shall direct, control and supervise the activities of the deputy registrar and may remove a deputy registrar for cause.

(b) The local registrar may, when necessary and with the approval of the State Registrar, appoint one or more persons to act as sub-registrars. Sub-registrars shall be authorized to receive certificates and issue burial-transit permits in and for designated portions of the county. Each sub-registrar shall enter the date the certificate was received and shall forward all certificates to the local registrar within three days.

(c) The State Registrar shall direct, control and supervise sub-registrars and may remove a sub-registrar for cause. (1913, c. 109, s. 4; C.S., s. 7091; 1955, c. 951, s. 8; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1983, c. 891, s. 2.)

§ 130A-97. Duties of local registrars.

The local registrar shall:

(1) Administer and enforce provisions of this Article and the rules, and immediately report any violation to the State Registrar;

(2) Furnish certificate forms and instructions supplied by the State Registrar to persons who require them;

(3) Examine each certificate when submitted to determine if it has been completed in accordance with the provisions of this Article and the rules. If a certificate is incomplete or unsatisfactory, the responsible person shall be notified and required to furnish the necessary information. All birth and death certificates shall be typed or written legibly in permanent black, blue-black, or blue ink;

(4) Enter the date on which a certificate is received and sign as local registrar;

(5) Transmit to the register of deeds of the county a copy of each certificate registered within seven days of receipt of a birth or death certificate. The copy transmitted shall include the race of the father and mother if that information is contained on the State copy of the certificate of live birth. Copies transmitted may be on blanks furnished by the State Registrar or may be photocopies made in a manner approved by the register of deeds. The local registrar may also keep a copy of each certificate for no more than two years;

(6) On the fifth day of each month or more often, if requested, send to the State Registrar all original certificates registered during the preceding month; and

(7) Maintain records, make reports and perform other duties required by the State Registrar. (1913, c. 109, s. 18; 1915, c. 85, s. 2; c. 164, s. 2; C.S., s. 7109; Ex. Sess. 1920, c. 58, s. 1; 1931, c. 79; 1933, c. 9, s. 1; 1943, c. 673; 1949, c. 133; 1955, c. 951, ss. 20, 21; 1957, c. 1357, s. 1; 1963, c. 492, ss. 4, 8; 1969, c. 1031, s. 1; 1971, c. 444, s. 8; 1979, c. 95, s. 9; 1981, c. 554; 1983, c. 891, s. 2; 2003-60, s. 1.)

§ 130A-98. Pay of local registrars.

A local health department shall provide sufficient staff, funds and other resources necessary for the proper administration of the local vital records registration program. (1913, c. 109, s. 19; Ex. Sess. 1913, c. 15, s. 1; 1915, c. 85, s. 3; 1919, c. 210, s. 1; C.S., s 7110; Ex. Sess. 1920, c. 58, s. 2; 1949, c. 306; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1983, c. 891, s. 2.)

Local Modification to Former G.S. 130-65. — Moore: 1975, c. 422.

§ 130A-99. Register of deeds to preserve copies of birth and death records.

(a) The register of deeds of each county shall file and preserve the copies of birth and death certificates furnished by the local registrar under the provisions of G.S. 130A-97, and shall make and keep a proper index of the certificates. These certificates shall be open to inspection and examination. Copies or abstracts of these certificates shall be provided to any person upon request. Certified copies of these certificates shall be provided only to those persons described in G.S. 130A-93(c).

(b) The register of deeds may remove from the records and destroy copies of birth or death certificates for persons born or dying in counties other than the county in which the office of the register of deeds is located, only after confirming that copies of the birth or death certificates removed and destroyed are maintained by the State Registrar or North Carolina State Archives. (1957, c. 1357, s. 1; 1969, c. 80, s. 3; c. 1031, s. 1; 1983, c. 891, s. 2; 1997-309, s. 11.)

Editor's Note. — Session Laws 1997-309, s. 15, provides in part that the removal and destruction by a register of deeds of any out-of-county birth certificates prior to the effective date of that act is valid, and the register of deeds is not in violation of G.S. 121-5 or G.S. 132-3.

§ 130A-100. Register of deeds may perform notarial acts.

(a) The register of deeds is authorized to take acknowledgments, administer oaths and affirmations and to perform all other notarial acts necessary for the registration or issuance of certificates relating to births, deaths or marriages. The register of deeds shall be entitled to a fee as prescribed in G.S. 161-10.

(b) All acknowledgments taken, affirmations or oaths administered or other notarial acts performed by the register of deeds relating to the registration of certificates of births, deaths or marriages prior to June 16, 1959, are validated. (1945, c. 100; 1957, c. 1357, s. 1; 1959, c. 986; 1969, c. 80, s. 9; c. 1031, s. 1; 1983, c. 891, s. 2.)

§ 130A-101. Birth registration.

(a) A certificate of birth for each live birth, regardless of the gestation period, which occurs in this State shall be filed with the local registrar of the county in which the birth occurs within 10 days after the birth and shall be registered by the registrar if it has been completed and filed in accordance with this Article and the rules.

(b) When a birth occurs in a hospital or other medical facility, the person in charge of the facility shall obtain the personal data, prepare the certificate, secure the signatures required by the certificate and file it with the local registrar within five days after the birth. The physician or other person in attendance shall provide the medical information required by the certificate.

(c) When a birth occurs outside a hospital or other medical facility, the certificate shall be prepared and filed by one of the following in the indicated order of priority:

(1) The physician in attendance at or immediately after the birth, or in the absence of such a person;
(2) Any other person in attendance at or immediately after the birth, or in the absence of such a person;
(3) The father, the mother or, in the absence or inability of the father and the mother, the person in charge of the premises where the birth occurred.

(d) When a birth occurs on a moving conveyance and the child is first moved from the conveyance in this State, the birth shall be registered in the county where the child is first removed from the conveyance, and that place shall be considered the place of birth.

(e) If the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband shall be entered on the certificate as the father of the child, unless paternity has been otherwise determined by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered. The surname of the child shall be the same as that of the husband, except that upon agreement of the husband and mother, or upon agreement of the mother and father if paternity has been otherwise determined, any surname may be chosen.

(f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity which contains the following:

(1) A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that the father is the child's natural father;
(2) A sworn statement by the father declaring that he believes he is the natural father of the child;
(3) Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and
(4) The social security numbers of both parents.

The State Registrar, in consultation with the Child Support Enforcement Section of the Division of Social Services, shall develop and disseminate a form affidavit for use in compliance with this section, together with an information sheet that contains all the information required to be disclosed by subdivision (3) of this subsection.

Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth certificate, subject to the declaring father's right to rescind under G.S. 110-132. The executed affidavit shall be filed with the registrar along with the birth certificate. In the event paternity is properly placed at issue, a certified copy of the affidavit shall be admissible in any action to establish paternity. The surname of the child shall be determined by the mother, except if the father's name is entered on the certificate, the mother and father shall agree upon the child's surname. If there is no agreement, the child's surname shall be the same as that of the mother.

The execution and filing of this affidavit with the registrar does not affect rights of inheritance unless the affidavit is also filed with the clerk of court in accordance with G.S. 29-19(b)(2).

(g) Each parent shall provide his or her social security number to the person responsible for preparing and filing the certificate of birth. (1913, c. 109, s. 13; 1915, c. 85, s. 1; C.S., s. 7010; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1979, c. 95, s. 4; c. 417; 1983, c. 891, s. 2; 1989, c. 199, ss. 1, 2; 1989 (Reg. Sess., 1990), c. 1004, s. 6; 1993, c. 333, s. 1; 1995, c. 428, s. 1; 1997-433, s. 4.12; 1998-17, s. 1; 2005-389, s. 4.)

Legal Periodicals. — For article, "'We Are Family': Valuing Associationalism in Disputes Over Children's Surnames," see 75 N.C.L. Rev. 1625 (1997).

CASE NOTES

As to the unconstitutionality of former G.S. 130-50(e) insofar as it precluded parents from recording the surnames of their choice on the birth certificates of their children, see O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981).

Exclusion of Birth Certificate in Paternity Action Held Proper. — In paternity action, trial court did not err by excluding the child's birth certificate in which the name of the father was left blank. The absence of a named father on the birth certificate had little probative value and was misleading because under subsection (f) of this section the name of the father of an illegitimate child may not be entered on the child's birth certificate without the father's sworn consent. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

Unilateral Petition for Name Change Disallowed After Birth Certificate Entry. — Where unmarried parents executed an Affidavit of Paternity and entered respondent's name on the birth certificate as the father, court held that there was no authority, statutory or decisional, permitting petitioner to unilaterally change the name of her son, born out of wedlock and not yet legitimated, absent the father's consent. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999), distinquishing In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

Inquiry into Child's Best Interests Not Appropriate. — The fact that the General Assembly specifically required a "best interests of the child" inquiry in contexts such as termination of parental rights, child custody and placement, parental visitation rights, and even in the change in surname on a birth certificate following legitimization, yet failed to require such inquiry in connection with name changes under G.S. 101-2 and subsection (f) of this section, was taken as clear evidence of its intent that no such inquiry was required in these contexts. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999).

Cited in In re Estate of Morris, 123 N.C. App. 264, 472 S.E.2d 786 (1996).

OPINIONS OF ATTORNEY GENERAL

Compliance with former G.S. 130-50(f) was not sufficient, standing alone, to establish paternity of an illegitimate child for the purpose of qualifying for Aid to Families with Dependent Children. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Dep't of Human Resources, 50 N.C.A.G. 5 (1980).

§ 130A-102. Contents of birth certificate.

The certificate of birth shall contain those items recommended by the federal agency responsible for national vital statistics, except as amended or changed by the State Registrar. Medical information contained in a birth certificate shall not be public records open to inspection. (1913, c. 109, s. 14; C.S., s. 7102; 1949, c. 161, s. 2; 1955, c. 951, s. 15; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1979, c. 95, s. 7; 1983, c. 891, s. 2.)

CASE NOTES

Change of Name of Illegitimate Child. — A third person having care of an illegitimate child can petition to have the name of the child changed with only the consent of the child's natural mother. Where the natural mother petitions to change the name of her illegitimate child, the consent of no other person is logically required, as no other person has any "rights" inherent in that child's name. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973), decided under former statutory provisions.

§ 130A-103. Registration of birth certificates more than five days and less than one year after birth.

Any birth may be registered more than five days and less than one year after birth in the same manner as births are registered under this Article within five days of birth. The registration shall have the effect as if the registration had occurred within five days of birth. The registration however, shall not relieve any person of criminal liability for the failure to register the birth within five days of birth as required by G.S. 130A-101. (1941, c. 126; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1979, c. 95, s. 5; 1983, c. 891, s. 2.)

§ 130A-104. Registration of birth one year or more after birth.

(a) When the birth of a person born in this State has not been registered within one year after birth, a delayed certificate may be filed with the register of deeds in the county in which the birth occurred. An applicant for a delayed certificate must submit the minimum documentation prescribed by the State Registrar.

(b) A certificate of birth registered one year or more after the date of the birth shall be marked "delayed" and show the date of the delayed registration. A summary statement of evidence submitted in support of the delayed registration shall be endorsed on the certificate. The register of deeds shall forward the original and a duplicate to the State Registrar for final approval. If the certificate complies with the rules and has not been previously registered, the State Registrar shall file the original and return the duplicate to the register of deeds for recording.

(c) When an applicant does not submit the minimum documentation required or when the State Registrar finds reason to question the validity or adequacy of the certificate or documentary evidence, the State Registrar shall not register the delayed certificate and shall advise the applicant of the reasons for this action. If the deficiencies are not corrected, the applicant shall be advised of the right to an administrative hearing and of the availability of a judicial determination under G.S. 130A-106.

(d) Delayed certificates shall have the same evidentiary value as those registered within five days. (1941, c. 126; 1957, c. 1357, s. 1; 1969, c. 80, s. 8; c. 1031, s. 1; 1973, c. 476, s. 128; 1979, c. 95, s. 6; 1983, c. 891, s. 2.)

§ 130A-105. Validation of irregular registration of birth certificates.

The registration and filing with the State Registrar prior to April 1, 1941, of the birth certificate of a person whose birth was not registered within five days of birth is validated. All copies of birth certificates filed prior to April 9, 1941, properly certified by the State Registrar, shall have the same evidentiary value as those registered within five days. (1941, c. 126; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-106. Establishing fact of birth by persons without certificates.

(a) A person born in this State not having a recorded certificate of birth, may file a verified petition with the clerk of the superior court in the county of the petitioner's legal residence or place of birth, setting forth the date, place of birth and parentage, and petitioning the clerk to hear evidence, and to find and adjudge the date, place and parentage of the birth of the petitioner. Upon the filing of a petition, the clerk shall set a hearing date, and shall conduct the proceeding in the same manner as other special proceedings. At the time set for the hearing, the petitioner shall present evidence to establish the facts of birth. If the evidence offered satisfies the court, the court shall enter judgment establishing the date, place of birth and parentage of the petitioner, and record it in the record of special proceedings. The clerk shall certify the judgment to the State Registrar who shall keep a record of the judgment. A copy shall be certified to the register of deeds of the county in which the petitioner was born.

(b) Repealed by Session Laws 2007-323, s. 30.10(f), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date.

(c) The record of birth established under this section, when recorded, shall have the same evidentiary value as other records covered by this Article. (1941, c. 122; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 2007-323, s. 30.10(f).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.10(f), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date, deleted subsection (b), which read: "The clerk may charge a fee not to exceed two dollars ($2.00) for services provided under this section."

§ 130A-107. Establishing facts relating to a birth of unknown parentage; certificate of identification.

(a) A person of unknown parentage whose place and date of birth are unknown may file a verified petition with the clerk of the superior court in the county where the petitioner was abandoned. The petition shall set forth the facts concerning abandonment, the name, date and place of birth of petitioner and the names of any persons acting in loco parentis to the petitioner.

(b) The clerk shall find facts and, if there is insufficient evidence to establish the place of birth, it shall be conclusively presumed that the person was born in the county of abandonment. The clerk shall enter and record judgment in the record of special proceedings. The clerk shall certify the judgment to the State Registrar who shall keep a record of the judgment. A copy shall be certified to the register of deeds of the county of abandonment.

(c) A certificate of identification for a person of unknown parentage shall be filed by the clerk with the local registrar of vital statistics of the district in which the person was found.

(d) Repealed by Session Laws 2007-323, s. 30.10(g), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date. (1959, c. 492; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 2007-323, s. 30.10(g).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.10(g), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date, deleted subsection (d), which read: "The clerk may charge a fee not to exceed two dollars ($2.00) for services provided under this section."

§ 130A-108. Certificate of identification for individual of foreign birth.

(a) In the case of an adopted individual born in a foreign country and residing in this State at the time of application, the State Registrar shall, upon the presentation of a certified copy of the original birth certificate from the country of birth and a certified copy of the final order of adoption signed by the clerk of court or other appropriate official, prepare a certificate of identification for the individual. The certificate shall contain the same information required by G.S. 48-9-107(a) for individuals adopted in this State, except that the country of birth shall be specified in lieu of the state of birth.

(b) In the case of an adopted individual born in a foreign country and readopted in this State, the State Registrar shall, upon receipt of a report of that adoption from the Division of Social Services pursuant to G.S. 48-9-102(f), prepare a certificate of identification for that individual. The certificate shall contain the same information required by G.S. 48-9-107(a) for individuals adopted in this State, except the country of birth shall be specified in lieu of the state of birth. (1949, c. 160, s. 2; 1955, c. 951, s. 16; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1983, c. 891, s. 2; 1995, c. 457, s. 8; 1997-215, s. 13; 2001-208, s. 13; 2001-487, s. 101.)

§ 130A-109. Birth certificate as evidence.

Certified copies of birth certificates shall be accepted by public school authorities in this State as prima facie evidence of the age of children registering for school attendance, and no other proof shall be required. In addition, certified copies of birth certificates shall be required by all factory inspectors and employers of youthful labor, as prima facie proof of age, and no other proof shall be required. However, when it is not possible to secure a certified copy of a birth certificate, school authorities, factory inspectors and employers may accept as secondary proof of age any competent evidence by which the age of persons is usually established. (1913, c. 109, s. 17; C.S., s. 7107; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1983, c. 891, s. 2.)

§ 130A-110. Registration of marriage certificates.

(a) On or before the fifteenth day of the month, the register of deeds shall transmit to the State Registrar a record of each marriage ceremony performed during the preceding calendar month for which a license was issued by the register of deeds. The State Registrar shall prescribe a form containing the information required by G.S. 51-16 and additional information to conform with the requirements of the federal agency responsible for national vital statistics. The form shall be the official form of a marriage license, certificate of marriage and application for marriage license.

(b) Each form signed and issued by the register of deeds, assistant register of deeds or deputy register of deeds shall constitute an original or a duplicate original. Upon request, the State Registrar shall furnish a true copy of the marriage registration. The copy shall have the same evidentiary value as the original.

(c) The register of deeds shall provide copies or abstracts of marriage certificates to any person upon request. Certified copies of these certificates shall be provided only to those persons described in G.S. 130A-93(c).

(d) Marriage certificates maintained by the local register of deeds shall be open to inspection and examination. (1961, c. 862; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1977, c. 1110, s. 3; 1983, c. 891, s. 2; 1985, c. 325, s. 2; 2001-62, s. 15; 2001-487, s. 83.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

§ 130A-111. Registration of divorces and annulments.

For each divorce and annulment of marriage granted by a court of competent jurisdiction in this State, a report shall be prepared and filed by the clerk of court with the State Registrar. On or before the fifteenth day of each month, the clerk shall forward to the State Registrar the report of each divorce and annulment granted during the preceding calendar month. (1957, c. 983; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1977, c. 1110, s. 2; 1983, c. 891, s. 2; 1985, c. 325, s. 3.)

§ 130A-112. Notification of death.

A funeral director or person acting as such who first assumes custody of a dead body or fetus of 20 completed weeks gestation or more shall submit a notification of death to the local registrar in the county where death occurred, within 24 hours of taking custody of the body or fetus. The notification of death shall identify the attending physician responsible for medical certification, except that for deaths under the jurisdiction of the medical examiner, the notification shall identify the medical examiner and certify that the medical examiner has released the body to a funeral director or person acting as such for final disposition. (1913, c. 109, s. 5; 1915, c. 164, s. 1; C.S., s. 7092; 1955, c. 951, s. 9; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 873, s. 1; 1983, c. 891, s. 2.)

§ 130A-113. Permits for burial-transit, authorization for cremation and disinterment-reinterment.

(a) The funeral director or person acting as such who first assumes custody of a dead body or fetus which is under the jurisdiction of the medical examiner shall obtain a burial-transit permit signed by the medical examiner prior to final disposition or removal from the State and within five days after death.

(b) A dead body shall not be cremated or buried at sea unless the provisions of G.S. 130A-388 are met.

(c) A permit for disinterment-reinterment shall be required prior to disinterment of a dead body or fetus except as otherwise authorized by law or rule. The permit shall be issued by the local registrar to a funeral director, embalmer or other person acting as such upon proper application.

(d) No dead body or fetus shall be brought into this State unless accompanied by a burial-transit or disposal permit issued under the law of the state in which death or disinterment occurred. The permit shall be final authority for final disposition of the body or fetus in this State.

(e) The local registrar shall issue a burial-transit permit for the removal of a dead body or fetus from this State if the requirements of G.S. 130A-112 are met and that the death is not under the jurisdiction of the medical examiner. (1973, c. 873, s. 2; 1977, c. 163, s. 2; 1983, c. 891, s. 2.)

§ 130A-114. Fetal death registration.

(a) Each spontaneous fetal death occurring in the State of 20 completed weeks gestation or more, as calculated from the first day of the last normal menstrual period until the day of delivery, shall be reported within 10 days after delivery to the local registrar of the county in which the delivery occurred. The report shall be made on a form prescribed and furnished by the State Registrar.

(b) When fetal death occurs in a hospital or other medical facility, the person in charge of the facility shall obtain the cause of fetal death and other required medical information over the signature of the attending physician, and shall prepare and file the report with the local registrar.

(c) When a fetal death occurs outside of a hospital or other medical facility, the physician in attendance at or immediately after the delivery shall prepare and file the report. When a fetal death is attended by a person authorized to attend childbirth, the supervising physician shall prepare and file the report. Fetal deaths attended by lay midwives and all other persons shall be treated as deaths without medical attendance as provided for in G.S. 130A-115 and the medical examiner shall prepare and file the report. (1913, c. 109, s. 6; C.S., s. 7093; 1933, c. 9, s. 2; 1951, c. 1091, s. 1; 1955, c. 951, s. 10; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 873, s. 3; 1979, c. 95, s. 1; 1983, c. 891, s. 2; 1989, c. 199, s. 3.)

§ 130A-115. Death registration.

(a) A death certificate for each death which occurs in this State shall be filed with the local registrar of the county in which the death occurred within five days after the death. If the place of death is unknown, a death certificate shall be filed within five days in the county where the dead body is found. If the death occurs in a moving conveyance, a death certificate shall be filed in the county in which the dead body was first removed from the conveyance.

(b) The funeral director or person acting as such who first assumes custody of a dead body shall file the death certificate with the local registrar. The personal data shall be obtained from the next of kin or the best qualified person or source available. The funeral director or person acting as such is responsible for obtaining the medical certification of the cause of death, stating facts relative to the date and place of burial, and filing the death certificate with the local registrar within five days of the death.

(c) The medical certification shall be completed and signed by the physician in charge of the patient's care for the illness or condition which resulted in death, except when the death falls within the circumstances described in G.S. 130A-383. In the absence of the physician or with the physician's approval, the certificate may be completed and signed by an associate physician, the chief medical officer of the hospital or facility in which the death occurred or a physician who performed an autopsy upon the decedent under the following circumstances: the individual has access to the medical history of the deceased; the individual has viewed the deceased at or after death; and the death is due to natural causes. When specifically approved by the State Registrar, an electronic signature or facsimile signature of the physician shall be acceptable. As used in this section, the term electronic signature has the same meaning as applies in G.S. 66-58.2. The physician shall state the cause of death on the certificate in definite and precise terms. A certificate containing any indefinite terms or denoting only symptoms of disease or conditions resulting from disease as defined by the State Registrar, shall be returned to the person making the medical certification for correction and more definite statement.

(d) The physician or medical examiner making the medical certification as to the cause of death shall complete the medical certification no more than three days after death. The physician or medical examiner may, in appropriate cases, designate the cause of death as unknown pending an autopsy or upon some other reasonable cause for delay, but shall send the supplementary information to the local registrar as soon as it is obtained.

(e) In the case of death or fetal death without medical attendance, it shall be the duty of the funeral director or person acting as such and any other person having knowledge of the death to notify the local medical examiner of the death. The body shall not be disposed of or removed without the permission of the medical examiner. If there is no county medical examiner, the Chief Medical Examiner shall be notified. (1913, c. 109, ss. 7, 9; C.S., ss. 7094, 7096; 1949, c. 161, s. 1; 1955, c. 951, ss. 11, 12; 1957, c. 1357, s. 1; 1963, c. 492, ss. 1, 2, 4; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; c. 873, s. 5; 1979, c. 95, ss. 2, 3; 1981, c. 187, s. 1; 1983, c. 891, s. 2; 1999-247, s. 1.)

§ 130A-116. Contents of death certificate.

The certificate of death shall contain those items prescribed and specified on the standard certificate of death as prepared by the federal agency responsible for national vital statistics. The State Registrar may require additional information. (1913, c. 109, s. 7; C.S., s. 7094; 1949, c. 161, s. 1; 1955, c. 951, s. 11; 1957, c. 1357, s. 1; 1963, c. 492, ss. 1, 4; 1969, c. 1031, s. 1; 1983, c. 891, s. 2.)

§ 130A-117. Persons required to keep records and provide information.

(a) All persons in charge of hospitals or other institutions, public or private, to which persons resort for confinement or treatment of diseases or to which persons are committed by process of law, shall make a record of personal data concerning each person admitted or confined to the institution. The record shall include information required for the certificates of birth and death and the reports of spontaneous fetal death required by this Article. The record shall be made at the time of admission from information provided by the person being admitted or confined. When this information cannot be obtained from this person, it shall be obtained from relatives or other knowledgeable persons.

(b) When a dead body or dead fetus of 20 weeks gestation or more is released or disposed of by an institution, the person in charge of the institution shall keep a record showing the name of the decedent, date of death, name and address of the person to whom the body or fetus is released and the date of removal from the institution. If final disposition is made by the institution, the date, place, and manner of disposition shall also be recorded.

(c) A funeral director, embalmer, or other person who removes from the place of death, transports or makes final disposition of a dead body or fetus, shall keep a record which shall identify the body, and information pertaining to the receipt, removal, delivery, burial, or cremation of the body, as may be required by the State Registrar. In addition, that person shall file a certificate or other report required by this Article or the rules of the Commission.

(d) Records maintained under this section shall be retained for a period of not less than three years and shall be made available for inspection by the State Registrar upon request. (1913, c. 109, s. 16; C.S., s. 7104; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1979, c. 95, s. 8; 1983, c. 891, s. 2.)

§ 130A-118. Amendment of birth and death certificates.

(a) After acceptance for registration by the State Registrar, no record made in accordance with this Article shall be altered or changed, except by a request for amendment. The State Registrar may adopt rules governing the form of these requests and the type and amount of proof required.

(b) A new certificate of birth shall be made by the State Registrar when:
- (1) Proof is submitted to the State Registrar that the previously unwed parents of a person have intermarried subsequent to the birth of the person;
- (2) Notification is received by the State Registrar from the clerk of a court of competent jurisdiction of a judgment, order or decree disclosing different or additional information relating to the parentage of a person;
- (3) Satisfactory proof is submitted to the State Registrar that there has been entered in a court of competent jurisdiction a judgment, order or decree disclosing different or additional information relating to the parentage of a person; or
- (4) A written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

(c) A new birth certificate issued under subsection (b) may reflect a change in surname when:
- (1) A child is legitimated by subsequent marriage and the parents agree and request that the child's surname be changed; or
- (2) A child is legitimated under G.S. 49-10 and the parents agree and request that the child's surname be changed, or the court orders a change in surname after determination that the change is in the best interests of the child.

(d) For the amendment of a certificate of birth or death after its acceptance for filing, or for the making of a new certificate of birth under this Article, the State Registrar shall be entitled to a fee not to exceed fifteen dollars ($15.00) to be paid by the applicant.

(e) When a new certificate of birth is made, the State Registrar shall substitute the new certificate for the certificate of birth then on file, and shall forward a copy of the new certificate to the register of deeds of the county of birth. The copy of the certificate of birth on file with the register of deeds, if any, shall be forwarded to the State Registrar within five days. The State Registrar shall place under seal the original certificate of birth, the copy forwarded by the register of deeds and all papers relating to the original certificate of birth. The seal shall not be broken except by an order of a court of competent jurisdiction. Thereafter, when a certified copy of the certificate of birth of the person is issued, it shall be a copy of the new certificate of birth, except when an order of a court of competent jurisdiction shall require the issuance of a copy of the original certificate of birth. (1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1975, c. 556; 1977, c. 1110, s. 4; 1983, c. 891, s. 2; 2002-126, s. 29A.18(b).)

CASE NOTES

Cited in In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999); In re Heilig, 372 Md. 692, 816 A.2d 68, 2003 Md. LEXIS 31 (2003).

§ 130A-119. Clerk of Court to furnish State Registrar with facts as to paternity of illegitimate children judicially determined.

Upon the entry of a judgment determining the paternity of an illegitimate child, the clerk of court of the county in which the judgment is entered shall notify the State Registrar in writing of the name of the person against whom the judgment has been entered, together with the other facts disclosed by the record as may assist in identifying the record of the birth of the child as it appears in the office of the State Registrar. If the judgment is modified or vacated, that fact shall be reported by the clerk to the State Registrar in the same manner. Upon receipt of the notification, the State Registrar shall record the information upon the birth certificate of the illegitimate child. (1941, c. 297, s. 1; 1955, c. 951, s. 19; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1971, c. 444, s. 5; 1983, c. 891, s. 2.)

Legal Periodicals. — For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

§ 130A-120. Certification of birth dates furnished to veterans' organizations.

Upon application by any veterans' organization in this State in connection with junior or youth baseball, the State Registrar shall furnish certification of dates of birth without the payment of the fees prescribed in this Article. (1931, c. 318; 1939, c. 353; 1945, c. 996; 1955, c. 951, s. 24; 1957, c. 1357, s. 1; 1969, c. 1031, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-121. List of deceased residents for county jury commission and Commissioner of Motor Vehicles.

(a) The State Registrar shall provide to each county's jury commission an alphabetical list of all residents of that county who have died in the two years prior to July 1 of each odd-numbered year, unless an annual jury list is being prepared under G.S. 9-2(a), in which case the list shall be of all residents of the county who have died in the year prior to July 1 of each year. The list shall include the name and address of each deceased resident and may be in either printed or computerized form, as requested by the jury commission.

(b) The State Registrar shall provide to the Commissioner of Motor Vehicles an alphabetical list of all residents of the State who have died in the two years prior to July 1 of each odd-numbered year, unless an annual jury list is being prepared under G.S. 9-2(a), in which case the list shall be of all residents of the State who have died in the year prior to July 1 of each year. The list shall include the name and address of each deceased resident and may be in either printed or computerized form, as requested by the Commissioner of Motor Vehicles. (2007-512, s. 2.)

Editor's Note. — Session Laws 2007-512, s. 6, made this section effective October 1, 2007.

§§ 130A-122 through 130A-123: Reserved for future codification purposes.

ARTICLE 5.

Maternal and Child Health and Women's Health.

Part 1. In General.

§ 130A-124. Department to establish maternal and child health program.

(a) The Department shall establish and administer a maternal and child health program for the delivery of preventive, diagnostic, therapeutic and habilitative health services to women of childbearing years, children and other persons who require these services. The program may include, but shall not be limited to, providing professional education and consultation, community coordination and direct care and counseling.

(b) The Commission shall adopt rules necessary to implement the program.

(c) Prior year refunds received by the Children's Special Health Services Program that are not encumbered or spent during a fiscal year shall not revert to the General Fund but shall remain in the Department for purchase of care and contracts in the Program. Funds appropriated for the purchase of care and contracts in the Program that are encumbered and not spent during a fiscal year shall not revert to the General Fund but shall remain in the Department for the purchase of care and contracts in the Program. (1983, c. 891, s. 2; 1993, c. 321, s. 275(a); 1997-172, s. 1; 1997-456, s. 54.)

Editor's Note. — Session Laws 1998-212, s. 12.43, provides in part that the Department of Health and Human Services may initiate a Healthy Mothers/Healthy Children Grant Program in up to six local health departments. The Department shall report on the implementation of the program no later than April 1, 1999.

Session Laws 1998-212, s. 1.1, provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5, contains a severability clause.

§ 130A-125. Screening of newborns for metabolic and other hereditary and congenital disorders.

(a) The Department shall establish and administer a Newborn Screening Program. The program shall include, but shall not be limited to:

(1) Development and distribution of educational materials regarding the availability and benefits of newborn screening.
(2) Provision of laboratory testing.
(3) Development of follow-up protocols to assure early treatment for identified children, and the provision of genetic counseling and support services for the families of identified children.
(4) Provision of necessary dietary treatment products or medications for identified children as medically indicated and when not otherwise available.
(5) For each newborn, provision of physiological screening in each ear for the presence of permanent hearing loss.

(b) The Commission shall adopt rules necessary to implement the Newborn Screening Program. The rules shall include, but shall not be limited to, the conditions for which screening shall be required, provided that screening shall not be required when the parents or the guardian of the infant object to such screening. If the parents or guardian object to the screening, the objection shall be presented in writing to the physician or other person responsible for administering the test, who shall place the written objection in the infant's medical record.

(b1) The Commission for Public Health shall adopt temporary and permanent rules to include newborn hearing screening in the Newborn Screening Program established under this section.

(c) A fee of fourteen dollars ($14.00) applies to a laboratory test performed by the State Public Health Laboratory performed pursuant to this section. Fees collected shall remain in the Department to be used to offset the cost of the Newborn Screening Program. (1991, c. 661, s. 1; 1991 (Reg. Sess., 1992), c.

1039, s. 6; 1998-131, s. 13; 2000-67, s. 11.31(a); 2005-276, s. 41.1(a); 2007-182, s. 2.)

Editor's Note. — Session Laws 1998-131, s. 13, was codified as subsection (b1) at the direction of the Revisor of Statutes.

Session Laws 2002-126, s. 29A.19, provides: "The Department of Health and Human Services shall charge a fee in the amount of ten dollars ($10.00) for a laboratory test performed by the State Public Health Laboratory under the Newborn Screening Program pursuant to G.S. 130A-125. If the actual cost to perform the test exceeds the amount of the fee authorized under this section, then the Department may increase the fee in accordance with its authority under G.S. 130A-125(c) to cover the cost."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, is a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 5.1(bb), provides: "The Department of Health and Human Services shall ensure that there will be follow-up testing in the Newborn Screening Program." For similar provisions, see Session Laws 2004-124, s. 5.1(b).

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (b1).

§ 130A-126. Rule-making authority for birth — three-year-old early intervention program.

The rule-making authority for the birth — three-year-old early intervention program through Part C of the Individuals with Disabilities Act (IDEA) is transferred from the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to the Commission for Public Health. (2005-276, s. 10.54A; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services."

Part 2. Perinatal Health Care.

§ 130A-127. Department to establish program.

(a) The Department shall establish and administer a perinatal health care program. The program may include, but shall not be limited to:

(1) Prenatal health care services including health education and identification of high-risk pregnancies;

(2) Prenatal, delivery and newborn health care services provided at hospitals participating at graduated levels of complexity; and

(3) Regionalized perinatal health care services including a plan for effective communication, consultation, referral and transportation links among hospitals, health departments, physicians, schools and other relevant community resources for mothers and infants at high risk for mortality and morbidity.

(b) The Commission shall adopt rules necessary to implement the program. (1973, c. 1240, s. 1; 1983, c. 891, s. 2.)

§ 130A-128: Repealed by Session Laws 1991, c. 518, s. 1.

Part 3. Sickle Cell.

§ 130A-129. Department to establish program.

The Department shall establish and administer a Sickle Cell Program. The Commission shall, after consultation with the Council on Sickle Cell Syndrome, adopt rules for the program that shall include, but not be limited to, programs for education, voluntary testing, counseling, and medical reimbursement services for sickle cell syndrome. "Sickle cell syndrome" includes sickle cell disease, sickle cell trait, sickle cell thalassemia and variants. (1987, c. 822, s. 2.)

§ 130A-130. Duties of local health departments.

Local health departments shall provide sickle cell syndrome testing and counseling at no cost to persons requesting these services. If an individual is found to have any aspect of sickle cell syndrome, the local health department shall inform the individual to that effect. The State Laboratory of Public Health shall, upon request, provide a person's sickle cell screening test results to any local health department or Sickle Cell Program contracting agency which has been requested to provide sickle cell services to that person. (1987, c. 822, s. 2.)

Part 3A. Council on Sickle Cell Syndrome.

§ 130A-131. Council on Sickle Cell Syndrome; appointment; expenses; terms.

A Council on Sickle Cell Syndrome is created. The Council shall consist of a chairperson and 14 other members appointed by the Governor. Members shall serve without compensation except for reimbursement for travel and expenses in pursuit of Council business. Except as provided in this subsection, Council members shall serve a term of three years. To achieve a staggered term structure, five members shall be appointed for a term of one year, five members for a term of two years, and five members for a term of three years. (1973, c. 570, s. 1; 1987, c. 822, s. 3; 1989, c. 727, s. 179.)

Editor's Note. — This Part 3A of Article 5 is former Part 18 of Article 3 of Chapter 143B, as rewritten and recodified by Session Laws 1989, c. 727, ss. 179 and 180. Where appropriate, the historical citations to the sections in the former Part have been added to corresponding sections in the Part as rewritten and recodified.

§ 130A-131.1. Council membership.

In making appointments, consideration shall be given to persons representing the following areas:

(1) Members of community agencies interested in sickle cell syndrome;
(2) State and local officials concerned with public health, social services and rehabilitation;
(3) Teachers and members of State and local school boards;
(4) Physicians in medical centers and physicians in community practice who are interested in sickle cell syndrome;
(5) Persons or relatives of persons with sickle cell disease. (1973, c. 570, s. 2; 1987, c. 822, s. 3; 1989, c. 727, s. 179.)

§ 130A-131.2. Council role.

The Council shall advise the Department and the Commission for Public Health on the needs of persons with sickle cell syndrome, and shall make recommendations to meet these needs. Such recommendations shall include but not be limited to recommendations for legislative action and for rules regarding the services of the Sickle Cell Program. The Council shall develop procedures to facilitate its operation. All clerical and other services required by the Council shall be furnished by the Department without budget limitations. (1973, c. 570, s. 3; 1987, c. 822, s. 3; 1989, c. 727, ss. 179, 180; 1997-443, s. 11A.76; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in the first sentence.

§§ 130A-131.3, 130A-131.4: Reserved for future codification purposes.

Part 4. Lead Poisoning in Children.

§ 130A-131.5. Commission to adopt rules.

(a) For the protection of the public health, the Commission shall adopt rules for the prevention and control of lead poisoning in children in accordance with this Part.

(b) Repealed by Session Laws 1998-209, s. 1, effective October 30, 1998. (1989, c. 333; c. 751, s. 15; 1991, c. 300, s. 1; 1997-506, s. 45; 1998-209, s. 1.)

§ 130A-131.6: Reserved for future codification purposes.

§ 130A-131.7. Definitions.

The following definitions apply in this Part:

(1) "Abatement" means undertaking any of the following measures to eliminate a lead-based paint hazard:
  a. Removing lead-based paint from a surface and repainting the surface.
  b. Removing a component, such as a windowsill, painted with lead-based paint and replacing the component.
  c. Enclosing a surface painted with lead-based paint with paneling, vinyl siding, or another approved material.
  d. Encapsulating a surface painted with lead-based paint with a sealant.

e. Any other measure approved by the Commission.

(2) "Child-occupied facility" means a building, or portion of a building, constructed before 1978, regularly visited by a child who is less than six years of age. Child-occupied facilities may include, but are not limited to, child care facilities, preschools, nurseries, kindergarten classrooms, schools, clinics, or treatment centers including the common areas, the grounds, any outbuildings, or other structures appurtenant to the facility.

(3) "Confirmed lead poisoning" means a blood lead concentration of 20 micrograms per deciliter or greater determined by the lower of two consecutive blood tests within a six-month period.

(4) "Department" means the Department of Environment and Natural Resources or its authorized agent.

(5) "Elevated blood lead level" means a blood lead concentration of 10 micrograms per deciliter or greater determined by the lower of two consecutive blood tests within a six-month period.

(6) "Lead-based paint hazard" means a condition that is likely to result in exposure to lead-based paint or to soil or dust that contains lead at a concentration that constitutes a lead poisoning hazard.

(7) "Lead poisoning hazard" means any of the following:

a. Any lead-based paint or other substance that contains lead in an amount equal to or greater than 1.0 milligrams lead per square centimeter as determined by X-ray fluorescence or five-tenths of a percent (0.5%) lead by weight as determined by chemical analysis: (i) on any readily accessible substance or chewable surface on which there is evidence of teeth marks or mouthing; or (ii) on any other deteriorated or otherwise damaged interior or exterior surface.

b. Any substance that contains lead intended for use by children less than six years of age in an amount equal to or greater than 0.06 percent (0.06%) lead by weight as determined by chemical analysis.

c. Any concentration of lead dust that is equal to or greater than 40 micrograms per square foot on floors or 250 micrograms per square foot on interior windowsills, vinyl miniblinds, bathtubs, kitchen sinks, or lavatories.

d. Any lead-based paint or other substance that contains lead on a friction or impact surface that is subject to abrasion, rubbing, binding, or damage by repeated contact and where the lead dust concentrations on the nearest horizontal surface underneath the friction or impact surface are equal to or greater than 40 micrograms per square foot on floors or 250 micrograms per square foot on interior windowsills.

e. Any concentration of lead in bare soil in play areas, gardens, pet sleeping areas, and areas within three feet of a residential housing unit or child-occupied facility equal to or greater than 400 parts per million. Any concentration of lead in bare soil in other locations of the yard equal to or greater than 1,200 parts per million.

f. Any ceramic ware generating equal to or greater than three micrograms of lead per milliliter of leaching solution for flatware or 0.5 micrograms of lead per milliliter for cups, mugs, and pitchers as determined by Method 973.32 of the Association of Official Analytical Chemists.

g. Any concentration of lead in drinking water equal to or greater than 15 parts per billion.

(8) "Lead-safe housing" is housing that was built since 1978 or has been tested by a person that has been certified to perform risk assessments and found to have no lead-based paint hazard within the meaning of the Residential Lead-Based Paint Reduction Act of 1992, 42 U.S.C. § 4851b(15).

(9) "Maintenance standard" means the following:

a. Using safe work practices, repairing and repainting areas of deteriorated paint inside a residential housing unit and for single-family and duplex residential dwelling built before 1950, repairing and repainting areas of deteriorated paint on interior and exterior surfaces;

b. Cleaning the interior of the unit to remove dust that constitutes a lead poisoning hazard;

c. Adjusting doors and windows to minimize friction or impact on surfaces;

d. Subject to the occupant's approval, appropriately cleaning any carpets;

e. Taking such steps as are necessary to ensure that all interior surfaces on which dust might collect are readily cleanable; and

f. Providing the occupant or occupants all information required to be provided under the Residential Lead-Based Paint Hazard Reduction Act of 1992, and amendments thereto.

(10) "Managing agent" means any person who has charge, care, or control of a building or part thereof in which dwelling units or rooming units are leased.

(11), (12) Repealed by Session Laws 2003-150, s. 1, effective July 1, 2003.

(13) "Readily accessible substance" means any substance that can be ingested or inhaled by a child less than six years of age. Readily accessible substances include deteriorated paint that is peeling, chipping, cracking, flaking, or blistering to the extent that the paint has separated from the substrate. Readily accessible substances also include soil, water, toys, vinyl miniblinds, bathtubs, lavatories, doors, door jambs, stairs, stair rails, windows, interior windowsills, baseboards, and paint that is chalking.

(14) "Regularly visits" means the presence at a residential housing unit or child-occupied facility on at least two different days within any week, provided that each day's visit lasts at least three hours and the combined weekly visits last at least six hours, and the combined annual visits last at least 60 hours.

(15) "Remediation" means the elimination or control of lead poisoning hazards by methods approved by the Department.

(16) "Residential housing unit" means a dwelling, dwelling unit, or other structure, all or part of which is designed or used for human habitation, including the common areas, the grounds, any outbuildings, or other structures appurtenant to the residential housing unit.

(17) "Supplemental address" means a residential housing unit or child-occupied facility where a child with confirmed lead poisoning regularly visits or attends. Supplemental address also means a residential housing unit or child-occupied facility where a child resided, regularly visited, or attended within the six months immediately preceding the determination of confirmed lead poisoning. (1997-443, ss. 11A.123, 15.30(b); 1998-209, s. 2; 2003-150, s. 1.)

§ 130A-131.8. Reports of blood levels in children.

All laboratories doing business in this State shall report to the Department all blood lead test results for children less than six years of age and for individuals whose ages are unknown at the time of testing. Reports shall be made within five working days after test completion on forms provided by the Department or on self-generated forms containing: the child's full name, date of birth, sex, race, address, and Medicaid number, if any; the name, address, and telephone number of the requesting health care provider; the name, address, and telephone number of the testing laboratory; the laboratory results, the specimen type — venous or capillary; the laboratory sample number, and the dates the sample was collected and analyzed. The reports may be made by electronic submissions. (1997-443, s. 15.30(b); 2003-150, s. 2.)

§ 130A-131.9. Examination and testing.

When the Department has a reasonable suspicion that a child less than six years of age has an elevated blood lead level or a confirmed lead poisoning, the Department may require that child to be examined and tested within 30 days. The Department shall require from the owner, managing agent, or tenant of the residential housing unit or child-occupied facility information on each child who resides in, regularly visits, or attends, or, who has within the past six months, resided in, regularly visited, or attended the unit or facility. The information required shall include each child's name and date of birth, the names and addresses of each child's parents, legal guardian, or full-time custodian. The owner, managing agent, or tenant shall submit the required information within 10 days of receipt of the request from the Department. (1997-443, s. 15.30(b); 2003-150, s. 3.)

§ 130A-131.9A. Investigation to identify lead poisoning hazards.

(a) When the Department learns of confirmed lead poisoning, the Department shall conduct an investigation to identify the lead poisoning hazards to children. The Department shall investigate the residential housing unit where the child with confirmed lead poisoning resides. The Department shall also investigate the supplemental addresses of the child who has confirmed lead poisoning.

(a1) When the Department learns of an elevated blood lead level, the Department shall, upon informed consent, investigate the residential housing unit where the child with the elevated blood level resides. When consent to investigate is denied, the child with the elevated blood lead level cannot be located, or the child's parent or guardian fails to respond, the Department shall document the denial of consent, inability to locate, or failure to respond.

(b) The Department shall also conduct an investigation when it reasonably suspects that a lead poisoning hazard to children exists in a residential housing unit or child-occupied facility occupied, regularly visited, or attended by a child less than six years of age.

(c) In conducting an investigation, the Department may take samples of surface materials, or other materials suspected of containing lead, for analysis and testing. If samples are taken, chemical determination of the lead content of the samples shall be by atomic absorption spectroscopy or equivalent methods approved by the Department. (1997-443, s. 15.30(b); 2003-150, s. 4.)

§ 130A-131.9B. Notification.

Upon determination that a lead poisoning hazard exists, the Department shall give written notice of the lead poisoning hazard to the owner or managing agent of the residential housing unit or child-occupied facility and to all persons residing in, attending, or regularly visiting the unit or facility. The written notice to the owner or managing agent shall include a list of possible methods of remediation. (1997-443, s. 15.30(b); 2003-150, s. 5.)

§ 130A-131.9C. Remediation.

(a) Upon determination that a child less than six years of age has a confirmed lead poisoning of 20 micrograms per deciliter or greater and that child resides in a residential housing unit containing lead poisoning hazards, the Department shall require remediation of the lead poisoning hazards. The Department shall also require remediation of the lead poisoning hazards identified at the supplemental addresses of a child less than six years of age with a confirmed lead poisoning of 20 micrograms per deciliter or greater.

(b) When remediation of lead poisoning hazards is required under subsection (a) of this section, the owner or managing agent shall submit a written remediation plan to the Department within 14 days of receipt of the lead poisoning hazard notification and shall obtain written approval of the plan before initiating remediation activities. The remediation plan shall comply with subsections (g), (h), and (i) of this section.

(c) If the remediation plan submitted fails to meet the requirements of this section, the Department shall issue an order requiring submission of a modified plan. The order shall indicate the modifications that shall be made to the remediation plan and the date that the plan as modified shall be submitted to the Department.

(d) If the owner or managing agent does not submit a remediation plan within 14 days, the Department shall issue an order requiring submission of a remediation plan within five days of receipt of the order.

(e) The owner or managing agent shall notify the Department and the occupants of the dates of remediation activities at least three days before commencement of the activities.

(f) Remediation of the lead poisoning hazards shall be completed within 60 days of the Department's approval of the remediation plan. If the remediation activities are not completed within 60 days, the Department shall issue an order requiring completion of the activities. An owner or managing agent may apply to the Department for an extension of the deadline. The Department may issue an order extending the deadline for 30 days upon proper written application by the owner or managing agent.

(g) All of the following methods of remediation of lead-based paint hazards are prohibited:

(1) Stripping paint on-site with methylene chloride-based solutions.
(2) Torch or flame burning.
(3) Heating paint with a heat gun above 1,100 degrees Fahrenheit.
(4) Covering with new paint or wallpaper unless all readily accessible lead-based paint has been removed.
(5) Uncontrolled abrasive blasting, machine sanding, or grinding, except when used with High Efficiency Particulate Air (HEPA) exhaust control that removes particles of 0.3 microns or larger from the air at ninety-nine and seven-tenths percent (99.7%) or greater efficiency.
(6) Uncontrolled waterblasting.
(7) Dry scraping, unless used in conjunction with heat guns, or around electrical outlets, or when treating no more than two square feet on interior surfaces, or no more than 20 square feet on exterior surfaces.

(h) All lead-containing waste and residue shall be removed and disposed of in accordance with applicable federal, State, and local laws and rules. Other substances containing lead that are intended for use by children less than six years of age and vinyl miniblinds that constitute a lead poisoning hazard shall be removed and disposed of in accordance with applicable federal, State, and local laws and rules.

(i) All remediation plans shall require that the lead poisoning hazards be reduced to the following levels:

(1) Fewer than 40 micrograms per square foot for lead dust on floors.
(2) Fewer than 250 micrograms per square foot for lead dust on interior windowsills, bathtubs, kitchen sinks, and lavatories.
(3) Fewer than 400 micrograms per square foot for lead dust on window troughs.
(4) Fewer than 400 parts per million for lead in bare soil in play areas, gardens, pet sleeping areas, and areas within three feet of the residential housing unit or child-occupied facility. Lead in bare soil in other locations of the yard shall be reduced to less than 1,200 parts per million.
(5) Fewer than 15 parts per billion for lead in drinking water.

(j) The Department shall verify by visual inspection that the approved remediation plan has been completed. The Department may also verify plan completion by residual lead dust monitoring and soil or drinking water lead level measurement.

(j1) Compliance with the maintenance standard satisfies the remediation requirements for confirmed lead poisoning cases identified on or after 1 October 1990 as long as all lead poisoning hazards identified on interior and exterior surfaces are addressed by remediation. Except for owner-occupied residential housing units, continued compliance shall be verified by means of an annual monitoring inspection conducted by the Department. For owner-occupied residential housing units, continued compliance shall be verified (i) by means of an annual monitoring inspection, (ii) by documentation that no child less than six years of age has resided in or regularly visited the residential housing unit within the past year, or (iii) by documentation that no child less than six years of age residing in or regularly visiting the unit has an elevated blood lead level.

(k) Removal of children from the residential housing unit or child-occupied facility shall not constitute remediation if the property continues to be used for a residential housing unit or child-occupied facility. The remediation requirements imposed in subsection (a) of this section apply so long as the property continues to be used as a residential housing unit or child-occupied facility. (1997-443, s. 15.30(b); 1998-209, s. 3; 2003-150, s. 6.)

§ 130A-131.9D. Effect of compliance with maintenance standard.

Any owner of a residential housing unit constructed prior to 1978 who is sued by a current or former occupant seeking damages for injuries allegedly arising from exposure to lead-based paint or lead-contaminated dust, shall not be deemed liable (i) for any injuries sustained by that occupant after the owner first complied with the maintenance standard defined under G.S. 130A-131.7 provided the owner has repeated the steps provided for in the maintenance standard annually for units in which children of less than six years of age have resided or regularly visited within the past year and obtained a certificate of compliance under G.S. 130A-131.9E annually during such occupancy; or (ii) if the owner is able to show by other documentation that compliance with the maintenance standard has been maintained during the period when the injuries were sustained; or (iii) if the owner is able to show that the unit was lead-safe housing containing no lead-based paint hazards during the period when the injuries were sustained. (1997-443, s. 15.30(b); 1998-209, s. 4.)

§ 130A-131.9E. Certificate of evidence of compliance.

An owner of a unit who has complied with the maintenance standard may apply annually to the Department for a certificate of compliance. Upon presentation of acceptable proof of compliance, the Department shall provide to the owner a certificate evidencing compliance. The Department may issue a certificate based solely on information provided by the owner and may revoke the certificate upon showing that any of the information is erroneous or inadequate, or upon finding that the unit is no longer in compliance with the maintenance standard. (1997-443, s. 15.30(b).)

§ 130A-131.9F. Discrimination in financing.

(a) No bank or financial institution in the business of lending money for the purchase, sale, construction, rehabilitation, improvement, or refinancing of real property of the lending of money secured by an interest in real property may refuse to make such loans merely because of the presence of lead-based paint on the residential real property or in the residential housing unit provided that the owner is in compliance with the maintenance standard and has obtained a certificate of compliance under G.S. 130A-131.9E annually.

(b) Nothing in this section shall (i) require a financial institution to extend a loan or otherwise provide financial assistance if it is clearly evident that health-related issues, other than those related to lead-based paint, made occupancy of the housing accommodation an imminent threat to the health or safety of the occupant, or (ii) be construed to preclude a financial institution from considering the fair market value of the property which will secure the proposed loan.

(c) Failure to meet the maintenance standard shall not be deemed a default under existing mortgages. (1997-443, s. 15.30(b).)

§ 130A-131.9G. Resident responsibilities.

In any residential housing unit occupied by a child less than six years of age who has an elevated blood lead level of 10 micrograms per deciliter or greater, the Department shall advise, in writing, the owner or managing agent and the child's parents or legal guardian of the importance of carrying out routine cleaning activities in the units they occupy, own, or manage. The cleaning activities shall include all of the following:

(1) Wiping clean all windowsills with a damp cloth or sponge at least weekly.
(2) Regularly washing all surfaces accessible to children.
(3) In the case of a leased residential housing unit, identifying any deteriorated paint in the unit and notifying the owner or managing agent of the conditions within 72 hours of discovery.
(4) Identifying and understanding potential lead poisoning hazards in the environment of each child less than six years of age in the unit (including toys, vinyl miniblinds, playground equipment, drinking water, soil, and painted surfaces), and taking steps to prevent children from ingesting lead such as encouraging children to wash their faces and hands frequently and especially after playing outdoors. (1997-443, s. 15.30(b); 2003-150, s. 7.)

§ 130A-131.9H. Application fees for certificates of compliance.

The Department shall collect an application fee of ten dollars ($10.00) for each certificate of compliance. Fee receipts shall be used to support the program that is developed to implement this Part. Fee receipts also may be used to provide for relocation and medical expenses incurred by children with confirmed lead poisoning. (1998-209, s. 5.)

Part 5. Disposition of Remains of Terminated Pregnancies.

§ 130A-131.10. Manner of disposition of remains of pregnancies.

(a) The Commission for Public Health shall adopt rules to ensure that all facilities authorized to terminate pregnancies, and all medical or research laboratories or facilities to which the remains of terminated pregnancies are sent by facilities authorized to terminate pregnancies, shall dispose of the remains in a manner limited to burial, cremation, or, except as prohibited by subsection (b) of this section, approved hospital type of incineration.

(b) A hospital or other medical facility or a medical or research laboratory or facility shall dispose of the remains of a recognizable fetus only by burial or cremation. The Commission shall adopt rules to implement this subsection.

(c) A hospital or other medical facility is relieved from the obligation to dispose of the remains in accordance with subsections (a) and (b) of this section if it sends the remains to a medical or research laboratory or facility.

(d) This section does not impose liability on a permitted medical waste treatment facility for a hospital's or other medical facility's violation of this section nor does it impose any additional duty on the treatment facility to inspect waste received from the hospital or medical facility to determine compliance with this section. (1989, c. 85; 1997-517, s. 4; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (a).

§§ 130A-131.11 through 130A-131.14: Reserved for future codification purposes.

Part 6. Teen Pregnancy Prevention.

§ 130A-131.15: Repealed by Session Laws 2001-424, s. 21.89(b), effective July 1, 2001.

Cross References. — For Teen Pregnancy Prevention Initiatives, see G.S. 130A-131.15A.

§ 130A-131.15A. Department to establish program.

(a) The Department shall establish and administer Teen Pregnancy Prevention Initiatives. The Department shall establish initiatives for primary prevention, secondary prevention, and special projects.

(b) The Commission shall adopt rules necessary to implement this section. The rules shall include a maximum annual funding level for initiatives and a requirement for local match.

(c) Initiatives shall be funded in accordance with selection criteria established by the Commission. In funding initiatives, the Department shall target counties with the highest teen pregnancy rates, increasingly higher rates, high rates within demographic subgroups, or greatest need for parenting programs. Grants shall be awarded on an annual basis.

(d) Initiatives shall be funded on a four-year funding cycle. The Department may end funding prior to the end of the four-year period if programmatic requirements and performance standards are not met. At the end of four years of funding, a local initiative shall be eligible to reapply for funding.

(e) Administrative costs in implementing this section shall not exceed ten percent (10%) of the total funds administered pursuant to this section.

(f) Programs are not required to provide a cash match for these funds; however, the Department may require an in-kind match.

(g) The Department shall periodically evaluate the effectiveness of teen pregnancy prevention programs. (2001-424, s. 21.89(c).)

Editor's Note. — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001'."

Session Laws 2001-424, s. 21.89(d), provides: "The Department of Health and Human Services shall administer the Adolescent Pregnancy Prevention Program, the Adolescent Parenting Program, and the TANF-funded pregnancy prevention projects pursuant to the provisions of G.S. 130A-131.15A."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Part 7. Birth Defects.

§ 130A-131.16. Birth defects monitoring program established; definitions.

(a) The Birth Defects Monitoring Program is established within the State Center for Health and Environmental Statistics. The Birth Defects Monitoring Program shall compile, tabulate, and publish information related to the incidence and prevention of birth defects.

(b) As used in this Part, unless the context clearly requires otherwise, the term:

(1) "Birth defect" means any physical, functional, or chemical abnormality present at birth that is of possible genetic or prenatal origin.

(2) "Program" means the Birth Defects Monitoring Program established under this Part.

(c) Physicians and persons in charge of licensed medical facilities shall, upon request, permit staff of the Program to examine, review, and obtain a copy of any medical record in their possession or under their control that pertains to a diagnosed or suspected birth defect, including the records of the mother.

(d) A physician or person in charge of a licensed medical facility who permits examination, review, or copying of medical records pursuant to this section shall be immune from civil or criminal liability that might otherwise be incurred or imposed for providing access to these medical records based upon invasion of privacy or breach of physician-patient confidentiality. (1995, c. 268, s. 1.)

§ 130A-131.17. Confidentiality of information; research.

(a) All information collected and analyzed by the Program pursuant to this Part shall be confidential insofar as the identity of the individual patient is concerned. This information shall not be considered public record open to inspection. Access to the information shall be limited to Program staff authorized by the Director of the State Center for Health and Environmental Statistics. The Director of the State Center for Health and Environmental Statistics may also authorize access to this information to persons engaged in demographic, epidemiological, or other similar scientific studies related to health. The Commission shall adopt rules that establish strict criteria for the use of monitoring Program information for scientific research. All persons given authorized access to Program information shall agree, in writing, to maintain confidentiality.

(b) All scientific research proposed to be conducted by persons other than authorized Program staff using the information from the Program, shall first be reviewed and approved by the Director of the State Center for Health and Environmental Statistics and an appropriate committee for the protection of human subjects which is approved by the United States Department of Health and Human Services pursuant to Part 46 of Title 45 of the Code of Federal Regulations. Satisfaction of the terms of the Commission's rules for data access shall entitle the researcher to obtain information from the Program and, if part of the research protocol, to contact case subjects.

(c) Whenever authorized Program staff propose a research protocol that includes contacting case subjects, the Director of the State Center for Health and Environmental Statistics shall submit a protocol describing the research to the State Health Director and to an appropriate committee for the protection of human subjects which is approved by the United States Department of Health and Human Services pursuant to Part 46 of Title 45 of the Code of Federal Regulations. If and when the protocol is approved by the committee and by the State Health Director pursuant to the rules of the Commission, then Program staff shall be entitled to complete the approved project and to contact case subjects.

(d) The Program shall maintain a record of all persons who are given access to the information in the system. The record shall include the following:

(1) The name of the person authorizing access;
(2) The name, title, and organizational affiliation of persons given access;
(3) The dates of access; and
(4) The specific purposes for which information is to be used.

The record required under this subsection shall be open to public inspection during normal operating hours.

(e) Nothing in this section prohibits the Program from publishing statistical compilations relating to birth defects that do not in any way identify individual patients. (1995, c. 268, s. 1.)

§§ **130A-131.18 through 130A-131.24:** Reserved for future codification purposes.

Part 8. Office of Women's Health.

§ 130A-131.25. Office of Women's Health established.

(a) There is established in the Department the Office of Women's Health. The purpose of the office is to expand the State's public health concerns and focus to include a comprehensive outlook on the overall health status of women. The primary goals of the Office shall be the prevention of disease and improvement in the quality of life for women over their entire lifespan. The Department shall develop strategies for achieving these goals, which shall include but not be limited to:

(1) Developing a strategic plan to improve public services and programs targeting women;
(2) Conducting policy analyses on specific issues related to women's health;
(3) Facilitating communication among the Department's programs and between the Department and external women's health groups and community-based organizations;

(4) Building public health awareness and capacity regarding women's health issues by providing a series of services including evaluation, recommendation, technical assistance, and training; and

(5) Developing initiatives for modification or expansion of women-oriented services with the intent of establishing meaningful public/private partnerships in the future.

(b) The Office shall study the feasibility of establishing initiatives for:

(1) Early intervention services for women infected with HIV; and

(2) Outreach, treatment, and follow-up services to women at high risk for contracting sexually transmitted diseases.

In conducting the study the Department shall take into consideration related services already in place in the Department and at the local level. (1997-172, s. 2.)

Editor's Note. — Session Laws 1997-172, s. 2, enacted this section as G.S. 130A-131.19. It has been redesignated as this section at the direction of the Revisor of Statutes.

§ 130A-132: Reserved for future codification purposes.

Article 6.

Communicable Diseases.

Part 1. In General.

§ 130A-133: Repealed by Session Laws 2002-179, s. 3, effective October 1, 2002.

§ 130A-134. Reportable diseases and conditions.

The Commission shall establish by rule a list of communicable diseases and communicable conditions to be reported. (1983, c. 891, s. 2; 1987, c. 782, s. 4.)

§ 130A-135. Physicians to report.

A physician licensed to practice medicine who has reason to suspect that a person about whom the physician has been consulted professionally has a communicable disease or communicable condition declared by the Commission to be reported, shall report information required by the Commission to the local health director of the county or district in which the physician is consulted. The Commission shall declare confirmed HIV infection to be a reportable communicable condition. (1893, c. 214, s. 11; Rev., s. 3448; 1917, c. 263, s. 7; C.S., s. 7151; 1921, c. 223, s. 1; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 782, s. 5; 1989, c. 698, s. 3.)

OPINIONS OF ATTORNEY GENERAL

Public Law 93-380 was inapplicable to reporting under former G.S. 130-81 by a college or university physician. See opinion of Attorney General to Mr. Rodney Hobbs, Division of Health Services, N.C. Department of Human Resources, 44 N.C.A.G. 163 (1974).

§ 130A-136. School principals and child care operators to report.

A principal of a school and an operator of a child care facility, as defined in G.S. 110-86(3), who has reason to suspect that a person within the school or child care facility has a communicable disease or communicable condition declared by the Commission to be reported, shall report information required by the Commission to the local health director of the county or district in which the school or facility is located. (1979, c. 192, s. 2; 1983, c. 891, s. 2; 1987, c. 782, s. 6; 1997-506, s. 46.)

§ 130A-137. Medical facilities may report.

A medical facility, in which there is a patient reasonably suspected of having a communicable disease or condition declared by the Commission to be reported, may report information specified by the Commission to the local health director of the county or district in which the facility is located. (1983, c. 891, s. 2; 1987, c. 782, s. 7.)

§ 130A-138. Operators of restaurants and other food or drink establishments to report.

An operator of a restaurant or other establishment where food or drink is prepared or served for pay, as defined in G.S. 130A-247(4) and (5), shall report information required by the Commission to the local health director of the county or district in which the restaurant or food establishment is located when the operator has reason to suspect an outbreak of food-borne illness in its customers or employees or when it has reason to suspect that a food handler at the establishment has a food-borne disease or food-borne condition required by the Commission to be reported. (1917, c. 263, s. 9; C.S., s. 7153; 1921, c. 223, s. 3; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1979, c. 192, s. 3; 1983, c. 891, s. 2; 1987, c. 782, s. 8.)

§ 130A-139. Persons in charge of laboratories to report.

A person in charge of a laboratory providing diagnostic service in this State shall report information required by the Commission to a public health agency specified by the Commission when the laboratory makes any of the following findings:

(1) Sputa, gastric contents, or other specimens which are smear positive for acid fast bacilli or culture positive for Mycobacterium tuberculosis;
(2) Urethral smears positive for Gram-negative intracellular diplococci or any culture positive for Neisseria gonorrhoeae;
(3) Positive serological tests for syphilis or positive darkfield examination;
(4) Any other positive test indicative of a communicable disease or communicable condition for which laboratory reporting is required by the Commission. (1981, c. 81, s. 1; 1983, c. 891, s. 2; 1987, c. 782, s. 9; 2001-28, s. 1.)

§ 130A-140. Local health directors to report.

A local health director shall report to the Department all cases of diseases or conditions or laboratory findings of residents of the jurisdiction of the local health department which are reported to the local health director pursuant to this Article. A local health director shall report all other cases and laboratory findings reported pursuant to this Article to the local health director of the county, district, or authority where the person with the reportable disease or condition or laboratory finding resides. (1919, c. 206, s. 2; C.S., s. 7192; 1957, c. 1357, s. 1; 1961, c. 753; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 782, s. 10; 1997-502, s. 10.)

§ 130A-141. Form, content and timing of reports.

The Commission shall adopt rules which establish the specific information to be submitted when making a report required by this Article, time limits for reporting, the form of the reports and to whom reports of laboratory findings are to be made. (1983, c. 891, s. 2; 1987, c. 782, s. 11.)

§ 130A-141.1. Temporary order to report.

(a) The State Health Director may issue a temporary order requiring health care providers to report symptoms, diseases, conditions, trends in use of health care services, or other health-related information when necessary to conduct a public health investigation or surveillance of an illness, condition, or symptoms that may indicate the existence of a communicable disease or condition that presents a danger to the public health. The order shall specify which health care providers must report, what information is to be reported, and the period of time for which reporting is required. The period of time for which reporting is required pursuant to a temporary order shall not exceed 90 days. The Commission may adopt rules to continue the reporting requirement when necessary to protect the public health.

(b) For the purposes of this section, the term "health care provider" has the same meaning as that term is defined in G.S. 130A-476(g). (2004-80, s. 5.)

§ 130A-142. Immunity of persons who report.

A person who makes a report pursuant to the provisions of this Article shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of making that report. (1983, c. 891, s. 2; 1987, c. 782, s. 12.)

§ 130A-143. Confidentiality of records.

All information and records, whether publicly or privately maintained, that identify a person who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential. This information shall not be released or made public except under the following circumstances:

(1) Release is made of specific medical or epidemiological information for statistical purposes in a way that no person can be identified;
(2) Release is made of all or part of the medical record with the written consent of the person or persons identified or their guardian;
(3) Release is made to health care personnel providing medical care to the patient;
(4) Release is necessary to protect the public health and is made as provided by the Commission in its rules regarding control measures for communicable diseases and conditions;
(5) Release is made pursuant to other provisions of this Article;
(6) Release is made pursuant to subpoena or court order. Upon request of the person identified in the record, the record shall be reviewed in camera. In the trial, the trial judge may, during the taking of testimony concerning such information, exclude from the courtroom

all persons except the officers of the court, the parties and those engaged in the trial of the case;

(7) Release is made by the Department or a local health department to a court or a law enforcement official for the purpose of enforcing this Article or Article 22 of this Chapter, or investigating a terrorist incident using nuclear, biological, or chemical agents. A law enforcement official who receives the information shall not disclose it further, except (i) when necessary to enforce this Article or Article 22 of this Chapter, or when necessary to conduct an investigation of a terrorist incident using nuclear, biological, or chemical agents, or (ii) when the Department or a local health department seeks the assistance of the law enforcement official in preventing or controlling the spread of the disease or condition and expressly authorizes the disclosure as necessary for that purpose;

(8) Release is made by the Department or a local health department to another federal, state or local public health agency for the purpose of preventing or controlling the spread of a communicable disease or communicable condition;

(9) Release is made by the Department for bona fide research purposes. The Commission shall adopt rules providing for the use of the information for research purposes;

(10) Release is made pursuant to G.S. 130A-144(b); or

(11) Release is made pursuant to any other provisions of law that specifically authorize or require the release of information or records related to AIDS. (1983, c. 891, s. 2; 1987, c. 782, s. 13; 2002-179, s. 7.)

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Hospital Policy of Identifying Potentially Infectious Patients. — Although this section does not mandate release of information that a person has the AIDS virus infection to health care providers, a doctor was bound by hospital policy of identifying patients as being potentially infectious and that policy is consistent with this section; therefore, the hospital's actions in disciplining the doctor for his failure to comply with the policy was not a wrongful, arbitrary, or capricious act. Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991).

Confidential HIV Testing Permissible. — As the statutory security provisions are adequate to protect against potential unlawful disclosure, the elimination of anonymous HIV testing in favor of confidential testing did not violate plaintiff's constitutional privacy rights. Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

§ 130A-144. Investigation and control measures.

(a) The local health director shall investigate, as required by the Commission, cases of communicable diseases and communicable conditions reported to the local health director pursuant to this Article.

(b) Physicians and persons in charge of medical facilities or laboratories shall, upon request and proper identification, permit a local health director or the State Health Director to examine, review, and obtain a copy of medical or other records in their possession or under their control which the State Health Director or a local health director determines pertain to the (i) diagnosis, treatment, or prevention of a communicable disease or communicable condition for a person infected, exposed, or reasonably suspected of being infected or exposed to such a disease or condition, or (ii) the investigation of a known or reasonably suspected outbreak of a communicable disease or communicable condition.

(c) A physician or a person in charge of a medical facility or laboratory who permits examination, review or copying of medical records pursuant to subsection (b) shall be immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of complying with a request made pursuant to subsection (b).

(d) The attending physician shall give control measures prescribed by the Commission to a patient with a communicable disease or communicable condition and to patients reasonably suspected of being infected or exposed to such a disease or condition. The physician shall also give control measures to other individuals as required by rules adopted by the Commission.

(e) The local health director shall ensure that control measures prescribed by the Commission have been given to prevent the spread of all reportable communicable diseases or communicable conditions and any other communicable disease or communicable condition that represents a significant threat to the public health. The local health department shall provide, at no cost to the patient, the examination and treatment for tuberculosis disease and infection and for sexually transmitted diseases designated by the Commission.

(f) All persons shall comply with control measures, including submission to examinations and tests, prescribed by the Commission subject to the limitations of G.S. 130A-148.

(g) The Commission shall adopt rules that prescribe control measures for communicable diseases and conditions subject to the limitations of G.S. 130A-148. Temporary rules prescribing control measures for communicable diseases and conditions shall be adopted pursuant to G.S. 150B-13.

(h) Anyone who assists in an inquiry or investigation conducted by the State Health Director for the purpose of evaluating the risk of transmission of HIV or Hepatitis B from an infected health care worker to patients, or who serves on an expert panel established by the State Health Director for that purpose, shall be immune from civil liability that otherwise might be incurred or imposed for any acts or omissions which result from such assistance or service, provided that the person acts in good faith and the acts or omissions do not amount to gross negligence, willful or wanton misconduct, or intentional wrongdoing. This qualified immunity does not apply to acts or omissions which occur with respect to the operation of a motor vehicle. Nothing in this subsection provides immunity from liability for a violation of G.S. 130A-143. (1893, c. 214, s. 16; Rev., s. 4459; 1909, c. 793, s. 8; C.S., s. 7158; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 782, s. 14; 1991, c. 225, s. 1; 1995, c. 228, s. 1; 2001-28, s. 2; 2004-80, s. 6.)

Editor's Note. — G.S. 150B-13, referred to in this section, was repealed by Session Laws 1991, c. 418, s. 5. As to rule making, see now G.S. 150B-18 et seq.

§ 130A-145. Quarantine and isolation authority.

(a) The State Health Director and a local health director are empowered to exercise quarantine and isolation authority. Quarantine and isolation authority shall be exercised only when and so long as the public health is endangered, all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists.

(b) No person other than a person authorized by the State Health Director or local health director shall enter quarantine or isolation premises. Nothing in this subsection shall be construed to restrict the access of authorized health care, law enforcement, or emergency medical services personnel to quarantine or isolation premises as necessary in conducting their duties.

(c) Before applying quarantine or isolation authority to livestock or poultry for the purpose of preventing the direct or indirect conveyance of an infectious agent to persons, the State Health Director or a local health director shall consult with the State Veterinarian in the Department of Agriculture and Consumer Services.

(d) When quarantine or isolation limits the freedom of movement of a person or animal or of access to a person or animal whose freedom of movement is limited, the period of limited freedom of movement or access shall not exceed 30 calendar days. Any person substantially affected by that limitation may institute in superior court in Wake County or in the county in which the limitation is imposed an action to review that limitation. The official who exercises the quarantine or isolation authority shall give the persons known by the official to be substantially affected by the limitation reasonable notice under the circumstances of the right to institute an action to review the limitation. If a person or a person's representative requests a hearing, the hearing shall be held within 72 hours of the filing of that request, excluding Saturdays and Sundays. The person substantially affected by that limitation is entitled to be represented by counsel of the person's own choice or if the person is indigent, the person shall be represented by counsel appointed in accordance with Article 36 of Chapter 7A of the General Statutes and the rules adopted by the Office of Indigent Defense Services. The court shall reduce or terminate the limitation unless it determines, by the preponderance of the evidence, that the limitation is reasonably necessary to prevent or limit the conveyance of a communicable disease or condition to others.

If the State Health Director or the local health director determines that a 30-calendar-day limitation on freedom of movement or access is not adequate to protect the public health, the State Health Director or local health director must institute in superior court in the county in which the limitation is imposed an action to obtain an order extending the period of limitation of freedom of movement or access. If the person substantially affected by the limitation has already instituted an action in superior court in Wake County, the State Health Director must institute the action in superior court in Wake County or as a counterclaim in the pending case. Except as provided below for persons with tuberculosis, the court shall continue the limitation for a period not to exceed 30 days if it determines, by the preponderance of the evidence, that the limitation is reasonably necessary to prevent or limit the conveyance of a communicable disease or condition to others. The court order shall specify the period of time the limitation is to be continued and shall provide for automatic termination of the order upon written determination by the State Health Director or local health director that the quarantine or isolation is no longer necessary to protect the public health. In addition, where the petitioner can prove by a preponderance of the evidence that quarantine or isolation was not or is no longer needed for protection of the public health, the person quarantined or isolated may move the trial court to reconsider its order extending quarantine or isolation before the time for the order otherwise expires and may seek immediate or expedited termination of the order. Before the expiration of an order issued under this section, the State Health Director or local health director may move to continue the order for additional periods not to exceed 30 days each. If the person whose freedom of movement has been limited has tuberculosis, the court shall continue the limitation for a period not to exceed one calendar year if it determines, by a preponderance of the evidence, that the limitation is reasonably necessary to prevent or limit the conveyance of tuberculosis to others. The court order shall specify the period of time the limitation is to be continued and shall provide for automatic termination of the order upon written determination by the State Health Director or local health director that the quarantine or isolation is no longer necessary to protect the public health. In addition, where the petitioner can prove by a preponderance of the evidence that quarantine or isolation was not or is no longer needed for protection of the public health, the person quarantined or isolated may move the trial court to reconsider its order extending quarantine or isolation before the time for the order otherwise expires and may seek immediate or expedited termination of the order. Before the expiration of an order limiting the freedom of movement of a person with tuberculosis, the State Health Director or local health director may move to continue the order for additional periods not to exceed one calendar year each. (1957, c. 1357, s. 1; 1983, c. 891, s. 2; 1987, c. 782, s. 15; 2002-179, s. 5; 2004-80, s. 2.)

Cross References. — As to entitlement to counsel of indigent person in a proceeding involving limitation of freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145, see G.S. 7A-451(a)(17). As to detention of an individual arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145, see G.S. 15A-401(b)(4), 15A-534.5.

Legal Periodicals. — For a note that addresses the effect of United States Supreme Court decision on sodomy laws and the manner in which society may shape its characterization of Acquired Immune Deficiency Syndrome (AIDS), and homosexuality, see 66 N.C.L. Rev. 226 (1987).

§ 130A-146. Transportation of bodies of persons who have died of reportable diseases.

No person shall transport in this State the remains of any person who has died of a disease declared by the Commission to be reported until the body has been encased in a manner as prescribed by rule by the Commission. Only persons who have complied with the rules of the Commission concerning the removal of dead bodies shall be issued a burial-transit permit. (1893, c. 214, s. 16; Rev., s. 4459; C.S., s. 7161; 1953, c. 675, s. 16; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-147. Rules of the Commission.

For the protection of the public health, the Commission is authorized to adopt rules for the detection, control and prevention of communicable diseases. (1983, c. 891, s. 2.)

CASE NOTES

Validity of Vaccination Regulations. — Regulations and provisions for the vaccination of the inhabitants, and their enforcement by penalties, constitute a valid exercise of governmental police power for the public welfare, health and safety. State v. Hay, 126 N.C. 999, 35 S.E. 459 (1900), decided under former statutory provisions.

§ 130A-148. Laboratory tests for AIDS virus infection.

(a) For the protection of the public health, the Commission shall adopt rules establishing standards for the certification of laboratories to perform tests for Acquired Immune Deficiency Syndrome (AIDS) virus infection. The rules shall address, but not be limited to, proficiency testing, record maintenance, adequate staffing and confirmatory testing. Tests for AIDS virus infection shall be performed only by laboratories certified pursuant to this subsection and only on specimens submitted by a physician licensed to practice medicine. This subsection shall not apply to testing performed solely for research purposes under the approval of an institutional review board.

(b) Prior to obtaining consent for donation of blood, semen, tissue or organs, a facility or institution seeking to obtain blood, tissue, semen or organs for transfusion, implantation, transplantation or administration shall provide the potential donor with information about AIDS virus transmission, and information about who should not donate.

(c) No blood or semen may be transfused or administered when blood from the donor has not been tested or has tested positive for AIDS virus infection by a standard laboratory test.

(d) No tissue or organs may be transplanted or implanted when blood from the donor has not been tested or has tested positive for AIDS virus infection by a standard laboratory test unless consent is obtained from the recipient, or from the recipient's guardian or a responsible adult relative of the recipient if the recipient is not competent to give such consent.

(e) Any facility or institution that obtains or tranfuses, implants, transplants, or administers blood, tissue, semen, or organs shall be immune from civil or criminal liability that otherwise might be incurred or imposed for transmission of AIDS virus infection if the provisions specified in subsections (b), (c), and (d) of this section have been complied with.

(f) Specimens may be tested for AIDS virus infection for research or epidemiologic purposes without consent of the person from whom the specimen is obtained if all personal identifying information is removed from the specimen prior to testing.

(g) Persons tested for AIDS virus infection shall be notified of test results and counseled appropriately. This subsection shall not apply to tests performed by or for entities governed by Article 39 of Chapter 58 of the General Statutes, the Insurance Information and Privacy Protection Act, provided that said entities comply with the notice requirements thereof.

(h) The Commission may authorize or require laboratory tests for AIDS virus infection when necessary to protect the public health.

A test for AIDS virus infection may also be performed upon any person solely by order of a physician licensed to practice medicine in North Carolina who is rendering medical services to that person when, in the reasonable medical judgment of the physician, the test is necessary for the appropriate treatment of the person; however, the person shall be informed that a test for AIDS virus infection is to be conducted, and shall be given clear opportunity to refuse to submit to the test prior to it being conducted, and further if informed consent is not obtained, the test may not be performed. A physician may order a test for AIDS virus infection without the informed consent of the person tested if the person is incapable of providing or incompetent to provide such consent, others authorized to give consent for the person are not available, and testing is necessary for appropriate diagnosis or care of the person.

An unemancipated minor may be tested for AIDS virus infection without the consent of the parent or legal guardian of the minor when the parent or guardian has refused to consent to such testing and there is reasonable suspicion that the minor has AIDS virus or HIV infection or that the child has been sexually abused.

(i) Except as provided in this section, no test for AIDS virus infection shall be required, performed or used to determine suitability for continued employment, housing or public services, or for the use of places of public accommodation as defined in G.S. 168A-3(8), or public transportation.

Further it shall be unlawful to discriminate against any person having AIDS virus or HIV infection on account of that infection in determining suitability for continued employment, housing, or public services, or for the use of places of public accommodation, as defined in G.S. 168A-3(8), or public transportation.

Any person aggrieved by an act or discriminatory practice prohibited by this subsection relating to housing shall be entitled to institute a civil action pursuant to G.S. 41A-7 of the State Fair Housing Act. Any person aggrieved by an act or discriminatory practice prohibited by this subsection other than one relating to housing may bring a civil action to enforce rights granted or protected by this subsection.

The action shall be commenced in superior court in the county where the alleged discriminatory practice or prohibited conduct occurred or where the plaintiff or defendant resides. Such action shall be tried to the court without a jury. Any relief granted by the court shall be limited to declaratory and injunctive relief, including orders to hire or reinstate an aggrieved person or admit such person to a labor organization.

In a civil action brought to enforce provisions of this subsection relating to employment, the court may award back pay. Any such back pay liability shall not accrue from a date more than two years prior to the filing of an action under this subsection. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person shall operate to reduce the back pay otherwise allowable. In any civil action brought under this subsection, the court, in its discretion, may award reasonable attorney's fees to the substantially prevailing party as a part of costs.

A civil action brought pursuant to this subsection shall be commenced within 180 days after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct.

Nothing in this section shall be construed so as to prohibit an employer from:

(1) Requiring a test for AIDS virus infection for job applicants in preemployment medical examinations required by the employer;

(2) Denying employment to a job applicant based solely on a confirmed positive test for AIDS virus infection;

(3) Including a test for AIDS virus infection performed in the course of an annual medical examination routinely required of all employees by the employer; or

(4) Taking the appropriate employment action, including reassignment or termination of employment, if the continuation by the employee who has AIDS virus or HIV infection of his work tasks would pose a significant risk to the health of the employee, coworkers, or the public, or if the employee is unable to perform the normally assigned duties of the job.

(j) It shall not be unlawful for a licensed health care provider or facility to:

(1) Treat a person who has AIDS virus or HIV infection differently from persons who do not have that infection when such treatment is appropriate to protect the health care provider or employees of the provider or employees of the facility while providing appropriate care for the person who has the AIDS virus or HIV infection; or

(2) Refer a person who has AIDS virus or HIV infection to another licensed health care provider or facility when such referral is for the purpose of providing more appropriate treatment for the person with AIDS virus or HIV infection. (1987, c. 782, s. 16; 1989, c. 698, s. 1; 1991, c. 720, s. 78.)

Legal Periodicals. — For note, "Rights of HIV-Infected Employees and Job Applicants Under North Carolina Law: Lots of Legislative Activity, But Just How Much Protection Does It Afford?," see 68 N.C.L. Rev. 1193 (1990).

For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

For comment, "HIV, AIDS & Job Discrimination: North Carolina Failure and Federal Redemption," see 17 Campbell L. Rev. 115 (1995).

For article, "Drugs, and Reproductive Choice: Maternal-State Conflict Continues into the Millenium"' see 28 N.C. Cent. L.J. 32 (2005).

CASE NOTES

Cited in Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

§ 130A-149: Recodified as G.S. 130A-479 by Session Laws 2002-179, s. 2, effective October 1, 2002.

§§ 130A-150, 130A-151: Reserved for future codification purposes.

Part 2. Immunization.

§ 130A-152. Immunization required.

(a) Every child present in this State shall be immunized against diphtheria, tetanus, whooping cough, poliomyelitis, red measles (rubeola) and rubella. In addition, every child present in this State shall be immunized against any other disease upon a determination by the Commission that the immunization is in the interest of the public health. Every parent, guardian, person in loco parentis and person or agency, whether governmental or private, with legal custody of a child shall have the responsibility to ensure that the child has received the required immunization at the age required by the Commission. If a child has not received the required immunizations by the specified age, the responsible person shall obtain the required immunization for the child as soon as possible after the lack of the required immunization is determined.

(b) Repealed by Session Laws 2002-179, s. 10, effective October 1, 2002.

(c) The Commission shall adopt and the Department shall enforce rules concerning the implementation of the immunization program. The rules shall provide for:

(1) The child's age at administration of each vaccine;
(2) The number of doses of each vaccine;
(3) Exemptions from the immunization requirements where medical practice suggests that immunization would not be in the best health interests of a specific category of children;
(4) The procedures and practices for administering the vaccine; and
(5) Redistribution of vaccines provided to local health departments.

(c1) The Commission for Public Health shall, pursuant to G.S. 130A-152 and G.S. 130A-433, adopt rules establishing reasonable fees for the administration of vaccines and rules limiting the requirements that can be placed on children, their parents, guardians, or custodians as a condition for receiving vaccines provided by the State. These rules shall become effective January 1, 1994.

(d) Only vaccine preparations which meet the standards of the United States Food and Drug Administration or its successor in licensing vaccines and are approved for use by the Commission may be used.

(e) When the Commission requires immunization against a disease not listed in paragraph (a) of this section, or requires an additional dose of a vaccine, the Commission is authorized to exempt from the new requirement children who are or who have been enrolled in school (K-12) on or before the effective date of the new requirement. (1957, c. 1357, s. 1; 1971, c. 191; 1973, c. 476, s. 128; c. 632, s. 1; 1975, c. 84; 1977, c. 160; 1979, c. 56, s. 1; 1983, c. 891, s. 2; 1985, c. 158; 1993, c. 321, s. 281(a); 2002-179, s. 10; 2007-182, s. 2.)

Editor's Note. — Session Laws 1993, c. 321, s. 281(a) was codified as subsection (c1) of this section at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (c1).

Legal Periodicals. — For article, "The Children We Abandon: Religious Exemptions to Child Welfare and Educational Laws as Denials of Equal Protection to Children of Religious Objectors," see 74 N.C.L. Rev. 1321 (1996).

CASE NOTES

Applied in In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234, 2002 N.C. App. LEXIS 1183 (2002), review denied, 356 N.C. 436, 573 S.E.2d 512 (2002).

§ 130A-153. Obtaining immunization; reporting by local health departments; access to immunization information in patient records; immunization of minors.

(a) The required immunization may be obtained from a physician licensed to practice medicine or from a local health department. Local health departments shall administer required and State-supplied immunizations at no cost to the patient. The Department shall provide the vaccines for use by the local health departments. A local health department may redistribute these vaccines only in accordance with the rules of the Commission.

(b) Local health departments shall file monthly immunization reports with the Department. The report shall be filed on forms prepared by the Department and shall state, at a minimum, each patient's age and the number of doses of each type of vaccine administered.

(c) Immunization certificates and information concerning immunizations contained in medical or other records shall, upon request, be shared with the Department, local health departments, and the patient's attending physician. In addition, an insurance institution, agent, or insurance support organization, as those terms are defined in G.S. 58-39-15, may share immunization information with the Department. The Commission may, for the purpose of assisting the Department in enforcing this Part, provide by rule that other persons may have access to immunization information, in whole or in part.

(d) A physician or local health department may immunize a minor with the consent of a parent, guardian, or person standing in loco parentis to the minor. A physician or local health department may also immunize a minor who is presented for immunization by an adult who signs a statement that he or she is authorized by a parent, guardian, or person standing in loco parentis to the minor to obtain the immunization for the minor. (1957, c. 1357, s. 1; 1959, c. 177; 1965, c. 652; 1971, c. 191; 1973, c. 476, s. 128; 1979, c. 56, s. 1; 1983, c. 891, s. 2; 1985, c. 743, ss. 1, 2; 1993, c. 134, s. 1; 1999-110, s. 2.)

§ 130A-154. Certificate of immunization.

(a) A physician or local health department administering a required vaccine shall give a certificate of immunization to the person who presented the child for immunization. The certificate shall state the name of the child, the name of the child's parent, guardian, or person responsible for the child obtaining the required immunization, the address of the child and the parent, guardian or responsible person, the date of birth of the child, the sex of the child, the number of doses of the vaccine given, the date the doses were given, the name and address of the physician or local health department administering the required immunization and other relevant information required by the Commission.

(b) Except as otherwise provided in this subsection, a person who received immunizations in a state other than North Carolina shall present an official certificate or record of immunization to the child care facility, school (K-12), or college or university. This certificate or record shall state the person's name, address, date of birth, and sex; the type and number of doses of administered vaccine; the dates of the first MMR and the last DTP and polio; the name and address of the physician or local health department administering the required immunization; and other relevant information required by the Commission. (1957, c. 1357, s. 1; 1959, c. 177; 1965, c. 652; 1971, c. 191; 1979, c. 56, s. 1; 1983, c. 891, s. 2; 1999-110, s. 3.)

§ 130A-155. Submission of certificate to child care facility, preschool and school authorities; record maintenance; reporting.

(a) No child shall attend a school (pre K-12), whether public, private or religious, a child care facility as defined in G.S. 110-86(3), unless a certificate of immunization indicating that the child has received the immunizations required by G.S. 130A-152 is presented to the school or facility. The parent, guardian, or responsible person must present a certificate of immunization on the child's first day of attendance to the principal of the school or operator of the facility, as defined in G.S. 110-86(7). If a certificate of immunization is not presented on the first day, the principal or operator shall present a notice of deficiency to the parent, guardian or responsible person. The parent, guardian or responsible person shall have 30 calendar days from the first day of attendance to obtain the required immunization for the child. If the administration of vaccine in a series of doses given at medically approved intervals requires a period in excess of 30 calendar days, additional days upon certification by a physician may be allowed to obtain the required immunization. Upon termination of 30 calendar days or the extended period, the principal or operator shall not permit the child to attend the school or facility unless the required immunization has been obtained.

(b) The school or child care facility shall maintain on file immunization records for all children attending the school or facility which contain the information required for a certificate of immunization as specified in G.S. 130A-154. These certificates shall be open to inspection by the Department and the local health department during normal business hours. When a child transfers to another school or facility, the school or facility which the child previously attended shall, upon request, send a copy of the child's immunization record at no charge to the school or facility to which the child has transferred.

(c) The school shall file an annual immunization report with the Department by November 1. The child care facility shall file an immunization report annually with the Department. The report shall be filed on forms prepared by the Department and shall state the number of children attending the school or facility, the number of children who had not obtained the required immunization within 30 days of their first attendance, the number of children who received a medical exemption and the number of children who received a religious exemption.

(d) Any adult who attends school (pre K-12), whether public, private or religious, shall obtain the immunizations required in G.S. 130A-152 and shall present to the school a certificate in accordance with this section. The physician or local health department administering a required vaccine to the adult shall give a certificate of immunization to the person. The certificate shall state the person's name, address, date of birth and sex; the number of doses of the vaccine given; the date the doses were given; the name and addresses of the physician or local health department administering the required immunization; and other relevant information required by the Commission. (1957, c. 1357, s. 1; 1959, c. 177; 1965, c. 652; 1971, c. 191; 1973, c. 632, s. 2; 1979, c. 56, s. 1; 1981, c. 44; 1983, c. 891, s. 2; 1997-506, s. 47; 1999-110, s. 4; 2007-187, s. 2.)

Effect of Amendments. — Session Laws 2007-187, s. 2, effective July 8, 2007, in the first sentence of subsection (c), deleted "Within 60 calendar days after the commencement of a new school year" at the beginning, inserted "annual" near the middle, and added "by November 1." at the end.

Legal Periodicals. — For article, "The Children We Abandon: Religious Exemptions to Child Welfare and Educational Laws as Denials of Equal Protection to Children of Religious Objectors," see 74 N.C.L. Rev. 1321 (1996).

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Cited in In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234, 2002 N.C. App. LEXIS 1183 (2002), review denied, 356 N.C. 436, 573 S.E.2d 512 (2002).

§ 130A-155.1. Submission of certificate to college or universities.

(a) Except as otherwise provided in this section, no person shall attend a college or university, whether public, private, or religious, unless a certificate of immunization or a record of immunization from a high school located in North Carolina indicating that the person has received immunizations required by G.S. 130A-152 is presented to the college or university. The person shall present a certificate or record of immunization on or before the date the person first registers for a quarter or semester during which the student will reside on the campus or first registers for more than four traditional day credit hours to the registrar of the college or university. If a certificate or record of immunization is not in the possession of the college or university on the date of first registration, the college or university shall present a notice of deficiency to the student. The student shall have 30 calendar days from the date of the student's first registration to obtain the required immunization. If immunization requires a series of doses and the period necessary to give the vaccine at standard intervals extends beyond the date of the first registration, the student shall be allowed to attend the college or university upon written certification by a physician that the standard series is in progress. The physician shall state the time period needed to complete the series. Upon termination of this time period, the college or university shall not permit the student to continue in attendance unless the required immunization has been obtained.

(b) The college or university shall maintain on file immunization records for all students attending the school which contain the information required for a certificate of immunization as specified in G.S. 130A-154. These certificates shall be open to inspection by the Department and the local health department during normal business hours. When a student transfers to another college or university, the college or university which the student previously attended shall, upon request, send a copy of the student's immunization record at no charge to the college or university to which the student has transferred.

(c) Within 60 calendar days after the commencement of a new school year, the college or university shall file an immunization report with the Department. The report shall be filed on forms prepared by the Department and shall state the number of students attending the school or facility, the number of students who had not obtained the required immunization within 30 days of their first attendance, the number of students who received a medical exemption and the number of students who received a religious exemption.

(d) Repealed by Session Laws 1999-110, s. 5.

(e) The provisions of this section shall not apply to:

(1) Educational institutions established under Chapter 115D of the General Statutes.

(2) Students residing off-campus and registering for any combination of:

a. Off-campus courses.

b. Evening courses.

c. Weekend courses.

d. No more than four traditional day credit hours in on-campus courses. (1985, c. 692, s. 1; 1987, c. 782, s. 17; 1991, c. 381, s. 1; 1999-110, s. 5; 2007-99, s. 1.)

Effect of Amendments. — Session Laws 2007-99, s. 1, effective June 20, 2007, substituted "student" for "person" and variations throughout the section; in subsection (a), substituted "section" for "subsection," deleted the former second sentence which read: "This section shall not apply to educational institutions established under Chapter 115D of the General Statutes, or to students registering only in off-campus courses, or to students attending night or weekend classes only, or to students taking a course load of four credit hours or less and residing off campus," and inserted "traditional day" preceding "credit hours" in the second sentence; and added subsection (e).

§ 130A-156. Medical exemption.

The Commission for Public Health shall adopt by rule medical contraindications to immunizations required by G.S. 130A-152. If a physician licensed to practice medicine in this State certifies that a required immunization is or may be detrimental to a person's health due to the presence of one of the contraindications adopted by the Commission, the person is not required to receive the specified immunization as long as the contraindication persists. The State Health Director may, upon request by a physician licensed to practice medicine in this State, grant a medical exemption to a required immunization for a contraindication not on the list adopted by the Commission. (1957, c. 1357, s. 1; 1959, c. 177; 1965, c. 652; 1971, c. 191; 1979, c. 56, s. 1; 1983, c. 891, s. 2; 1987, c. 782, s. 18; 1989, c. 122; 1999-110, s. 6; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" at the beginning of the section.

CASE NOTES

Cited in In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234, 2002 N.C. App. LEXIS 1183 (2002), review denied, 356 N.C. 436, 573 S.E.2d 512 (2002).

§ 130A-157. Religious exemption.

If the bona fide religious beliefs of an adult or the parent, guardian or person in loco parentis of a child are contrary to the immunization requirements contained in this Chapter, the adult or the child shall be exempt from the requirements. Upon submission of a written statement of the bona fide religious beliefs and opposition to the immunization requirements, the person may attend the college, university, school or facility without presenting a certificate of immunization. (1957, c. 1357, s. 1; 1959, c. 177; 1965, c. 652; 1971, c. 191; 1979, c. 56, s. 1; 1983, c. 891, s. 2; 1985, c. 692, s. 2; 2002-179, s. 17.)

Legal Periodicals. — For article, "The Children We Abandon: Religious Exemptions to Child Welfare and Educational Laws as Denials of Equal Protection to Children of Religious Objectors," see 74 N.C.L. Rev. 1321 (1996).

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Even though their parental rights had not been formally terminated, parents lost the right to object to their children's immunization, on religious grounds, where they lost custody of the children due to neglect, including the failure to provide the children with adequate shelter, clothing, food, medical care, and a formal education. In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234, 2002 N.C. App. LEXIS 1183 (2002), review denied, 356 N.C. 436, 573 S.E.2d 512 (2002).

§ 130A-158. Restitution required when vaccine spoiled due to provider negligence.

Immunization program providers shall be liable for restitution to the State for the cost of replacement vaccine when vaccine in the provider's inventory has become spoiled or unstable due to the provider's negligence and unreasonable failure to properly handle or store the vaccine. (2001-424, s. 21.86(a).)

§ 130A-159: Reserved for future codification purposes.

Part 3. Venereal Disease.

§§ 130A-160 through 130A-166: Repealed by Session Laws 1991, c. 225, s. 2.

Cross References. — As to the duty of local health departments to provide free examination and treatment for tuberculosis and sexually transmitted diseases designated by the Commission, see G.S. 130A-144(e).

Editor's Note. — G.S. 130A-163 was previously repealed by Session Laws 1987, c. 782, s. 20.

G.S. 130A-164 was previously repealed by Session Laws 1985, c. 168, s. 1.

§§ 130A-167 through 130A-170: Reserved for future codification purposes.

Part 4. Inflammation of Eyes of Newborn.

§§ 130A-171 through 130A-174: Repealed by Session Laws 1991, c. 225, s. 2.

Cross References. — As to the duty of local health departments to provide free examination and treatment for tuberculosis and sexually transmitted diseases designated by the Commission, see G.S. 130A-144(e).

§§ 130A-175, 130A-176: Reserved for future codification purposes.

Part 5. Tuberculosis.

§§ 130A-177, 130A-178: Repealed by Session Laws 1991, c. 225, s. 2.

Cross References. — As to the duty of local health departments to provide free examination and treatment for tuberculosis and sexually transmitted diseases designated by the Commission, see G.S. 130A-144(e).

§ 130A-179: Repealed by Session Laws 1987, c. 782, s. 20.

§§ 130A-180 through 130A-183: Reserved for future codification purposes.

Part 6. Rabies.

§ 130A-184. Definitions.

The following definitions shall apply throughout this Part:

(1) "Animal Control Officer" means a city or county employee designated as dog warden, animal control officer, animal control official or other designations that may be used whose responsibility includes animal control.

(2) "Cat" means a domestic feline.

(3) "Certified rabies vaccinator" means a person appointed and certified to administer rabies vaccine to animals in accordance with this Part.

(4) "Dog" means a domestic canine.

(5) "Rabies vaccine" means an animal rabies vaccine licensed by the United States Department of Agriculture and approved for use in this State by the Commission.

(6) "State Public Health Veterinarian" means a person appointed by the Secretary to direct the State public health veterinary program.

(7) "Vaccination" means the administration of rabies vaccine by a licensed veterinarian or by a certified rabies vaccinator. (1935, c. 122, s. 1; 1949, c. 645, s. 1; 1953, c. 876, s. 1; 1957, c. 1357, s. 3; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

CASE NOTES

Cited in Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005).

§ 130A-185. Vaccination of all dogs and cats.

(a) The owner of every dog and cat over four months of age shall have the animal vaccinated against rabies. The time or times of vaccination shall be established by the Commission. Rabies vaccine shall be administered only by a licensed veterinarian or by a certified rabies vaccinator.

(b) Only animal rabies vaccine licensed by the United States Department of Agriculture and approved by the Commission shall be used on animals in this State. (1935, c. 122, s. 1; 1941, c. 259, s. 2; 1953, c. 876, s. 2; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-186. Appointment and certification of certified rabies vaccinator.

In those counties where licensed veterinarians are not available to participate in all scheduled county rabies control clinics, the local health director shall appoint one or more persons for the purpose of administering rabies vaccine to animals in that county. Whether or not licensed veterinarians are available, the local health director may appoint one or more persons for the purpose of administering rabies vaccine to animals in their county and these persons will make themselves available to participate in the county rabies control program. The State Public Health Veterinarian shall provide at least four hours of training to those persons appointed by the local health director to administer rabies vaccine. Upon satisfactory completion of the training, the State Public Health Veterinarian shall certify in writing that the appointee has demonstrated a knowledge and procedure acceptable for the administration of rabies vaccine to animals. A certified rabies vaccinator shall be authorized to administer rabies vaccine to animals in the county until the appointment by the local health director has been terminated. (1935, c. 122, s. 3; 1941, c. 259, s. 3; 1953, c. 876, s. 3; 1957, c. 1357, s. 4; 1983, c. 891, s. 2.)

§ 130A-187. County rabies vaccination clinics.

The local health director shall organize or assist other county departments to organize at least one countywide rabies vaccination clinic per year for the purpose of vaccinating dogs and cats. Public notice of the time and place of rabies vaccination clinics shall be published in a newspaper having general circulation within the area. (1983, c. 891, s. 2; 1987, c. 219.)

§ 130A-188. Fee for vaccination at county rabies vaccination clinics.

The county board of commissioners is authorized to establish a fee to be charged at the county rabies vaccination clinics. The fee shall include an administrative charge not to exceed four dollars ($4.00) per vaccination, and a charge for the actual cost of the vaccine, the vaccination certificate, and the rabies vaccination tag. (1935, c. 122, s. 9; 1941, c. 259, s. 7; 1949, c. 645, s. 5; 1953, c. 876, s. 5; 1959, c. 139; 1983, c. 891, s. 2.)

§ 130A-189. Rabies vaccination certificates.

A licensed veterinarian or a certified rabies vaccinator who administers rabies vaccine to a dog or cat shall complete a three-copy rabies vaccination certificate. The original rabies vaccination certificate shall be given to the owner of each dog or cat that receives rabies vaccine. One copy of the rabies vaccination certificate shall be retained by the licensed veterinarian or the certified rabies vaccinator. The other copy shall be given to the county agency responsible for animal control, provided the information given to the county agency shall not be used for commercial purposes. (1935, c. 122, s. 6; 1941, c. 259, s. 5; 1959, c. 352; 1983, c. 891, s. 2; 1993, c. 245, s. 1.)

§ 130A-190. Rabies vaccination tags.

(a) Issuance. — A licensed veterinarian or a certified rabies vaccinator who administers rabies vaccine to a dog or cat shall issue a rabies vaccination tag to the owner of the animal. The rabies vaccination tag shall show the year issued, a vaccination number, the words "North Carolina" or the initials "N.C." and the words "rabies vaccine." Dogs and cats shall wear rabies vaccination tags at all times. However, cats may be exempted from wearing the tags by local ordinance.

(b) Fee. — Rabies vaccination tags, links, and rivets may be obtained from the Department. The Secretary is authorized to establish by rule a fee for the rabies tags, links, and rivets in accordance with this subsection. The fee for each tag is the sum of the following:

(1) The actual cost of the rabies tag, links, and rivets.
(2) Transportation costs.
(3) Five cents (5¢). This portion of the fee shall be used to fund rabies education and prevention programs.
(4) Twenty cents (20¢). This portion of the fee shall be credited to the Spay/Neuter Account established in G.S. 19A-62 and used to fund statewide spay/neuter programs. This portion of the fee shall not be imposed for tags provided to persons who operate establishments primarily for the purpose of boarding or training hunting dogs or who own and vaccinate 10 or more dogs per year.

(c) Repealed by Session Laws 2007-487, s. 1, effective January 1, 2008. (1935, c. 122, s. 6; 1941, c. 259, s. 5; 1959, c. 352; 1983, c. 891, s. 2; 1997-69, s. 1; 2000-163, s. 2; 2007-487, s. 1.)

Effect of Amendments. — Session Laws 2007-487, s. 1, effective January 1, 2008, added "Issuance" at the beginning of subsection (a); rewrote subsection (b); and repealed former subsection (c) which pertained to special edition rabies tags.

§ 130A-191. Possession and distribution of rabies vaccine.

It shall be unlawful for persons other than licensed veterinarians, certified rabies vaccinators and persons engaged in the distribution of rabies vaccine to possess rabies vaccine. Persons engaged in the distribution of vaccines may distribute, sell and offer to sell rabies vaccine only to licensed veterinarians and certified rabies vaccinators. (1987, c. 218, s. 1.)

§ 130A-192. Dogs and cats not wearing required rabies vaccination tags.

The Animal Control Officer shall canvass the county to determine if there are any dogs or cats not wearing the required rabies vaccination tag. If a dog or cat is found not wearing the required tag, the Animal Control Officer shall check to see if the owner's identification can be found on the animal. If the animal is wearing an owner identification tag, or if the Animal Control Officer otherwise knows who the owner is, the Animal Control Officer shall notify the owner in writing to have the animal vaccinated against rabies and to produce the required rabies vaccination certificate to the Animal Control Officer within three days of the notification. If the animal is not wearing an owner identification tag and the Animal Control Officer does not otherwise know who the owner is, the Animal Control Officer may impound the animal. The duration of the impoundment of these animals shall be established by the county board of commissioners, but the duration shall not be less than 72 hours. During the impoundment period, the Animal Control Officer shall make a reasonable effort to locate the owner of the animal. If the animal is not reclaimed by its owner during the impoundment period, the animal shall be disposed of in one of the following manners: returned to the owner; adopted as a pet by a new owner; sold to institutions within this State registered by the United States Department of Agriculture pursuant to the Federal Animal Welfare Act, as amended; or put to death by a procedure approved by the American Veterinary Medical Association, the Humane Society of the United States or of the American Humane Association. The Animal Control Officer shall maintain a record of all animals impounded under this section which shall include the date of impoundment, the length of impoundment, the method of disposal of the animal and the name of the person or institution to whom any animal has been released. (1935, c. 122, s. 8; 1983, c. 891, s. 2.)

CASE NOTES

Subject Matter Jurisdiction. — Trial court was without subject matter jurisdiction to enter findings or conclusions regarding an animal rights organization's claim against a private agency for alleged violations by the agency of G.S. 130A-192, as enforcement of the statute was proper against the local board of health in the Office of Administrative Hearings under G.S. 130A-4(a) and G.S. 130A-24. Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005).

Cited in Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 2004 N.C. App. LEXIS 813 (2004).

§ 130A-193. Vaccination and confinement of dogs and cats brought into this State.

(a) A dog or cat brought into this State shall immediately be securely confined and shall be vaccinated against rabies within one week after entry. The animal shall remain confined for two weeks after vaccination.

(b) The provisions of subsection (a) shall not apply to:

(1) A dog or cat brought into this State for exhibition purposes if the animal is confined and not permitted to run at large; or

(2) A dog or cat brought into this State accompanied by a certificate issued by a licensed veterinarian showing that the dog or cat is apparently free from and has not been exposed to rabies and that the dog or cat has received rabies vaccine within the past year. (1935, c. 122, s. 11; 1983, c. 891, s. 2.)

§ 130A-194. Quarantine of districts infected with rabies.

An area may be declared under quarantine against rabies by the local health director when the disease exists to the extent that the lives of persons are endangered. When quarantine is declared, each dog and cat in the area shall be confined on the premises of the owner or in a veterinary hospital. However, dogs or cats on a leash or under the control and in the sight of a responsible adult may be permitted to leave the premises of the owner or the veterinary hospital. (1935, c. 122, s. 12; 1941, c. 259, s. 9; 1949, c. 645, s. 3; 1953, c. 876, s. 8; 1957, c. 1357, s. 8; 1983, c. 891, s. 2.)

§ 130A-195. Destroying stray dogs and cats in quarantine districts.

When quarantine has been declared and dogs and cats continue to run uncontrolled in the area, any peace officer or Animal Control Officer shall have the right, after reasonable effort has been made to apprehend the animals, to destroy the uncontrolled dogs and cats and properly dispose of their bodies. (1935, c. 122, s. 13; 1953, c. 876, s. 9; 1983, c. 891, s. 2.)

§ 130A-196. Confinement of all biting dogs and cats; notice to local health director; reports by physicians; certain dogs exempt.

When a person has been bitten by a dog or cat, the person or parent, guardian or person standing *in loco parentis* of the person, and the person owning the animal or in control or possession of the animal shall notify the local health director immediately and give the name and address of the person bitten and the owner of the animal. All dogs and cats that bite a person shall be immediately confined for 10 days in a place designated by the local health director. However, the local health director may authorize a dog trained and used by a law enforcement agency to be released from confinement to perform official duties upon submission of proof that the dog has been vaccinated for rabies in compliance with this Part. After reviewing the circumstances of the particular case, the local health director may allow the owner to confine the animal on the owner's property. An owner who fails to confine his animal in accordance with the instructions of the local health director shall be guilty of a Class 2 misdemeanor. If the owner or the person who controls or possesses a dog or cat that has bitten a person refuses to confine the animal as required by this section, the local health director may order seizure of the animal and its confinement for 10 days at the expense of the owner. A physician who attends a person bitten by an animal known to be a potential carrier of rabies shall report within 24 hours to the local health director the name, age and sex of that person. (1935, c. 122, s. 17; 1941, c. 259, s. 11; 1953, c. 876, s. 13; 1957, c. 1357, s. 9; 1977, c. 628; 1983, c. 891, s. 2; 1985, c. 674; 1989, c. 298; 1993, c. 539, s. 950; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 130A-197. Infected dogs and cats to be destroyed; protection of vaccinated dogs and cats.

When the local health director reasonably suspects that a dog or cat has been exposed to the saliva or nervous tissue of a proven rabid animal or animal reasonably suspected of having rabies that is not available for laboratory diagnosis, the dog or cat shall be considered to have been exposed to rabies. A dog or cat exposed to rabies shall be destroyed immediately by its owner, the county Animal Control Officer or a peace officer unless the dog or cat has been vaccinated against rabies in accordance with this Part and the rules of the Commission more than three weeks prior to being exposed, and is given a booster dose of rabies vaccine within three days of the exposure. As an alternative to destruction, the dog or cat may be quarantined at a facility approved by the local health director for a period up to six months, and under reasonable conditions imposed by the local health director. (1935, c. 122, s. 14; 1953, c. 876, s. 10; 1983, c. 891, s. 2; 2000-163, s. 4.)

§ 130A-198. Confinement.

A person who owns or has possession of an animal which is suspected of having rabies shall immediately notify the local health director or county Animal Control Officer and shall securely confine the animal in a place designated by the local health director. Dogs and cats shall be confined for a period of 10 days. Other animals may be destroyed at the discretion of the State Public Health Veterinarian. (1935, c. 122, s. 15; c. 344; 1941, c. 259, s. 10; 1953, c. 876, s. 11; 1983, c. 891, s. 2.)

§ 130A-199. Rabid animals to be destroyed; heads to be sent to State Laboratory of Public Health.

An animal diagnosed as having rabies by a licensed veterinarian shall be destroyed and its head sent to the State Laboratory of Public Health. The heads of all dogs and cats that die during the 10-day confinement period required by G.S. 130A-196, shall be immediately sent to the State Laboratory of Public Health for rabies diagnosis. (1935, c. 122, s. 16; 1953, c. 876, s. 12; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-200. Confinement or leashing of vicious animals.

A local health director may declare an animal to be vicious and a menace to the public health when the animal has attacked a person causing bodily harm without being teased, molested, provoked, beaten, tortured or otherwise harmed. When an animal has been declared to be vicious and a menace to the public health, the local health director shall order the animal to be confined to its owner's property. However, the animal may be permitted to leave its owner's property when accompanied by a responsible adult and restrained on a leash. (1935, c. 122, s. 18; 1953, c. 876, s. 14; 1983, c. 891, s. 2.)

CASE NOTES

***Editor's Note.** — Many of the cases below were decided under former statutory provisions relating to vicious animals.*

Purpose. — Former provisions relating to vicious animals were enacted for the specific purpose of protecting the public from dogs which have become vicious or a menace to public health. Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975).

Ordinance Valid. — An ordinance of a city making it unlawful to keep a dog which habitually or repeatedly chases, snaps at, attacks or barks at pedestrians, bicycles or vehicles is a valid exercise of the city's police power. Gray v. Clark, 9 N.C. App. 319, 176 S.E.2d 16 (1970).

To safeguard and promote the public health, safety and convenience, municipal power to regulate the keeping and licensing of dogs within the corporate area is generally recognized, and ordinances regulating and requiring them to be registered, licensed, and at times muzzled and prevented from going at large, are within the police powers usually conferred upon the local corporation. Such ordinances are authorized by virtue of general powers and the usual general welfare clause. Gray v. Clark, 9 N.C. App. 319, 176 S.E.2d 16 (1970).

A town ordinance dealing with dogs running at large was not inconsistent with former provisions relating to vicious animals, which were designed to provide minimum protection against vicious dogs in all parts of the State — rural, urban, small villages and large cities. With more concentrated population, cities are justified in adopting stricter regulations for dogs. Thus, a city was authorized to require a higher standard of conduct or condition with respect to the keeping of dogs within its corporate limits than was required for the State generally. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Violation of Safety Statute as Negligence Per Se. — The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence per se, unless the statute, itself, otherwise provides. Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975).

Evidence Insufficient to Show Dog "Vicious". — Evidence that a small dog frequently dashed into the street to bark at and pursue motorcycles, automobiles, and other noisy vehicles was not sufficient to justify classifying him as a "vicious" animal and did not make him "a menace to the public health." Sink v. Moore, 267 N.C. 344, 148 S.E.2d 265 (1966); Gray v. Clark, 9 N.C. App. 319, 176 S.E.2d 16 (1970).

Canine courage in a contest for the championship of the neighborhood, together with determination to remain on possession of the field of battle "whence all but him had fled," was not evidence of a vicious character within the meaning of former statute. Sink v. Moore, 267 N.C. 344, 148 S.E.2d 265 (1966).

§ 130A-201. Rabies emergency.

A local health director in whose county or district rabies is found in the wild animal population as evidenced by a positive diagnosis of rabies in the past year in any wild animal, except a bat, may petition the State Health Director to declare a rabies emergency in the county or district. In determining whether a rabies emergency exists, the State Health Director shall consult with the Public Health Veterinarian and the State Agriculture Veterinarian and may consult with any other source of veterinary expertise the State Health Director deems advisable. Upon finding that a rabies emergency exists in a county or district, the State Health Director shall petition the Executive Director of the Wildlife Resources Commission to develop a plan pursuant to G.S. 113-291.2(a1) to reduce the threat of rabies exposure to humans and domestic animals by foxes, raccoons, skunks, or bobcats in the county or district. Upon determination by the State Health Director that the rabies emergency no longer exists for a county or district, the State Health Director shall immediately notify the Executive Director of the Wildlife Resources Commission. (1997-402, s. 1.)

§§ 130A-202 through 130A-204: Reserved for future codification purposes.

Article 7.

Chronic Disease.

Part 1. Cancer.

§ 130A-205. Administration of program; rules.

(a) The Department shall establish and administer a program for the prevention and detection of cancer and the care and treatment of persons with cancer.

(b) The Commission shall adopt rules necessary to implement the program. (1945, c. 1050, s. 1; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-206. Financial aid for diagnosis and treatment.

The Department shall provide financial aid for diagnosis and treatment of cancer to indigent citizens of this State having or suspected of having cancer. The Department may make facilities for diagnosis and treatment of cancer available to all citizens. Reimbursement shall only be provided for diagnosis and treatment performed in a medical facility which meets the minimum requirements for cancer control established by the Commission. The Commission shall adopt rules specifying the terms and conditions by which the patients may receive financial aid. (1945, c. 1050, s. 2; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-207. Cancer clinics.

The Department is authorized to provide financial aid to sponsored cancer clinics in medical facilities and local health departments. The Commission shall adopt rules to establish minimum standards for the staffing, equipment and operation of the clinics sponsored by the Department. (1945, c. 1050, s. 3; 1949, c. 1071; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-208. Central cancer registry.

A central cancer registry is established within the Department. The central cancer registry shall compile, tabulate and preserve statistical, clinical and other reports and records relating to the incidence, treatment and cure of cancer received pursuant to this Part. The central cancer registry shall provide assistance and consultation for public health work. (1945, c. 1050, s. 7; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-209. Incidence reporting of cancer; charge for collection if failure to report.

(a) All health care facilities and health care providers that detect, diagnose, or treat cancer or benign brain or central nervous system tumors shall report to the central cancer registry each diagnosis of cancer or benign brain or central nervous system tumors in any person who is screened, diagnosed, or treated by the facility or provider. The reports shall be made within six months of diagnosis. Diagnostic, demographic and other information as prescribed by the rules of the Commission shall be included in the report.

(b) If a health care facility or health care provider fails to report as required under this section, then the central cancer registry may conduct a site visit to the facility or provider or be provided access to the information from the facility or provider and report it in the appropriate format. The Commission may adopt rules requiring that the facility or provider reimburse the registry for its cost to access and report the information in an amount not to exceed one hundred dollars ($100.00) per case. Thirty days after the expiration of the six-month period for reporting under subsection (a) of this section, the registry shall send notice to each facility and provider that has not submitted a report as of that date that failure to file a report within 30 days shall result in collection of the data by the registry and liability for reimbursement imposed under this section. Failure to receive or send the notice required under this section shall not be construed as a waiver of the reporting requirement. For good cause, the central cancer registry may grant an additional 30 days for reporting.

(c) As used in this section, the term:

(1) "Health care facility" or "facility" means any hospital, clinic, or other facility that is licensed to administer medical treatment or the primary function of which is to provide medical treatment in this State. The term includes health care facility laboratories and independent pathology laboratories;

(2) "Health care provider" or "provider" means any person who is licensed or certified to practice a health profession or occupation under Chapter 90 of the General Statutes and who diagnoses or treats cancer or benign brain or central nervous system tumors. (1949, c. 499; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2; 1999-33, s. 1; 2005-373, s. 1.)

Editor's Note. — Session Laws 1999-33, which amended this section, provides in s. 3 that the Health Services Commission [now the Commission for Public Health] may adopt temporary rules in accordance with Chapter 150B of the General Statutes to implement this section.

Effect of Amendments. — Session Laws 2005-373, s. 1, effective January 1, 2006, inserted "or benign brain or central nervous system tumors" twice in subsection (a) and once at the end of subdivision (c)(2).

§ 130A-210: Repealed by Session Laws 1999-33, s. 2, effective May 7, 1999.

§ 130A-211. Immunity of persons who report cancer.

A person who makes a report pursuant to G.S. 130A-209 or 130A-210 to the central cancer registry shall be immune from any civil or criminal liability that might otherwise be incurred or imposed. (1967, c. 859; 1969, c. 5; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

Editor's Note. — G.S. 130A-210, referred to in this section, has been repealed.

§ 130A-212. Confidentiality of records.

The clinical records or reports of individual patients shall be confidential and shall not be public records open to inspection. The Commission shall provide by rule for the use of the records and reports for medical research. (1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-213. Cancer Committee of the North Carolina Medical Society.

In implementing this Part, the Department shall consult with the Cancer Committee of the North Carolina Medical Society. The Committee shall consist of at least one physician from each congressional district. Any proposed rules or reports affecting the operation of the cancer control program shall be reviewed by the Committee for comment prior to adoption. (1945, c. 1050, s. 9; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-214. Duties of Department.

The Department shall study the entire problem of cancer including its causes, including environmental factors; prevention; detection; diagnosis and treatment. The Department shall provide or assure the availability of cancer educational resources to health professionals, interested private or public organizations and the public. (1967, c. 186, s. 2; 1973, c. 476, s. 128; 1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§ 130A-215. Reports.

The Secretary shall make a report to the Governor and the General Assembly specifying the activities of the cancer control program and its budget. The report shall be made to the Governor annually and to the General Assembly biennially. (1981, c. 345, s. 2; 1983, c. 891, s. 2.)

§§ 130A-216 through 130A-219: Reserved for future codification purposes.

Part 2. Chronic Renal Disease.

§ 130A-220. Department to establish program.

(a) The Department shall establish and administer a program for the detection and prevention of chronic renal disease and the care and treatment of persons with chronic renal disease. The program may include:

(1) Development of services for the prevention of chronic renal disease;
(2) Development and expansion of services for the care and treatment of persons with chronic renal disease, including techniques which will have a lifesaving effect in the care and treatment of those persons;
(3) Provision of financial assistance on the basis of need for diagnosis and treatment of persons with chronic renal disease;
(4) Equipping dialysis and transplantation centers; and
(5) Development of an education program for physicians, hospitals, local health departments and the public concerning chronic renal disease.

(b) The Commission is authorized to adopt rules necessary to implement the program. (1971, c. 1027, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

Part 3. Glaucoma and Diabetes.

§ 130A-221. Department authorized to establish program.

(a) The Department may establish and administer a program for the detection and prevention of glaucoma and diabetes and the care and treatment of persons with glaucoma and diabetes. The program may include:

(1) Education of patients, health care personnel and the public;
(2) Development and expansion of services to persons with glaucoma and diabetes; and
(3) Provision of supplies, equipment and medication for detection and control of glaucoma and diabetes.

(b) The Commission is authorized to adopt rules necessary to implement the program. (1977, 2nd Sess., c. 1257, s. 1; 1983, c. 891, s. 2; 1997-137, s. 2.)

Part 4. Arthritis.

§ 130A-222. Department to establish program.

(a) The Department shall establish and administer a program for the detection and prevention of arthritis and the care and treatment of persons with arthritis. The purpose of the program shall be:

(1) To improve professional education for physicians and allied health professionals including nurses, physical and occupational therapists and social workers;
(2) To conduct programs of public education and information;
(3) To provide detection and treatment programs and services for the at-risk population of this State;
(4) To utilize the services available at the State medical schools, existing arthritis rehabilitation centers and existing local arthritis clinics and agencies;
(5) To develop an arthritis outreach clinical system;
(6) To develop and train personnel at clinical facilities for diagnostic work-up, laboratory analysis and consultations with primary physicians regarding patient management; and
(7) To develop the epidemiologic studies to determine frequency and distribution of the disease.

(b) The Commission is authorized to adopt rules necessary to implement the program. (1979, c. 996, s. 2; 1983, c. 891, s. 2.)

Part 5. Adult Health.

§ 130A-223. Department to establish program.

(a) The Department shall establish and administer a program for the prevention of diseases, disabilities and accidents that contribute significantly to mortality and morbidity among adults. The program may also provide for the care and treatment of persons with these diseases or disabilities.

(b) The Commission is authorized to adopt rules necessary to implement the program. (1983, c. 891, s. 2.)

Part 6. Injury Prevention.

§ 130A-224. Department to establish program.

To protect and enhance the public health, welfare, and safety, the Department shall establish and administer a comprehensive statewide injury prevention program. The Department shall designate the Division of Public Health as the lead agency for injury prevention activities. The Division of Public Health shall:

(1) Develop a comprehensive State plan for injury prevention;
(2) Maintain an injury prevention program that includes data collection, surveillance, and education and promotes injury control activities; and
(3) Develop collaborative relationships with other State agencies and private and community organizations to establish programs promoting injury prevention. (2007-187, s. 3.)

Editor's Note. — Session Laws 2007-187, s. 6, made this Part effective July 8, 2007.

§§ 130A-225, 130A-226: Reserved for future codification purposes.

ARTICLE 8.

Sanitation.

Part 1. General.

§ 130A-227. Department to establish program; definitions.

(a) For the purpose of promoting a safe and healthful environment and developing corrective measures required to minimize environmental health hazards, the Department shall establish a sanitation program. The Department shall employ environmental engineers, sanitarians, soil scientists and other scientific personnel necessary to carry out the sanitation provisions of this Chapter and the rules of the Commission.

(b) The following definitions shall apply throughout this Article:

(1) "Department" means the Department of Environment and Natural Resources.
(2) "Secretary" means the Secretary of Environment and Natural Resources. (1983, c. 891, s. 2; 1997-443, s. 11A.77A.)

Part 2. Meat Markets.

§§ 130A-228, 130A-229: Repealed by Session Laws 1995, c. 123, s. 11.

Part 3. Sanitation of Scallops, Shellfish and Crustacea.

§ 130A-230. Commission to adopt rules; enforcement of rules.

For the protection of the public health, the Commission shall adopt rules establishing sanitation requirements for the harvesting, processing and handling of scallops, shellfish and crustacea of in-State origin. The rules of the Commission may also regulate scallops, shellfish and crustacea shipped into North Carolina. The Department is authorized to enforce the rules and may issue and revoke permits according to the rules. (1965, c. 783, s. 1; 1967, c. 1005, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-231. Agreements between the Division of Environmental Health and the Division of Marine Fisheries.

Nothing in this Part is intended to limit the authority of the Division of Marine Fisheries of the Department of Environment and Natural Resources to regulate aspects of the harvesting, processing and handling of scallops, shellfish and crustacea relating to conservation of the fisheries resources of the State. The Division of Environmental Health and the Division of Marine Fisheries are authorized to enter into agreements respecting the duties and responsibilities of each agency as to the harvesting, processing and handling of scallops, shellfish and crustacea. (1965, c. 783, s. 1; 1967, c. 1005, s. 1; 1973, c. 476, s. 128; c. 1262, s. 86; 1977, c. 771, s. 4; 1983, c. 891, s. 2; 1989, c. 727, s. 142; 1997-443, s. 11A.78.)

§ 130A-232: Reserved for future codification purposes.

Part 3A. Monitor Water Quality of Coastal Fishing and Recreation Waters.

§ 130A-233. Definitions.

The following definitions apply to this Part:

(1) Coastal fishing waters. — Defined in G.S. 113-129(4).
(2) Inland fishing waters. — Defined in G.S. 113-129(9).
(3) Coastal recreation waters. — Defined in 33 U.S.C. § 1362. (1997-443, s. 15.17(a); 1998-217, s. 13; 2003-149, s. 1.)

§ 130A-233.1. Monitoring program for State coastal fishing and recreation waters; development and implementation of program.

(a) For the protection of the public health of swimmers and others who use the State's coastal fishing waters for recreational activities, the Department shall develop and implement a program to monitor the State's coastal fishing waters for contaminants. The monitoring program shall cover all coastal fishing waters up to the point where those waters are classified as inland fishing waters.

(b) The Commission shall adopt rules to provide for a water quality monitoring program for the coastal recreation waters of the State and to allow the Department to implement the federal Beaches Environmental Assessment and Coastal Health Act of 2000 (Pub. L. No. 106-284; 114 Stat. 870, 875; 33 U.S.C. §§ 1313, 1362). The rules shall address, but are not limited to, definitions, surveys, sampling, action standards, and posting of information on the water quality of coastal recreation waters. (1997-443, s. 15.17(a); 2003-149, s. 1.)

§ 130A-233.2. Removal or destruction of warning signs.

No person shall remove, destroy, damage, deface, mutilate, or otherwise interfere with any sign posted by the Department pursuant to G.S. 130A-233.1. No person, without just cause or excuse, shall have in his possession any sign posted by the Department pursuant to G.S. 130A-233.1. Any person who violates this section is guilty of a Class 2 misdemeanor. (2003-149, s. 1.)

§ 130A-234: Reserved for future codification purposes.

Part 4. Institutions and Schools.

§ 130A-235. Regulation of sanitation in institutions; setback requirements applicable to certain water supply wells.

(a) For protection of the public health, the Commission shall adopt rules to establish sanitation requirements for all institutions and facilities at which individuals are provided room or board and for which a license to operate is required to be obtained or a certificate for payment is obtained from the Department. The rules shall also apply to facilities that provide room and board to individuals but are exempt from licensure under G.S. 131D-10.4(1). No other State agency may adopt rules to establish sanitation requirements for these institutions and facilities. The Department shall issue a license to operate or a certificate for payment to such an institution or facility only upon compliance with all applicable sanitation rules of the Commission, and the Department may suspend or revoke a license or a certificate for payment for violation of these rules. In adopting rules pursuant to this section, the Commission shall define categories of standards to which such institutions and facilities shall be subject and shall establish criteria for the placement of any such institution or facility into one of the categories. This section shall not apply to State institutions and facilities subject to inspection under G.S. 130A-5(10). This section shall not apply to a single-family dwelling that is used for a family foster home or a therapeutic foster home, as those terms are defined in G.S. 131D-10.2.

(b) Rules that establish a minimum distance from a building foundation for a water supply well shall provide that an institution or facility located in a single-family dwelling served by a water supply well that is located closer to a building foundation than the minimum distance specified in the rules may be licensed or approved if the results of water testing meet or exceed standards established by the Commission and there are no other potential health hazards associated with the well. At the time of application for licensure or approval, water shall be sampled and tested for pesticides, nitrates, and bacteria. Thereafter, water shall be sampled and tested at intervals determined by the Commission but not less than annually. A registered sanitarian or other health official who is qualified by training and experience shall collect the water samples as required by this subsection and may examine the well location to determine if there are other potential health hazards associated with the well. A well shall comply with all other applicable sanitation requirements established by the Commission.

(c) The Department may suspend or revoke a license or approval for a violation of this section or rules adopted by the Commission. (1945, c. 829, s. 1; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 543, s. 1; 1989, c. 727, s. 143; 1997-443, s. 11A.79; 1998-136, s. 1; 2001-109, s. 1; 2001-487, s. 84(a).)

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Foster Homes. — Former G.S. 130-170 authorized the Commission to adopt rules and regulations governing the sanitation of family foster homes. See opinion of Attorney General to Miss Lela Moore Hall, Director of Social Services, New Hanover County, 45 N.C.A.G. 138 (1975).

§ 130A-236. Regulation of sanitation in schools.

For the protection of the public health, the Commission shall adopt rules to establish sanitation requirements for public, private and religious schools. The rules shall address, but not be limited to, the cleanliness of floors, walls, ceilings, storage spaces and other areas; adequacy of lighting, ventilation, water supply, toilet and lavatory facilities; sewage collection, treatment and disposal facilities; and solid waste disposal. The Department shall inspect schools at least annually. The Department shall submit written inspection reports of public schools to the State Board of Education and written inspection reports of private and religious schools to the Department of Administration. (1973, c. 1239, s. 1; 1983, c. 891, s. 2; 1993, c. 522, s. 11.)

§ 130A-237. Corrective action.

A principal or administrative head of a public, private, or religious school shall immediately take action to correct conditions that do not satisfy the sanitation rules. (1973, c. 1239, s. 2; 1983, c. 891, s. 2; 1993, c. 262, s. 6.)

Part 5. Migrant Housing.

§§ 130A-238 through 130A-246: Repealed by Session Laws 1989, c. 91.

Cross References. — For the Migrant Housing Act, see G.S. 95-222 et seq.

Editor's Note. — Repealed G.S. 130A-245 and 130A-246 had been reserved for future codification purposes.

Part 6. Regulation of Food and Lodging Facilities.

§ 130A-247. Definitions.

The following definitions shall apply throughout this Part:

(1) "Establishment" means (i) an establishment that prepares or serves drink, (ii) an establishment that prepares or serves food, (iii) an establishment that provides lodging, (iv) a bed and breakfast inn, or (v) an establishment that prepares and sells meat food products as defined in G.S. 106-549.15(14) or poultry products as defined in G.S. 106-549.51(26).

(1a) "Permanent house guest" means a person who receives room or board for periods of a week or longer. The term includes visitors of the permanent house guest.

(2) "Private club" means an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member's guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1).

(3) "Regular boarder" means a person who receives food for periods of a week or longer.

(4) "Establishment that prepares or serves drink" means a business or other entity that prepares or serves beverages made from raw apples or potentially hazardous beverages made from other raw fruits or vegetables or that otherwise puts together, portions, sets out, or hands out drinks for human consumption.

(5) "Establishment that prepares or serves food" means a business or other entity that cooks, puts together, portions, sets out, or hands out food for human consumption.

(6) "Bed and breakfast inn" means a business of not more than 12 guest rooms that offers bed and breakfast accommodations to at least nine but not more than 23 persons per night for a period of less than one week, and that:
  a. Does not serve food or drink to the general public for pay;
  b. Serves only the breakfast meal, and that meal is served only to overnight guests of the business;
  c. Includes the price of breakfast in the room rate; and
  d. Is the permanent residence of the owner or the manager of the business.

(7) "Limited food services establishment" means an establishment as described in G.S. 130A-248(a4), with food handling operations that are restricted by rules adopted by the Commission pursuant to G.S. 130A-248(a4) and that prepares or serves food only in conjunction with amateur athletic events. (1983, c. 891, s. 2; 1987, c. 367; 1991, c. 733, s. 1; 1993, c. 262, s. 1; c. 513, s. 12; 1995, c. 123, s. 12; c. 507, s. 26.8(f); 1999-247, ss. 3, 4.)

§ 130A-248. Regulation of food and lodging establishments.

(a) For the protection of the public health, the Commission shall adopt rules governing the sanitation of establishments that prepare or serve drink or food for pay and establishments that prepare and sell meat food products or poultry products. However, any establishment that prepares or serves food or drink to the public, regardless of pay, shall be subject to the provisions of this Article if the establishment that prepares or serves food or drink holds an ABC permit, as defined in G.S. 18B-101, meets any of the definitions in G.S. 18B-1000, and does not meet the definition of a private club as provided in G.S. 130A-247(2).

(a1) For the protection of the public health, the Commission shall adopt rules governing the sanitation of hotels, motels, tourist homes, and other establishments that provide lodging for pay.

(a2) For the protection of the public health, the Commission shall adopt rules governing the sanitation of private homes offering bed and breakfast accommodations to eight or fewer persons per night, and rules governing the sanitation of bed and breakfast inns as defined in G.S. 130A-247. In carrying out this function, the Commission shall adopt requirements that are the least restrictive so as to protect the public health and not unreasonably interfere with the operation of bed and breakfast inns.

(a3) The rules adopted by the Commission pursuant to subsections (a), (a1), and (a2) of this section shall address, but not be limited to, the following:

(1) Sanitation requirements for cleanliness of floors, walls, ceilings, storage spaces, utensils, ventilation equipment, and other areas and items;

(2) Requirements for:
  a. Lighting and water supply;
  b. Wastewater collection, treatment, and disposal facilities; and
  c. Lavatory and toilet facilities, food protection, and waste disposal;

(3) The cleaning and bactericidal treatment of eating and drinking utensils and other food-contact surfaces. A requirement imposed under this subdivision to sanitize multiuse eating and drinking utensils and other food-contact surfaces does not apply to utensils and surfaces provided in the guest room of the lodging unit for guests to prepare food while staying in the guest room.

(3a) The appropriate and reasonable use of gloves or utensils by employees who handle unwrapped food;

(4) The methods of food preparation, transportation, catering, storage, and serving;

(5) The health of employees;

(6) Animal and vermin control; and

(7) The prohibition against the offering of unwrapped food samples to the general public unless the offering and acceptance of the samples are continuously supervised by an agent of the entity preparing or offering the samples or by an agent of the entity on whose premises the samples are made available. As used in this subdivision, "food samples" means unwrapped food prepared and made available for sampling by and without charge to the general public for the purpose of promoting the food made available for sampling. This subdivision does not apply to unwrapped food prepared and offered in buffet, cafeteria, or other style in exchange for payment by the general public or by the person or entity arranging for the preparation and offering of such unwrapped food. This subdivision shall not apply to open air produce markets nor to farmer market facilities operated on land owned or leased by the State of North Carolina or any local government.

The rules shall contain a system for grading establishments, such as Grade A, Grade B, and Grade C. The rules shall be written in a manner that promotes consistency in both the interpretation and application of the grading system.

(a4) For the protection of the public health, the Commission shall adopt rules governing the sanitation of limited food service establishments. In adopting the rules, the Commission shall not limit the number of days that limited food service establishments may operate. Limited food service establishment permits shall be issued only to political subdivisions of the State, establishments operated by volunteers that prepare or serve food in conjunction with amateur athletic events, or for establishments operated by organizations that are exempt from federal income tax under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code.

(b) No establishment shall commence or continue operation without a permit or transitional permit issued by the Department. The permit or transitional permit shall be issued to the owner or operator of the establishment and shall not be transferable. If the establishment is leased, the permit or transitional permit shall be issued to the lessee and shall not be transferable. If the location of an establishment changes, a new permit shall be obtained for the establishment. A permit shall be issued only when the establishment satisfies all of the requirements of the rules. The Commission shall adopt rules establishing the requirements that must be met before a transitional permit may be issued, and the period for which a transitional permit may be issued. The Department may also impose conditions on the issuance of a permit or transitional permit in accordance with rules adopted by the Commission. A permit or transitional permit shall be immediately revoked in accordance with G.S. 130A-23(d) for failure of the establishment to maintain a minimum grade of C. A permit or transitional permit may otherwise be suspended or revoked in accordance with G.S. 130A-23.

(b1) A permit shall expire one year after an establishment closes unless the permit is the subject of a contested case pursuant to Article 3 of Chapter 150B of the General Statutes.

(c) If ownership of an establishment is transferred or the establishment is leased, the new owner or lessee shall apply for a new permit. The new owner or lessee may also apply for a transitional permit. A transitional permit may be issued upon the transfer of ownership or lease of an establishment to allow the correction of construction and equipment problems that do not represent an immediate threat to the public health. Upon issuance of a new permit or a transitional permit for an establishment, any previously issued permit for an establishment in that location becomes void.

(c1) The Commission shall adopt rules governing the sanitation of pushcarts and mobile food units. A permitted restaurant or commissary shall serve as a base of operations for a pushcart or mobile food unit.

(d) The Department shall charge each establishment subject to this section, except nutrition programs for the elderly administered by the Division of Aging of the Department of Health and Human Services, establishments that prepare and sell meat food products or poultry products, and public school cafeterias, an annual fee of fifty dollars ($50.00). The Commission shall adopt rules to implement this subsection. Fees collected under this subsection shall be used for State and local food, lodging, and institution sanitation programs and activities. No more than thirty-three and one-third percent (33 ⅓%) of the fees collected under this subsection may be used to support State health programs and activities.

(d1) The Department shall charge a twenty-five dollar ($25.00) late payment fee to any establishment subject to this section, except nutrition programs for the elderly administered by the Division of Aging of the Department of Health and Human Services, establishments that prepare and sell meat food products or poultry products, and public school cafeterias, that fails to pay the fee required by subsection (d) of this section within 45 days after billing by the Department. The Department may, in accordance with G.S. 130A-23, suspend the permit of an establishment that fails to pay the required fee within 60 days after billing by the Department. The Department shall charge a reinstatement fee of one hundred fifty dollars ($150.00) to any establishment that requests reinstatement of its permit after the permit has been suspended. The Commission shall adopt rules to implement this subsection.

The clear proceeds of civil penalties collected pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) In addition to the fees under subsection (d) of this section, the Department may charge a fee of two hundred dollars ($200.00) for plan review of plans for prototype franchised or chain facilities for food establishments subject to this section. All of the fees collected under this subsection may be used to support the State food, lodging, and institution sanitation programs and activities under this Part.

(f) Any local health department may charge a fee not to exceed two hundred dollars ($200.00) for plan review by that local health department of plans for food establishments subject to this section that are not subject to subsection (e) of this section. All of the fees collected under this subsection may be used for local food, lodging, and institution sanitation programs and activities. No food establishment that pays a fee under subsection (e) of this section is liable for a fee under this subsection. (1941, c. 309, s. 1; 1955, c. 1030, s. 1; 1957, c. 1214, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 438, s. 2; 1989, c. 551, ss. 1, 4; 1989 (Reg. Sess., 1990), c. 1064, s. 1; 1991, c. 226, s. 1; c. 656, ss. 1, 2; c. 733, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 7; 1993, c. 262, s. 2; c. 346, s. 1; c. 513, s. 13; 1995, c. 123, s. 13(a)-(d); c. 507, s. 26.8(b), (g); 1997-367, s. 1; 1997-443, s. 11A.118(a); 1997-479, s. 1; 2002-126, ss. 29A.15(a), 29A.16; 2003-340, ss. 1.5, 3; 2005-276, s. 6.37(s).)

Editor's Note. — Session Laws 1991, c. 689, s. 179, which amended subsection (d) of this section by inserting "nutrition programs for the elderly administered by the Division of Aging of the Department of Human Resources and," was repealed by Session Laws 1991, c. 761, s. 37.2 since it duplicated Session Laws 1991, c. 656, s. 2.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 130A-249. Inspections; report and grade card.

The Secretary may enter any establishment that is subject to the provisions of G.S. 130A-248 for the purpose of making inspections. The Secretary shall inspect each food service establishment at a frequency established by the Commission. In establishing a schedule for inspections, the Commission shall consider the risks to the population served by the establishment and the type of food or drink served by the establishment. The person responsible for the management or control of an establishment shall permit the Secretary to inspect every part of the establishment and shall render all aid and assistance necessary for the inspection. The Secretary shall leave a copy of the inspection form and a card or cards showing the grade of the establishment with the responsible person. The Secretary shall post the grade card in a conspicuous place as determined by the Secretary where it may be readily observed by the public upon entering the establishment or upon picking up food prepared inside but received and paid for outside the establishment through delivery windows or other delivery devices. If a single establishment has one or more outside delivery service stations and an internal delivery system, that establishment shall have a grade card posted where it may be readily visible upon entering the establishment and one posted where it may be readily visible in each delivery window or delivery device upon picking up the food outside the establishment. The grade card or cards shall not be removed by anyone, except by or upon the instruction of the Secretary. (1941, c. 309, s. 2; 1955, c. 1030, s. 2; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 145; c. 189; 1989, c. 551, s. 2; 1993, c. 262, s. 3; 2005-386, s. 4.1.)

Editor's Note. — Session Laws 2005-386, s. 4.2, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt rules to implement the provisions of Section 4.1 of this act so that the rules become effective on or before 1 January 2007."

Effect of Amendments. — Session Laws 2005-386, s. 4.1, effective January 1, 2007, substituted "food service establishment at a frequency established by the Commission" for "restaurant at least quarterly, except that the quarterly inspection requirement shall not apply to temporary food establishments" at the end of the second sentence; and added the third sentence.

§ 130A-250. Exemptions.

The following shall be exempt from this Part:

(1) Establishments that provide lodging described in G.S. 130A-248(a1) with four or fewer lodging units.

(2) Condominiums.

(3) Establishments that prepare or serve food or provide lodging to regular boarders or permanent houseguests only. However, the rules governing food sanitation adopted under G.S. 130A-248 apply to establishments that are not regulated under G.S. 130A-235 and that prepare or serve food for pay to 13 or more regular boarders or permanent houseguests who are disabled or who are 55 years of age or

older. Establishments to which the rules governing food sanitation are made applicable by this subdivision that are in operation as of 1 July 2000 may continue to use equipment and construction in use on that date if no imminent hazard exists. Replacement equipment for these establishments shall comply with the rules governing food sanitation adopted under G.S. 130A-248.

(4) Private homes that occasionally offer lodging accommodations, which may include the providing of food, for two weeks or less to persons attending special events, provided these homes are not bed and breakfast homes or bed and breakfast inns.

(5) Private clubs.

(6) Curb markets operated by the State Agricultural Extension Service.

(7) Establishments (i) that are incorporated as nonprofit corporations in accordance with Chapter 55A of the General Statutes or (ii) that are exempt from federal income tax under the Internal Revenue Code, as defined in G.S. 105-228.90, or (iii) that are political committees as defined in G.S. 163-278.6(14) and that prepare or serve food or drink for pay no more frequently than once a month for a period not to exceed two consecutive days, including establishments permitted pursuant to this Part when preparing or serving food or drink at a location other than the permitted locations. A nutrition program for the elderly that is administered by the Division of Aging of the Department of Health and Human Services and that prepares and serves food or drink on the premises where the program is located in connection with a fundraising event is exempt from this Part if food and drink are prepared and served no more frequently than one day each month.

(8) Establishments that put together, portion, set out, or hand out only beverages that do not include those made from raw apples or potentially hazardous beverages made from raw fruits or vegetables, using single service containers that are not reused on the premises.

(9) Establishments where meat food products or poultry products are prepared and sold and which are under inspection by the North Carolina Department of Agriculture and Consumer Services or the United States Department of Agriculture.

(10) Markets that sell uncooked cured country ham or uncooked cured salted pork and that engage in minimal preparation such as slicing, weighing, or wrapping the ham or pork, when this minimal preparation is the only activity that would otherwise subject these markets to regulation under this Part.

(11) Establishments that only set out or hand out beverages that are regulated by the North Carolina Department of Agriculture and Consumer Services in accordance with Article 12 of Chapter 106 of the General Statutes.

(12) Establishments that only set out or hand out food that is regulated by the North Carolina Department of Agriculture and Consumer Services in accordance with Article 12 of Chapter 106 of the General Statutes. (1955, c. 1030, s. 4; 1957, c. 1214, s. 3; 1983, c. 884, ss. 1, 2; c. 891, s. 2; 1985 (Reg. Sess., 1986), c. 926; 1989, c. 551, s. 3; 1991, c. 733, s. 3; 1993, c. 262, s. 4; c. 513, s. 14; 1995, c. 123, s. 14; 1997-261, s. 86; 1999-13, s. 1; 1999-247, s. 5; 2000-82, s. 1; 2001-440, s. 4.)

Part 7. Mass Gatherings.

§ 130A-251. Legislative intent and purpose.

The intent and purpose of this Part is to provide for the protection of the public health, safety and welfare of those persons in attendance at mass gatherings and of those persons who reside near or are located in proximity to the sites of mass gatherings or are directly affected by them. (1971, c. 712, s. 1; 1983, c. 891, s. 2.)

§ 130A-252. Definition of mass gathering; applicability of Part.

(a) For the purposes of this Part, "mass gathering" means a congregation or assembly of more than 5,000 people in an open space or open air for a period of more than 24 hours. A mass gathering shall include all congregations and assemblies organized or held for any purpose, but shall not include assemblies in permanent buildings or permanent structures designed or intended for use by a large number of people. To determine whether a congregation or assembly extends for more than 24 hours, the period shall begin when the people expected to attend are first permitted on the land where the congregation or assembly will be held and shall end when the people in attendance are expected to depart. To determine whether a congregation or assembly shall consist of more than 5,000 people, the number reasonably expected to attend, as determined from the promotion, advertisement and preparation for the congregation or assembly and from the attendance at prior congregations or assemblies of the same type, shall be considered.

(b) The provisions of this Part do not apply to a permanent stadium with an adjacent campground that hosts an annual event that has, within the previous five years, attracted crowds in excess of 70,000 people. The term "stadium" includes speedways and dragways. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1999-3, s. 1; 1999-171, s. 1.)

§ 130A-253. Permit required; information report; revocation of permit.

(a) No person shall organize, sponsor or hold any mass gathering unless a permit has been issued to the person by the Secretary under the provisions of this Part. A permit shall be required for each mass gathering and is not transferable.

(b) A permit may be revoked by the Secretary at any time if the Secretary finds that the mass gathering is being or has been maintained or operated in violation of this Part. A permit may be revoked upon the request of the permittee or upon abandonment of the operation. A permit will otherwise expire upon satisfactory completion of the post-gathering cleanup following the close of the mass gathering.

(c) The Secretary, upon information that a congregation or assembly of people which may constitute a mass gathering is being organized or promoted, may direct the organizer or promoter to submit within five calendar days an information report to the Department. The report shall contain the information required for an application for permit under G.S. 130A-254(b) and other information concerning the promotion, advertisement and preparation for the congregation or assembly and prior congregations or assemblies, as the Secretary deems necessary. The Secretary shall consider all available information including any report received and shall determine if the proposed congregation or assembly is a mass gathering. If the Secretary determines that a proposed congregation or assembly is a mass gathering, the Secretary shall notify the organizer or promoter to submit an application for permit at least 30 days prior to the commencement of the mass gathering. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-254. Application for permit.

(a) Application for a permit for a mass gathering shall be made to the Secretary on a form and in a manner prescribed by the Secretary. The application shall be filed with the Secretary at least 30 days prior to the commencement of the mass gathering. A fee as prescribed by the Secretary, not to exceed one hundred dollars ($100.00), shall accompany the application.

(b) The application shall contain the following information: identification of the applicant; identification of any other person or persons responsible for organizing, sponsoring or holding the mass gathering; the location of the proposed mass gathering; the estimated maximum number of persons reasonably expected to be in attendance at any time; the date or dates and the hours during which the mass gathering is to be conducted; and a statement as to the total time period involved.

(c) The application shall be accompanied by an outline map of the area to be used, to approximate scale, showing the location of all proposed and existing privies or toilets; lavatory and bathing facilities; all water supply sources including lakes, ponds, streams, wells and storage tanks; all areas of assemblage; all camping areas; all food service areas; all garbage and refuse storage and disposal areas; all entrances and exits to public highways; and emergency ingress and egress roads.

(d) The application shall be accompanied by additional plans, reports and information required by the Secretary as necessary to carry out the provisions of this Part.

(e) A charge shall be levied by the Secretary to cover the cost of additional services, including police, fire and medical services, provided by the State or units of local government on account of the mass gathering. The Secretary shall reimburse the State or the units of local government for the additional services upon receipt of payment. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-255. Provisional permit; performance bond; liability insurance.

(a) Within 15 days after the receipt of the application, the Secretary shall review the application and inspect the proposed site for the mass gathering. If it is likely that the requirements of this Part and the rules of the Commission can be met by the applicant, a provisional permit shall be issued.

(b) The Secretary shall require the permittee within five days after issuance of the provisional permit to file with the Secretary a performance bond or other surety to be executed to the State in the amount of five thousand dollars ($5,000) for up to 10,000 persons and an additional one thousand dollars ($1,000) for each additional 5,000 persons or fraction reasonably estimated to attend the mass gathering. The bond shall be conditioned on full compliance with this Part and the rules of the Commission and shall be forfeitable upon noncompliance and a showing by the Secretary of injury, damage or other loss to the State or local governmental agencies caused by the noncompliance.

(c) The permittee shall in addition file satisfactory evidence of public liability and property damage insurance in an amount determined by the Secretary to be reasonable, not to exceed one million dollars ($1,000,000) in amount, in relation to the risks and hazards involved in the proposed mass gathering. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-256. Issuance of permit; revocation; forfeiture of bond; cancellation.

(a) If, upon inspection by the Secretary five days prior to the starting date of the mass gathering, or earlier upon request of the permittee, the required facilities are found to be in place, satisfactory arrangements are found to have been made for required services, the charge for additional services levied in accordance with G.S. 130A-254(e) has been paid and other applicable provisions of this Part and the rules of the Commission are found to have been met, the Secretary shall issue a permit for the mass gathering. If, upon inspection, the facilities, arrangements or other provisions are not satisfactory, the provisional permit shall be revoked and no permit shall be issued.

(b) Upon revocation of either the provisional permit or the permit, the permittee shall immediately announce cancellation of the mass gathering in as effective a manner as is reasonably possible including, but not limited to, the use or whatever methods were used for advertising or promoting the mass gathering.

(c) If the provisional permit or the permit is revoked prior to or during the mass gathering, the Secretary may order the permittee to install facilities and make arrangements necessary to accommodate persons who may nevertheless attend or be present at the mass gathering despite its cancellation and to restore the site to a safe and sanitary condition. In the event the permittee fails to comply with the order of the Secretary, the Secretary may immediately proceed to install facilities and make other arrangements and provisions for cleanup as may be minimally required in the interest of public health and safety, utilizing any State and local funds and resources as may be available.

(d) If the Secretary installs facilities or makes arrangements or provisions for cleanup pursuant to subsection (c), the Secretary may apply to a court of competent jurisdiction prior to or within 60 days after the action to order forfeiture of the permittee's performance bond or surety for violation of this Part or the rules of the Commission. The court may order that the proceeds shall be applied to the extent necessary to reimburse State and local governmental agencies for expenditures made pursuant to the action taken by the Secretary upon the permittee's failure to comply with the order. Any excess proceeds shall be returned to the insurer of the bond or to the surety after deducting court costs. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-257. Rules of the Commission.

For the protection of the public health, safety and welfare of those attending mass gatherings and of other persons who may be affected by mass gatherings, the Commission shall adopt rules to carry out the provisions of this Part and to establish requirements for the provision of facilities and services at mass gatherings. The rules shall include, but not be limited to, the establishment of requirements as follows:

(1) General requirements relating to minimum size of activity area including camping and parking space, distance of activity area from dwellings, distance from public water supplies and watersheds and an adequate command post for use by personnel of health, law-enforcement and other governmental agencies;

(2) Adequate ingress and egress roads, parking facilities and entrances and exits to public highways;

(3) Plans for limiting attendance and crowd control, dust control and rapid emergency evacuation;

(4) Medical care, including facilities, services and personnel;

(5) Sanitary water supply, source and distribution; toilet facilities; sewage disposal; solid waste collection and disposal; food dispensing; insect and rodent control; and post-gathering cleanup; and

(6) Noise level at perimeter; lighting and signs. (1971, c. 712, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-258. Local ordinances not abrogated.

Nothing in this Part shall be construed to limit the authority of units of local government to adopt ordinances regulating, but not prohibiting, congregations and assemblies not covered by this Part. (1971, c. 712, s. 1; 1983, c. 891, s. 2.)

§§ 130A-259, 130A-260: Reserved for future codification purposes.

Part 8. Bedding.

§ 130A-261. Definitions.

The following definitions shall apply throughout this Part:

(1) "Bedding" means any mattress, upholstered spring, sleeping bag, pad, comforter, cushion, pillow, decorative pillow, and any other padded or stuffed item designed to be or commonly used for reclining or sleeping. This definition includes dual purpose furniture such as studio couches and sofa beds. The term "mattress" does not include water bed liners, bladders or cylinders unless they contain padding or stuffing. The term "mattress" also does not include quilts and comforters made principally by hand sewing or stitching in a home or community workshop.

(2) "Itinerant vendor" means a person who sells bedding from a movable conveyance.

(3) "Manufacture" means the making of bedding out of new materials.

(4) "New material" means any material or article that has not been used for any other purpose and by-products of industry that have not been in human use.

(5) "Previously used material" means any material of which previous use has been made, but manufacturing processes shall not be considered previous use.

(6) "Renovate" means the reworking or remaking of used bedding or the making of bedding from previously used materials, except for the renovator's own personal use or the use of the renovator's immediate family.

(7) "Sanitize" means treatment of secondhand bedding or previously used materials to be used in renovating for the destruction of pathogenic microorganisms and arthropods and the removal of dirt and filth.

(8) "Secondhand bedding" means any bedding of which prior use has been made.

(9) "Sell" or "sold" means sell, have to sell, give away in connection with a sale, delivery or consignment; or possess with intent to sell, deliver or consign in sale. (1937, c. 298, s. 1; 1957, c. 1357, s. 1; 1959, c. 619; 1965, c. 579, s. 1; 1983, c. 891, s. 2; 1987, c. 456, s. 1; 1991, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 647, s. 5.)

§ 130A-262. Sanitizing.

(a) No person shall sell any renovated bedding or secondhand bedding unless it is sanitized in accordance with rules adopted by the Commission.

(b) A sanitizing apparatus or process shall not be used for sanitizing bedding or material required to be sanitized under this Part until the apparatus is approved by the Department.

(c) A person who sanitizes bedding shall attach to the bedding a yellow tag containing information required by the rules of the Commission.

(d) A person who sanitizes material or bedding for another person shall keep a complete record of the kind of material and bedding which has been sanitized. The record shall be subject to inspection by the Department.

(e) A person who receives used bedding for renovation or storage shall attach to the bedding a tag on which is legibly written the date of receipt and the name and address of the owner. (1937, c. 298, s. 2; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 456, s. 2.)

§ 130A-263. Manufacture regulated.

All materials used in the manufacture of bedding in this State or used in manufactured bedding to be sold in this State shall be free of toxic materials and shall be made from new materials. (1937, c. 298, s. 3; 1951, c. 929, s. 2; 1957, c. 1357, s. 1; 1959, c. 619; 1965, c. 579, s. 2; 1971, c. 371, ss. 1, 2; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-264. Storage of used materials.

No establishment shall store any unsanitized previously used materials in the same room with bedding or materials that are new or have been sanitized unless the new or sanitized bedding or materials are completely segregated from the unsanitized materials in a manner approved by the rules of the Commission. (1937, c. 298, s. 3; 1951, c. 929, s. 2; 1957, c. 1357, s. 1; 1959, c. 619; 1965, c. 579, s. 2; 1971, c. 371, ss. 1, 2; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-265. Tagging requirements.

(a) A tag of durable material approved by the Commission shall be sewed securely to all bedding. The tag shall be at least two inches by three inches in size.

(b) The following shall be plainly stamped or printed upon the tag with ink in English:

(1) The name and kind of material or materials used to fill the bedding which are listed in the order of their predominance;

(2) A registration number obtained from the Department; and

(3) In letters at least one-eighth inch high the words "made of new material", if the bedding contains no previously used material; or the words "made of previously used materials", if the bedding contains any previously used material; or the word "secondhand" on any bedding which has been used but not remade.

(4) Repealed by Session Laws 1987, c. 456, s. 4, effective January 1, 1988.

(c) A white tag shall be used for manufactured bedding and a yellow tag for renovated or sanitized bedding.

(d) The tag must be sewed to the outside covering before the filling material has been inserted. No trade name, advertisement nor any other wording shall appear on the tag. (1937, c. 298, ss. 2, 3; 1951, c. 929, s. 2; 1957, c. 1357, s. 1; 1959, c. 619; 1965, c. 579, s. 2; 1971, c. 371, ss. 1, 2; 1973, c. 476 s. 128; 1983, c. 891, s. 2; 1987, c. 456, ss. 3, 4.)

§ 130A-266. Altering tags prohibited.

No person, other than one purchasing bedding for personal use or a representative of the Department shall remove, deface or alter the tag required by this Part. (1937, c. 298, s. 4; 1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-267. Selling regulated.

(a) No person shall sell any bedding in this State (whether manufactured within or without this State) which has not been manufactured, tagged, and labeled in the manner required by this Part and which does not otherwise comply with the provisions of this Part.

(b) This Part shall not apply to bedding sold by the owner and previous user from the owner's home directly to a purchaser for the purchaser's own personal use unless the bedding has been exposed to an infectious or communicable disease.

(c) Possession of any bedding in any store, warehouse, itinerant vendor's conveyance or place of business, other than a private home, hotel or other place where these articles are ordinarily used, shall constitute prima facie evidence that the item is possessed with intent to sell. No secondhand bedding shall be possessed with intent to sell for a period exceeding 60 days unless it has been sanitized. (1957, c. 1357, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 456, s. 5.)

§ 130A-268. Registration numbers.

(a) All persons manufacturing or sanitizing bedding in this State or manufacturing bedding to be sold in this State shall apply for a registration number on a form prescribed by the Secretary. Upon receipt of the completed application and applicable fees, the Department shall issue to the applicant a certificate of registration showing the person's name and address, registration number and other pertinent information required by the rules of the Commission.

(b) through (e) Repealed by Session Laws 1987, c. 456, s. 6. (1937, c. 298, s. 7; 1951, c. 929, s. 1; 1957, c. 1357, s. 1; 1959, c. 619; 1971, c. 371, s. 3; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 456, s. 6.)

§ 130A-269. Payment of fees; licenses.

(a), (b) Repealed by Session Laws 1987, c. 456, s. 7.

(c) The Department shall administer and enforce this Part. A person who has done business in this State throughout the preceding calendar year shall obtain a license by paying a fee to the Department in an amount determined by the total number of bedding units manufactured, sold, or sanitized in this State by the applicant during the calendar year immediately preceding, at the rate of five and two tenths cents (5.2¢) per bedding unit. However, if this amount is less than fifty dollars ($50.00), a minimum fee of fifty dollars ($50.00) shall be paid to the Department.

(d) A person who has not done business in this State throughout the preceding calendar year shall obtain a license by paying an initial fee to the Department in the amount of seven hundred twenty dollars ($720.00) for the first year in which business is done in this State, prorated in accordance with the quarter of the calendar year in which the person begins doing business. After submission of proof of business volume in accordance with subsection (h) of this section for the part of the preceding calendar year in which the person did business in this State, the Department shall determine the amount of fee for which the person is responsible for that time period by using a rate of five and two tenths cents (5.2¢) for each bedding unit. However, if this amount is less than fifty dollars ($50.00), then the amount of the fee for which the person is responsible shall be fifty dollars ($50.00). If the person's initial payment is more than the amount of the fee for which the person is responsible, the Department shall make a refund or adjustment to the cost of the fee due for the next year in the amount of the difference. If the initial payment is less than the amount of the fee for which the person is responsible, the person shall pay the difference to the Department.

(d1) Payments, refunds, and adjustments shall be made in accordance with rules adopted by the Commission.

(d2) Upon payment of the fees charged pursuant to subsections (c) and (d), or the first installment thereof as provided by rules adopted by the Commission, the Department shall issue a license to the person. Licenses shall be kept conspicuously posted in the place of business of the licensee at all times. The Secretary may suspend a license for a maximum of six months for two or more serious violations of this Part or of the rules of the Commission, within any 12-month period.

(e) A maximum fee of seven hundred fifty dollars ($750.00) shall be charged for units of bedding manufactured in this State but not sold in this State.

(f) For the sole purpose of computing fees for which a person is responsible, the following definitions shall apply: One mattress is defined as one bedding unit; one upholstered spring is defined as one bedding unit; one pad is defined as one bedding unit; one sleeping bag is defined as one bedding unit; five comforters, pillows or decorative pillows are defined as one bedding unit; and any other item is defined as one bedding unit.

(g) An application for license must be submitted on a form prescribed by the Secretary. No license may be issued to a person unless the person complies with the rules of the Commission governing the granting of licenses.

(h) The Commission shall adopt rules for the proper enforcement of this section. The rules shall include provisions governing the type and amount of proof which must be submitted by the applicant to the Department in order to establish the number of bedding units that were, during the preceding calendar year:

(1) Manufactured and sold in this State;
(2) Manufactured outside of this State and sold in this State; and
(3) Manufactured in this State but not sold in this State.

(i) The Commission may provide in its rules for additional proof of the number of bedding units sold during the preceding calendar year when it has reason to believe that the proof submitted by the manufacturer is incomplete, misleading or incorrect. (1937, c. 298, s. 5; 1949, c. 636; 1957, c. 1357, s. 1; 1965, c. 579, s. 3; 1967, c. 771; 1971, c. 371, ss. 4-7; 1973, s. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 456, s. 7.)

§ 130A-270. Bedding Law Account.

The Bedding Law Account is established as a nonreverting account within the Department. All fees collected under this Part shall be credited to the Account and applied to the following costs:

(1) Salaries and expenses of inspectors and other employees who enforce this Part.
(2) Expenses directly connected with the enforcement of this Part, including attorney's fees, which are expressly authorized to be incurred by the Secretary without authority from any other source when in the Secretary's opinion it is advisable to employ an attorney to prosecute any persons. (1937, c. 298, s. 5; 1949, c. 636; 1957, c. 1357, s. 1; 1965, c. 579, s. 3; 1967, c. 771; 1971, c. 371, ss. 4-7; 1973, c. 476, s. 128; 1983, c. 891, s. 2; c. 913, s. 23; 1991 (Reg. Sess., 1992), c. 1039, s. 20.2.)

Editor's Note. — Pursuant to Session Laws 1983, c. 913, s. 23, which amended repealed G.S. 130-177, and Session Laws 1983, c. 891, s. 16.1, which provided that any bill ratified by the 1983 General Assembly amending part of repealed Chapter 130 would be construed to amend the appropriate part of Chapter 130A, a second sentence from former subsection (a) of this section, relating to a semiannual report to the State Auditor, was deleted from this section.

§ 130A-271. Enforcement by the Department.

(a) The Department shall enforce the provisions of this Part and the rules adopted by the Commission.

(b) The Secretary may prohibit sale and place an "off sale" tag on any bedding which is not made, sanitized, or tagged as required by this Part and the rules of the Commission. The bedding shall not be sold or otherwise removed until the violation is remedied and the Secretary has reinspected it and removed the "off sale" tag.

(c) A person supplying material to a bedding manufacturer shall furnish an itemized invoice of all furnished material. Each material entering into willowed or other mixtures shall be shown on the invoice. The bedding manufacturer shall keep the invoice on file for one year subject to inspection by the Department.

(d) When the Secretary has reason to believe that bedding is not tagged or filled as required by this Part, the Secretary shall have authority to open a seam of the bedding to examine the filling, and, if unable after this examination to determine if the filling is of the kind stated on the tag, shall have the authority to examine purchase or other records necessary to determine definitely the kind of material used in the bedding. The Secretary shall have authority to seize and hold for evidence any records and any bedding or bedding material which in the Secretary's opinion is made, possessed or offered for sale in violation of this Part or the rules of the Commission. The Secretary shall have authority to take a sample of any bedding or bedding material for the purpose of examination or for evidence. (1937, c. 298, s. 6; 1957, c. 1357, s. 1; 1971, c. 371, s. 8; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 456, s. 8.)

§ 130A-272. Exemptions for blind persons and State institutions.

(a) In cases where bedding is manufactured, sanitized or renovated in a plant or place of business which has qualified as a nonprofit agency for the blind or severely handicapped under P.L. 92-28, as amended, the responsible person shall satisfy the provisions of this Part and the rules of the Commission. However, the responsible persons at these plants or places of business shall not be required to pay fees in accordance with G.S. 130A-269.

(b) State institutions engaged in the manufacture, renovation or sanitizing of bedding for their own use or that of another State institution are exempted from all provisions of this Part. (1937, c. 298, s. 11; 1957, c. 1357, s. 1; 1971, c. 371, s. 9; 1983, c. 891, s. 2; 1987, c. 456, s. 9.)

§ 130A-273. Rules.

The Commission shall adopt rules required by this Part in order to protect the public health. (1983, c. 891, s. 2.)

Part 9. Milk Sanitation.

§ 130A-274. Definitions.

The following definitions shall apply throughout this Part:

(1) "Grade 'A' milk" means fluid milk and milk products which have been produced, transported, handled, processed and distributed in accordance with the provisions of the rules adopted by the Commission.
(2) "Milk" means the lacteal secretion practically free from colostrum obtained by the milking of one or more cows, goats, or other lactating animals. (1983, c. 891, s. 2; 2004-195, s. 6.1.)

§ 130A-275. Commission to adopt rules.

Notwithstanding the provisions of G.S. 106-267 et seq., the Commission is authorized and directed to adopt rules relating to the sanitary production, transportation, processing and distribution of Grade "A" milk. The rules, in order to protect and promote the public health, shall provide definitions and requirements for: (i) the sanitary production and handling of milk on Grade "A" dairy farms; (ii) the sanitary transportation of Grade "A" raw milk for processing; (iii) the sanitary processing of Grade "A" milk; (iv) the sanitary handling and distribution of Grade "A" milk; (v) the requirements for the issuance, suspension and revocation of permits; and (vi) the establishment of quality standards for Grade "A" milk. The rules shall be no less stringent than the 1978 Pasteurized Milk Ordinance recommended by the U.S. Public Health Service/Food and Drug Administration as amended effective January 1, 1982. The Commission may adopt by reference the U.S. Public Health Service/Food and Drug Administration 1978 Pasteurized Milk Ordinance and any amendment thereto. (1983, c. 891, s. 2; 1985, c. 462, s. 15.)

§ 130A-276. Permits required.

No person shall produce, transport, process, or distribute Grade "A" milk without first having obtained a valid permit from the Department. (1983, c. 891, s. 2.)

§ 130A-277. Duties of the Department.

The Department shall enforce the rules of the Commission governing Grade "A" milk by making sanitary inspections of Grade "A" dairy farms, Grade "A" processing plants, Grade "A" milk haulers and Grade "A" distributors; by determining the quality of Grade "A" milk; and by evaluating methods of handling Grade "A" milk to insure compliance with the provisions of the rules of the Commission. The Department shall issue permits for the operation of Grade "A" dairy farms, processing plants and haulers in accordance with the provisions of the rules of the Commission and shall suspend or revoke permits for violations in accordance with the rules. (1983, c. 891, s. 2; 1995, c. 123, s. 3.)

§ 130A-278. Certain authorities of Department of Agriculture and Consumer Services not replaced.

This Part shall not repeal or limit the Department of Agriculture and Consumer Services' authority to carry out labeling requirements, required butterfat testing, aflatoxin testing, pesticide testing, other testing performed by the Department of Agriculture and Consumer Services any other function of the Department of Agriculture and Consumer Services concerning Grade "A" milk which is not inconsistent with this Article. (1983, c. 891, s. 2; 1997-261, s. 87.)

§ 130A-279. Sale or dispensing of milk.

Only milk that is Grade "A" pasteurized milk may be sold or dispensed directly to consumers for human consumption. Raw milk and raw milk products shall be sold or dispensed only to a permitted milk hauler or to a processing facility at which the processing of milk is permitted, graded, or regulated by a local, State, or federal agency. The Commission may adopt rules to provide exceptions for dispensing raw milk and raw milk products for nonhuman consumption. "Sale" or "sold" shall mean any transaction that involves the transfer or dispensing of milk and milk products or the right to acquire milk and milk products through barter or contractual arrangement or in exchange for any other form of compensation including, but not limited to, the sale of shares or interest in a cow, goat, or other lactating animal or herd. (1983, c. 891, s. 2; 2004-195, s. 6.2.)

Part 10. Public Swimming Pools.

§ 130A-280. Scope.

This Article provides for the regulation of public swimming pools in the State as they may affect the public health and safety. As used in this Article, the term "public swimming pool" means any structure, chamber, or tank containing an artificial body of water used by the public for swimming, diving, wading, recreation, or therapy, together with buildings, appurtenances, and equipment used in connection with the body of water, regardless of whether a fee is charged for its use. The term includes municipal, school, hotel, motel, apartment, boarding house, athletic club, or other membership facility pools and spas. This Article does not apply to a private pool serving a single family dwelling and used only by the residents of the dwelling and their guests. This Article also does not apply to therapeutic pools used in physical therapy programs operated by medical facilities licensed by the Department or operated by a licensed physical therapist, nor to therapeutic chambers drained, cleaned, and refilled after each individual use. (1989, c. 577, s. 1; 1997-443, s. 11A.80.)

§ 130A-281. Operation permit required.

No public swimming pool may be opened for use unless the owner or operator has obtained an operation permit issued by the Department pursuant to rules adopted under G.S. 130A-282. (1989, c. 577, s. 1.)

§ 130A-282. Commission to adopt rules; exception.

(a) Rules Required. — For protection of the public health and safety, the Commission shall adopt and the Department shall enforce rules concerning the construction and operation of public swimming pools. The Commission shall classify public swimming pools on the basis of size, usage, type, or any other appropriate factor and shall adopt requirements for each classification. The rules shall include requirements for:

(1) Submission and review of plans prior to construction.
(2) Application, review, expiration, renewal, and revocation or suspension of an operating permit.
(3) Inspection.
(4) Design and construction including materials, depth and other dimensions, and standards for the abatement of suction hazards.
(5) Operation and safety including water source, water quality and testing, fencing, water treatment, chemical storage, toilet and bath facilities, measures to ensure the personal cleanliness of bathers, safety equipment and other safety measures, and sewage and other wastewater disposal.

(b) Exception. — Public swimming pools constructed or remodeled prior to May 1, 1993, that do not meet specific design and construction requirements of the rules for public swimming pools adopted by the Commission shall not be required to comply with design and construction requirements other than requirements related to the abatement of suction hazards. Public swimming pools constructed or remodeled prior to May 1, 1993, shall comply with all other rules for public swimming pools adopted by the Commission.

(c) No single drain, single suction outlet public swimming pools less than 18 inches deep shall be allowed to operate. (1989, c. 577, s. 1; 1993, c. 215, s. 1; 1993 (Reg. Sess., 1994), c. 732, s. 1.)

Part 11. Tattooing.

§ 130A-283. Tattooing regulated.

(a) Definition. — As used in this Part, the term "tattooing" means the inserting of permanent markings or coloration, or the producing of scars, upon or under human skin through puncturing by use of a needle or any other method.

(b) Prohibited Practice. — No person shall engage in tattooing without first obtaining a tattooing permit from the Department. Licensed physicians, as well as physician assistants and nurse practitioners working under the supervision of a licensed physician, who perform tattooing within the normal course of their professional practice are exempt from the requirements of this Part.

(c) Application. — To obtain a tattooing permit, a person must apply to the Department. Upon receipt of the application, the Department, acting through the local health department, shall inspect the premises, instruments, utensils, equipment, and procedures of the applicant to determine whether the applicant meets the requirements for a tattooing permit set by the Commission. If the applicant meets these requirements, the Department shall issue a permit to the applicant. A permit is valid for one year and must be renewed annually by applying to the Department for a permit renewal.

(d) Violations. — The Department may deny an application for a tattooing permit if an applicant does not meet the requirements set by the Commission for the permit. The Department may suspend, revoke, or refuse to renew a permit if it finds that tattooing is being performed in violation of this Part. In accordance with G.S. 130A-24(a), Chapter 150B of the General Statutes, the Administrative Procedure Act, governs appeals concerning the enforcement of this Part.

(e) Limitation. — A permit issued pursuant to this Part does not authorize a person to remove a tattoo from the body of a human being. Compliance with this Part is not a bar to prosecution for a violation of G.S. 14-400. (1993 (Reg. Sess., 1994), c. 670, s. 1.)

Part 12. Decontamination Standards for Methamphetamine Sites.

§ 130A-284. Decontamination of property used for the manufacture of methamphetamine.

For the protection of the public health, the Commission shall adopt rules establishing decontamination standards to ensure that certain property is reasonably safe for habitation. An owner, lessee, operator or other person in control of a residence or place of business or any structure appurtenant to a residence or place of business, and who has knowledge that the property has been used for the manufacture of methamphetamine, shall comply with these rules. For purposes of this section, the terms "residence" and "place of business" shall be defined as set forth in G.S. 130A-334. (2004-178, s. 7.)

§§ 130A-285 through 130A-289: Reserved for future codification purposes.

ARTICLE 9.

Solid Waste Management.

Part 1. Definitions.

§ 130A-290. Definitions.

(a) Unless a different meaning is required by the context, the following definitions shall apply throughout this Article:

(1) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(1a) "Business entity" has the same meaning as in G.S. 55-1-40(2a).

(1b) "CERCLA/SARA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, as amended.

(1c) "Chemical or portable toilet" means a self-contained mobile toilet facility and holding tank and includes toilet facilities in recreational vehicles.

(1d) "Chlorofluorocarbon refrigerant" means any of the following when used as a liquid heat transfer agent in a mechanical refrigeration system: carbon tetrachloride, chlorofluorocarbons, halons, or methyl chloroform.

(2) "Closure" means the cessation of operation of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment.

(2a) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (1 July 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.

(2b) "Combustion products" means residuals, including fly ash, bottom ash, boiler slag, mill rejects, and flue gas desulfurization residue produced by a coal-fired generating unit.

(2c) "Combustion products landfill" means a facility or unit for the disposal of combustion products, where the landfill is located at the same facility with the coal-fired generating unit or units producing the combustion products, and where the landfill is located wholly or partly on top of a facility that is, or was, being used for the disposal or storage of such combustion products, including, but not limited to, landfills, wet and dry ash ponds, and structural fill facilities.

(3) "Commercial" when applied to a hazardous waste facility, means a hazardous waste facility that accepts hazardous waste from the general public or from another person for a fee.

(4) "Construction" or "demolition" when used in connection with "waste" or "debris" means solid waste resulting solely from construction, remodeling, repair, or demolition operations on pavement, buildings, or other structures, but does not include inert debris, land-clearing debris or yard debris.

(4a) "Department" means the Department of Environment and Natural Resources.

(5) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 1.

(6) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land or water so that the solid waste or any constituent part of the solid waste may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(7) "Garbage" means all putrescible wastes, including animal offal and carcasses, and recognizable industrial by-products, but excluding sewage and human waste.

(8) "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics may:

a. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

(8a) "Hazardous waste constituent" has the same meaning as in 40 Code of Federal Regulations § 260.10 (1 July 2006).

(9) "Hazardous waste facility" means a facility for the collection, storage, processing, treatment, recycling, recovery, or disposal of hazardous waste. Hazardous waste facility does not include a hazardous waste transfer facility that meets the requirements of 40 Code of Federal Regulations § 263.12 (1 July 2006).

(10) "Hazardous waste generation" means the act or process of producing hazardous waste.

(11) "Hazardous waste disposal facility" means any facility or any portion of a facility for disposal of hazardous waste on or in land in accordance with rules adopted under this Article.

(12) "Hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous wastes.

(13) "Hazardous waste management program" means the program and activities within the Department pursuant to Part 2 of this Article, for hazardous waste management.

(13a) "Hazardous waste transfer facility" means a facility or location where a hazardous waste transporter stores hazardous waste for a period of more than 24 hours but less than 10 days.

(13b) "Industrial solid waste" means solid waste generated by manufacturing or industrial processes that is not hazardous waste.

(14) "Inert debris" means solid waste which consists solely of material that is virtually inert and that is likely to retain its physical and chemical structure under expected conditions of disposal.

(15) "Land-clearing debris" means solid waste which is generated solely from land-clearing activities.

(16) "Landfill" means a disposal facility or part of a disposal facility where waste is placed in or on land and which is not a land treatment facility, a surface impoundment, an injection well, a hazardous waste long-term storage facility or a surface storage facility.

(17) "Manifest" means the form used for identifying the quantity, composition and the origin, routing and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment or storage.

(17a) "Medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals, but does not include any hazardous waste identified or listed pursuant to this Article, radioactive waste, household waste as defined in 40 Code of Federal Regulations § 261.4(b)(1) in effect on 1 July 1989, or those substances excluded from the definition of "solid waste" in this section.

(18) **(Effective October 1, 2009)** "Motor vehicle oil filter" means a filter that removes impurities from the oil used to lubricate an internal combustion engine in a motor vehicle.

(18a) "Municipal solid waste" means any solid waste resulting from the operation of residential, commercial, industrial, governmental, or institutional establishments that would normally be collected, processed, and disposed of through a public or private solid waste management service. Municipal solid waste does not include hazardous waste, sludge, industrial waste managed in a solid waste management facility owned and operated by the generator of the industrial waste for management of that waste, or solid waste from mining or agricultural operations.

(18b) "Municipal solid waste management facility" means any publicly or privately owned solid waste management facility permitted by the Department that receives municipal solid waste for processing, treatment, or disposal.

(19) "Natural resources" means all materials which have useful physical or chemical properties which exist, unused, in nature.

(20) "Open dump" means any facility or site where solid waste is disposed of that is not a sanitary landfill and that is not a facility for the disposal of hazardous waste.

(21) "Operator" means any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility and includes the person in charge of a shift or periods of operation during any part of the day.

(21a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(22) "Person" means an individual, corporation, company, association, partnership, unit of local government, State agency, federal agency or other legal entity.

(22a) "Pre-1983 landfill" means any land area, whether publicly or privately owned, on which municipal solid waste disposal occurred prior to 1 January 1983 but not thereafter, but does not include any landfill used primarily for the disposal of industrial solid waste.

(23) "Processing" means any technique designed to change the physical, chemical, or biological character or composition of any solid waste so as to render it safe for transport; amenable to recovery, storage or recycling; safe for disposal; or reduced in volume or concentration.

(24) "Recovered material" means a material that has known recycling potential, can be feasibly recycled, and has been diverted or removed from the solid waste stream for sale, use, or reuse. In order to qualify as a recovered material, a material must meet the requirements of G.S. 130A-309.05(c).

(25) "RCRA" means the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795, 42 U.S.C. § 6901 et seq., as amended.

(26) "Recyclable material" means those materials which are capable of being recycled and which would otherwise be processed or disposed of as solid waste.

(27) "Recycling" means any process by which solid waste, or materials which would otherwise become solid waste, are collected, separated, or processed, and reused or returned to use in the form of raw materials or products.

(28) "Refuse" means all nonputrescible waste.

(28a) "Refuse-derived fuel" means fuel that consists of municipal solid waste from which recyclable and noncombustible materials are removed so that the remaining material is used for energy production.

(29) "Resource recovery" means the process of obtaining material or energy resources from discarded solid waste which no longer has any useful life in its present form and preparing the solid waste for recycling.

(30) "Reuse" means a process by which resources are reused or rendered usable.

(31) "Sanitary landfill" means a facility for disposal of solid waste on land in a sanitary manner in accordance with the rules concerning sanitary landfills adopted under this Article.

(31a) "Secretary" means the Secretary of Environment and Natural Resources.

(32) "Septage" means solid waste that is a fluid mixture of untreated and partially treated sewage solids, liquids, and sludge of human or domestic origin which is removed from a wastewater system. The term septage includes the following:

a. Domestic septage, which is either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works receiving only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works receiving either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

b. Domestic treatment plant septage, which is solid, semisolid, or liquid residue generated during the treatment of domestic sewage in a treatment works where the designed disposal is subsurface. Domestic treatment plant septage includes, but is not limited to, scum or solids removed in primary, secondary, or advanced wastewater treatment processes and a material derived from domestic treatment plant septage. Domestic treatment plant septage does not include ash generated during the firing of domestic treatment plant septage in an incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

c. Grease septage, which is material pumped from grease interceptors, separators, traps, or other appurtenances used for the purpose of removing cooking oils, fats, grease, and food debris from the waste flow generated from food handling, preparation, and cleanup.

d. Industrial or commercial septage, which is material pumped from septic tanks or other devices used in the collection, pretreatment, or treatment of any water-carried waste resulting from any process of industry, manufacture, trade, or business where the design disposal of the wastewater is subsurface. Domestic septage mixed with any industrial or commercial septage is considered industrial or commercial septage.

e. Industrial or commercial treatment plant septage, which is solid, semisolid, or liquid residue generated during the treatment of sewage that contains any waste resulting from any process of industry, manufacture, trade, or business in a treatment works where the designed disposal is subsurface. Industrial or commercial treatment plant septage includes, but is not limited to, scum or solids removed in primary, secondary, or advanced wastewater treatment processes and a material derived from domestic treatment plant septage. Industrial or commercial treatment plant septage does not include ash generated during the firing of industrial or commercial treatment plant septage in an incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

(33) "Septage management firm" means a person engaged in the business of pumping, transporting, storing, treating or disposing septage. The term does not include public or community wastewater systems that treat or dispose septage.

(34) "Sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, institutional or industrial wastewater treatment plant, water supply treatment plant or air pollution control facility, or any other waste having similar characteristics and effects.

(35) "Solid waste" means any hazardous or nonhazardous garbage, refuse or sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, domestic sewage and sludges generated by the treatment thereof in sanitary sewage collection, treatment and disposal systems, and other material that is either discarded or is being accumulated, stored or treated prior to being discarded, or has served its original intended use and is generally discarded, including solid, liquid, semisolid or contained gaseous material resulting from industrial, institutional, commercial and agricultural operations, and from community activities. The term does not include:

a. Fecal waste from fowls and animals other than humans.

b. Solid or dissolved material in:

   1. Domestic sewage and sludges generated by treatment thereof in sanitary sewage collection, treatment and disposal systems which are designed to discharge effluents to the surface waters.
   2. Irrigation return flows.
   3. Wastewater discharges and the sludges incidental to and generated by treatment which are point sources subject to permits granted under Section 402 of the Water Pollution Control Act, as amended (P.L. 92-500), and permits granted under G.S. 143-215.1 by the Environmental Management Commission. However, any sludges that meet the criteria for hazardous waste under RCRA shall also be a solid waste for the purposes of this Article.

c. Oils and other liquid hydrocarbons controlled under Article 21A of Chapter 143 of the General Statutes. However, any oils or other liquid hydrocarbons that meet the criteria for hazardous waste under RCRA shall also be a solid waste for the purposes of this Article.

d. Any source, special nuclear or byproduct material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011).

e. Mining refuse covered by the North Carolina Mining Act, G.S. 74-46 through 74-68 and regulated by the North Carolina Mining Commission (as defined under G.S. 143B-290). However, any specific mining waste that meets the criteria for hazardous waste under RCRA shall also be a solid waste for the purposes of this Article.

f. Recovered material.

(36) "Solid waste disposal site" means any place at which solid wastes are disposed of by incineration, sanitary landfill or any other method.

(37) "Solid waste generation" means the act or process of producing solid waste.

(38) "Solid waste management" means purposeful, systematic control of the generation, storage, collection, transport, separation, treatment, processing, recycling, recovery and disposal of solid waste.

(39) "Solid waste management facility" means land, personnel and equipment used in the management of solid waste.

(40) "Special wastes" means solid wastes that can require special handling and management, including white goods, whole tires, used oil, lead-acid batteries, and medical wastes.

(41) "Storage" means the containment of solid waste, either on a temporary basis or for a period of years, in a manner which does not constitute disposal.

(41a) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(41b) "Tire-derived fuel" means a form of fuel derived from scrap tires.

(42) "Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. "Treatment" includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(43) "Unit of local government" means a county, city, town or incorporated village.

(44) "White goods" includes refrigerators, ranges, water heaters, freezers, unit air conditioners, washing machines, dishwashers, clothes dryers, and other similar domestic and commercial large appliances.

(44a) **(Effective October 1, 2009)** "Wooden pallet" means a wooden object consisting of a flat or horizontal deck or platform supported by structural components that is used as a base for assembling, stacking, handling, and transporting goods.

(45) "Yard trash" means solid waste consisting solely of vegetative matter resulting from landscaping maintenance.

(b) Unless a different meaning is required by the context, the following definitions shall apply throughout G.S. 130A-309.15 through G.S. 130A-309.24:

(1) "Public used oil collection center" means:

a. Automotive service facilities or governmentally sponsored collection facilities, which in the course of business accept for disposal small quantities of used oil from households; and

b. Facilities which store used oil in aboveground tanks, which are approved by the Department, and which in the course of business accept for disposal small quantities of used oil from households.

(2) "Reclaiming" means the use of methods, other than those used in rerefining, to purify used oil primarily to remove insoluble contami-

nants, making the oil suitable for further use; the methods may include settling, heating, dehydration, filtration, or centrifuging.

(3) "Recycling" means to prepare used oil for reuse as a petroleum product by rerefining, reclaiming, reprocessing, or other means or to use used oil in a manner that substitutes for a petroleum product made from new oil.

(4) "Rerefining" means the use of refining processes on used oil to produce high-quality base stocks for lubricants or other petroleum products. Rerefining may include distillation, hydrotreating, or treatments employing acid, caustic, solvent, clay, or other chemicals, or other physical treatments other than those used in reclaiming.

(5) "Used oil" means any oil which has been refined from crude oil or synthetic oil and, as a result of use, storage, or handling, has become unsuitable for its original purpose due to the presence of impurities or loss of original properties, but which may be suitable for further use and is economically recyclable.

(6) "Used oil recycling facility" means any facility that recycles more than 10,000 gallons of used oil annually. (1969, c. 899; 1975, c. 311, s. 2; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 1; 1981, c. 704, s. 4; 1983, c. 795, ss. 1, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, s. 2; 1985, c. 738, s. 1; 1987, c. 574, s. 1; 1987 (Reg. Sess., 1988), c. 1020, s. 1; c. 1058, s. 1; 1989, c. 168, s. 11; c. 742, s. 5; c. 784, s. 1; 1991, c. 342, s. 7; c. 621, s. 1; 1991 (Reg. Sess., 1992), c. 1013, s. 7; 1993, c. 173, ss. 1-3; c. 471, ss. 1, 2; 1995 (Reg. Sess., 1996), c. 594, ss. 1-5; 1997-27, s. 1; 1997-330, s. 3; 1997-443, s. 11A.81; 2005-362, s. 1; 2007-107, ss. 1.1(c), 1.8(a), (b); 2007-550, ss. 7(a), 12(a), (b).)

Cross References. — As to manufacturing redevelopment districts, qualified immunity for third-party claims, and enforcement of environmental requirements, see G.S. 66-343. As to provisions for regional solid waste management authorities, see Article 22 of Chapter 153A, G.S. 153A-421 et seq.

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1013, which amended this section, in s. 8 provides: "Any contract for solid waste collection or disposal entered into by any county, city, or town that would have been lawful if this act had been in effect at the time the contract was entered into is validated. The provisions of this act that limit a contract or franchise for the collection and disposal of solid waste to a period of not more than 30 years shall not be construed to invalidate any contract or franchise for a longer period up to 60 years that was entered into by any county, city, or town prior to the date this act is effective." The act became effective July 22, 1992.

Session Laws 1997-374, s. 1, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt a rule regarding design criteria for municipal solid waste landfills that complies with 40 C.F.R. Part 258.40 (1 July 1996 Edition) and that provides for alternate landfill liners that are at least as protective as the liner currently authorized under the rules of the Commission for Health Services [now the Commission for Public Health]."

Session Laws 1997-374, s. 2, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Commission for Health Services [now the Commission for Public Health] shall adopt the rule required by Section 1 of this act as a temporary rule no later than 1 July 1998."

Session Laws 2000-19, s. 19, which had authorized the Commission on Health Services to adopt a rule that requires a person who generates wastes at a dry-cleaning facility or wholesale distribution facility, other than wastewater generated from dry-cleaning processes, which contain solvents perchloroethylene, F-1,1,3, or 1,1,1 trichloroethane to deliver the wastes to a facility legally authorized to manage or recycle hazardous wastes containing these solvents, was repealed by Session Laws 2001-265, s. 3.

Session Laws 2000-19, s. 20, contains a severability clause.

Session Laws 2007-107, s. 1.8(d) provides: "The Department of Environment and Natural Resources shall study the need for further regulation of hazardous waste transfer facilities, as defined in G.S. 130A-290(a)(13a), as enacted by subsection (a) of this section, including whether to require these facilities to obtain a permit under Part 2 of Article 9 of Chapter 130A of the General Statutes, pay permit fees, provide contingency plans, and demonstrate financial responsibility. The Department of Environment and Natural Resources shall report its findings and recommendations, including any legislative proposals, to the Environmental Review Commission on or before 15 February 2008."

Session Laws 2007-107, s. 6.2 contains a severability clause.

Session Laws 2007-550, s. 12(b), added a new subdivision (a)(21a), and redesignated the existing subdivision (a)(21a) as subdivision (a)(21b). The existing subdivision (a)(21a) has retained its current location, and the newly added subdivision has been renumbered as subdivision (a)(22a), to maintain alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2007-550, s. 15, provides: "(a) The Commission for Health Services shall review rules governing the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of solid waste management facilities to determine whether changes are required to protect public health, safety, welfare, and the environment; to improve the performance of solid waste management facilities; to take advantage of technological advances in landfill design, construction, operation, maintenance, and closure; and to provide additional protection to environmentally sensitive areas of the State. The Commission shall adopt rules necessary to minimize impacts from solid waste management facilities on public health, safety, welfare, and the environment. These rules shall:

"(1) Establish standards for the collection, control, and utilization or destruction of landfill gases at municipal solid waste landfills.

"(2) Establish standards for the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of bioreactor landfills.

"(3) Establish criteria for development of bird and wildlife management plans.

"(4) Incorporate measures necessary to minimize impacts to natural, historic, and cultural resources, including, but not limited to, wetlands, critical fisheries habitats, parks, recreation areas, cultural and historic sites, and potential water supplies.

"(b) This section is effective when it becomes law [August 31, 2007]."

Session Laws 2007-550, s. 19, contains a severability clause.

Effect of Amendments. — Session Laws 2005-362, s. 1, effective October 1, 2009, redesignated former subdivision (a)(18) as present subdivision (a)(17a); and added subdivisions (a)(18) and (a)(44a).

Session Laws 2007-107, ss. 1.1(c), 1.8(a) and (b), effective October 1, 2007, added subdivision (a)(8a); added the second sentence of subdivision (a)(9); added subdivision (a)(13a); and redesignated former subdivision (a)(13a) as present subdivision (a)(13b).

Session Laws 2007-550, ss. 7(a), 12(a)-12(b), effective August 1, 2007, redesignated subdivisions (a)(1a) as (a)(1b), (a)(1b) as (a)(1c), and (a)(1c) as (a)(1d); added present subdivision (a)(1a); added subdivisions (a)(2a) through (a)(2c); added subdivision (a)(21a), and redesignated former subdivision (a)(21a) as present (a)(21b). For renumbering of subdivisions to maintain alphabetical order, see Editor's note.

Legal Periodicals. — For comment on North Carolina's 1981 Waste Management Act, see 5 Campbell L. Rev. 337 (1983).

For 1997 legislative survey, see 20 Campbell L. Rev. 443.

CASE NOTES

"Garbage" Distinguished from "Trash" and "Rubbish". — Under former G.S. 130-166.16 as it stood before 1977 revision the legislature distinguished "garbage" from "trash" and "rubbish." Lafayette Transp. Serv., Inc. v. County of Robeson, 283 N.C. 494, 196 S.E.2d 770 (1973).

Definitions Properly Adopted in Construing Authority Granted to Counties. — In construing the authority conferred upon counties to grant an exclusive franchise to collect and dispose of "garbage," the trial court did not err in adopting the definitions of "garbage," "refuse" and "solid waste" contained in former G.S. 130-166.16 as it stood before 1977 revision. Porter v. Suburban San. Serv., Inc., 283 N.C. 479, 196 S.E.2d 760 (1973).

Sanitary Landfill. — Subdivision (a)(31) cloaks the Department of Environment and Natural Resources with rulemaking authority with regard to issues of solid waste management as to how sanitary landfills are to be defined and managed. County of Durham v. North Carolina Dep't of Env't & Natural Resources, 131 N.C. App. 395, 507 S.E.2d 310 (1998).

Solid Waste. — Agency committed an error of law in its decision that a cigarette manufacturer's byproduct from its initial processing of the tobacco leaf, consisting of stems, scraps and dust, which it stored and later used to manufacture reconstituted tobacco, used in the production of its product, was not solid waste, under G.S. 130A-290(35) was an error of law. R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res., 148 N.C. App. 610, 560 S.E.2d 163, 2002 N.C. App. LEXIS 51 (2002), cert. denied, 355 N.C. 493, 564 S.E.2d 44 (2002).

Definition of solid waste in G.S. 130A-290(35) is broader than the federal definition of the same term in 42 U.S.C.S. § 6903(27). R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't &

Natural Res., 148 N.C. App. 610, 560 S.E.2d 163, 2002 N.C. App. LEXIS 51 (2002), cert. denied, 355 N.C. 493, 564 S.E.2d 44 (2002).

Cited in C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990); In re E.I. DuPont de Nemours & Co., 109 N.C. App. 435, 428 S.E.2d 195 (1993); Air-A-Plane Corp. v. North Carolina Dep't of Env't, 118 N.C. App. 118, 454 S.E.2d 297 (1995).

OPINIONS OF ATTORNEY GENERAL

Dumping Waste Within Three Miles of Seashore Is Prohibited. — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse, and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials are dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (1988).

Part 2. Solid and Hazardous Waste Management.

Cross References. — As to solid waste disposal tax, generally, see G.S. 105-187.60 et seq.

§ 130A-291. Division of Waste Management.

(a) For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management to promote sanitary processing, treatment, disposal, and statewide management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain qualified personnel as may be necessary to effect such purposes. It is the purpose and intent of the State to be and remain cognizant not only of its responsibility to authorize and establish a statewide solid waste management program, but also of its responsibility to monitor and supervise, through the Department, the activities and operations of units of local government implementing a permitted solid waste management facility serving a specified geographic area in accordance with a solid waste management plan.

(b) In furtherance of this purpose and intent, it is hereby determined and declared that it is necessary for the health and welfare of the inhabitants of the State that solid waste management facilities permitted hereunder and serving a specified geographic area shall be used by public or private owners or occupants of all lands, buildings, and premises within the geographic area, and a unit of local government may, by ordinance, require that all solid waste generated within the geographic area and placed in the waste stream for disposal, shall be delivered to the permitted solid waste management facility or facilities serving the geographic area. Actions taken pursuant to this Article shall be deemed to be acts of the sovereign power of the State of North Carolina, and to the extent reasonably necessary to achieve the purposes of this section, a unit of local government may displace competition with public service for solid waste management and disposal. It is further determined and declared that no person, firm, corporation, association or entity within the geographic area shall engage in any activities which would be competitive with this purpose or with ordinances, rules adopted pursuant to the authority granted herein. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 3; 1977, 2nd Sess., c. 1216; 1983, c. 795, ss. 2, 8.1; c. 891, s. 2; 1987, c. 574, s. 1; 1989, c. 727, s. 144; 1989 (Reg. Sess., 1990), c. 1004, ss. 7, 8; 1995 (Reg. Sess., 1996), c. 743, s. 4.)

Moratorium on New Landfills from August 1, 2006, through August 1, 2007. — The preamble to Session Laws 2006-244, provides: "Whereas, North Carolina has experienced severe problems from widespread flooding during the past five years; and

"Whereas, large areas of the State have also experienced severe drought conditions during the past five years; and

"Whereas, groundwater is the source of drinking water for approximately half the population of the State; and

"Whereas, depletion of certain large groundwater aquifers in the State has been documented in recent years; and

"Whereas, protection and enhancement of water quality in the State's rivers and coastal estuaries is the declared public policy of the State; and

"Whereas, North Carolina is home to many rare and endangered species of plants and animals; and

"Whereas, the State has established many parks, natural areas, and wildlife refuges to protect habitats for migrating birds and other species; and

"Whereas, many fragile ecosystems exist in the State which are in need of further study and protection; and

"Whereas, the State recognizes that ecosystems transcend state borders, and that changes affecting the State's water, air, natural habitats, and scenic resources also have impacts outside the State; and

"Whereas, it is the policy of the State to ensure the continued public enjoyment of the natural attractions of the State; and

"Whereas, improperly sited, designed, or operated landfills have the potential to cause serious environmental damage, including groundwater contamination; and

"Whereas, it is essential that the State study the siting, design, and operational requirements for landfills for the disposal of solid waste in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas in order to protect public health and the environment; and

"Whereas, it is critical to the protection of public health and the environment to adequately staff the State solid waste program to review permit applications, ensure compliance with State solid waste management laws and rules, and provide technical assistance on solid waste management issues; and

"Whereas, economic and other factors may cause landfills to be concentrated in minority and low-income communities in the State; and

"Whereas, minority and low-income communities may be at particularly high risk for potential threats to human health and the environment from the siting of landfills in these areas; and

"Whereas, it is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills;"

Session Laws 2006-244, s. 1 provides: "Definitions. — The definitions set forth in G.S. 130A-290 apply throughout this act."

Session Laws 2006-244, s. 2, provides: "Moratorium Established. — There is hereby established a moratorium on consideration of applications for a permit and on the issuance of permits for new landfills in the State. The purposes of this moratorium are to allow the State to study solid waste disposal issues in order to protect public health and the environment. The Department of Environment and Natural Resources shall not consider a permit application nor issue a permit for a new landfill for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste for a period beginning on 1 August 2006 and ending on 1 August 2007."

Session Laws 2006-244, s. 3, provides: "Exceptions. — The moratorium established by Section 2 of this act shall not prohibit consideration of an application for or issuance of:

"(1) An amendment, modification, or other change to a permit for a landfill issued on or before 1 June 2006.

"(2) A permit for a horizontal or vertical expansion of the landfill permitted on or before 1 June 2006.

"(3) A permit to construct a new landfill within the facility boundary identified in the facility plan of a landfill permitted on or before 1 June 2006.

"(4) A permit to operate a new landfill if a permit to construct the new landfill was issued on or before 1 June 2006.

"(5) A permit for a sanitary landfill used only to dispose of waste generated by a coal-fired generating unit that is owned or operated by an investor-owned utility subject to the requirements of G.S. 143-215.107D.

"(6) A permit for a sanitary landfill determined to be necessary by the Secretary of Environment and Natural Resources in order to respond to an imminent hazard to public health or a natural disaster."

Session Laws 2006-244, s. 4(a), provides: "Study. — The Environmental Review Commission, with the assistance of the Division of Waste Management of the Department of Environment and Natural Resources, shall study issues related to solid waste. The Commission shall specifically study measures concerning:

"(1) Financial responsibility requirements for solid waste landfills, including the application of requirements to limited liability companies and other business entity structures of applicants seeking solid waste landfill permits.

"(2) Application of franchise requirements and local government approval for solid waste landfill permits, including adequacy of public notice and comment, community studies, and site designations prior to local government approval.

"(3) Siting, design, and operational requirements for landfills for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste that are proposed in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas.

"(4) Formation of dangerous chemicals and gases in flood-prone landfill environments.

"(5) Traffic considerations for proposed landfills.

"(6) Regulatory oversight and staffing for permitting and compliance of solid waste landfills, and inspection of waste containers on barges, railways, and trucks.

"(7) Compliance with statutory prohibitions on disposal of certain types of solid waste and measures to prevent disposal of hazardous waste in solid waste and construction and demolition landfills.

"(8) Ways to reduce the amount of solid waste disposed of within North Carolina landfills, including statewide tipping fees, bans on the disposal of certain types of waste in landfills, more aggressive recycling requirements, and enhanced regulatory requirements for landfills and other solid waste management facilities."

Session Laws 2006-244, s. 4(b), provides: "Subcommittee. — In order to facilitate the conduct of this study, the Cochairs of the Environmental Review Commission may establish a subcommittee of the Commission. The subcommittee of the Commission may include nonlegislative members who have special knowledge, interest, or expertise in various aspects of solid waste management, appointed in consultation with the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

Session Laws 2006-244, s. 4(c), provides: "Report. — The Commission shall report its findings, together with any recommended legislation, to the 2007 Regular Session of the General Assembly upon its convening."

Session Laws 2006-244, s. 5(a), provides: "Committee Established. — The Joint Select Committee on Environmental Justice is hereby established."

Session Laws 2006-244, s. 5(b) provides: "Membership. — The Committee shall consist of 12 members as follows:

"(1) Four members appointed by the President Pro Tempore of the Senate.

"(2) Four members appointed by the Speaker of the House of Representatives.

"(3) The Director of the Division of Waste Management of the Department of Environment and Natural Resources, or the Director's designee.

"(4) The President of the North Carolina Conference of the NAACP, or the President's designee.

"(5) The Executive Director of the North Carolina Association of County Commissioners, or the Director's designee.

"(6) The Executive Director of the North Carolina League of Municipalities, or the Director's designee."

Session Laws 2006-244, s. 5(c) provides: "Cochairs. — The Committee shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Committee shall meet upon the call of the cochairs."

Session Laws 2006-244, s. 5(d) provides: "Quorum. — A quorum of the Committee shall consist of seven members."

Session Laws 2006-244, s. 5(e) provides: "Vacancies. — Any vacancy on the Committee shall be filled by the original appointing authority."

Session Laws 2006-244, s. 5(f) provides: "Purpose and Duties. — The Committee shall study:

"(1) The location of landfills in the State, with historical and current demographic information, including health statistics of the surrounding population of each site where available. The Committee shall identify landfills located in proximity to minority and low-income communities.

"(2) The impacts that landfills located in proximity to minority and low-income communities have on these communities with regard to human health, the environment, and economic development.

"(3) Factors, including economic factors, that may have caused landfills to be concentrated in minority and low-income communities in the State.

"(4) Past enforcement actions taken by the U.S. Environmental Protection Agency or the Department of Environment and Natural Resources for violations affecting human health or the environment at any landfill in the State in order to assess whether enforcement practices for violations at these sites have resulted in uneven enforcement outcomes, and to determine if alternative or stronger enforcement measures could be taken, or in the alternative if other methods could be used to allocate resources, in order to more equitably serve minority and low-income communities.

"(5) Statutes, rules, and policies used by State, regional, and local governments, and a review of the role played by these entities to influence or make siting and land-use decisions concerning landfills in the State.

"(6) Data and methodologies by which State, regional, and local governments might become more specifically aware of situations in which neighborhoods are at particularly high risk for potential threats to human health and the environment from the siting of landfills.

"(7) Approaches to ensure consideration of environmental justice and equity issues when formulating and implementing policies, procedures, and legislation within governmental agencies and other institutions."

Session Laws 2006-244, s. 5(g), provides: "Expenses of Members. — Members of the Committee shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1."

Session Laws 2006-244, s. 5(h), provides: "Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Committee to aid in its work."

Session Laws 2006-244, s. 5(i), provides: "Consultants. — The Committee may hire consultants to assist with the study as provided in G.S. 120-32.02(b)."

Session Laws 2006-244, s. 5(j), provides: "Meetings. — The Committee may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Committee."

Session Laws 2006-244, s. 5(k), provides: "Report. — The Committee shall report its findings and recommendations to the General Assembly and the Environmental Review Commission on or before 1 February 2007, at which time the Committee shall terminate."

Session Laws 2006-244, s. 5(*l*), provides: "Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this act."

Regulation of Hazardous Materials Facilities Task Force. — Session Laws 2007-107, s. 4.1(a)-(k), as amended by Session Laws 2007-495, s. 15(f), provides: "(a) Task Force Established. - There is established the Regulation of Hazardous Materials Facilities Task Force.

"(b) Definitions. — As used in this section "hazardous material" means hazardous materials, as defined in G.S. 166A-21, hazardous waste, as defined in G.S. 130A-290, hazardous substances, as defined in G.S. 143-215.77, and hazardous chemicals, as defined in G.S. 95-174.

"(c) Membership. — The Task Force shall consist of 15 members as follows:

"(1) The Secretary of Environment and Natural Resources or the Secretary's designee.

"(2) The Commissioner of Insurance or the Commissioner's designee.

"(3) Three persons appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, one of whom shall be a member of the North Carolina Association of Fire Marshals and one of whom shall be a fire marshal or inspector from the western region of the State.

"(4) Three persons appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, one of whom shall be a member of the North Carolina Fire Chiefs Association and one of whom shall be a fire marshal or inspector from the eastern region of the State.

"(5) A member from one of the seven North Carolina Regional Response Teams for Hazardous Materials Response appointed by the Governor.

"(6) A fire marshal or inspector from the central region of the State appointed by the Governor.

"(7) Two members of the Building Code Council appointed by the Chair of the Council.

"(8) A person who is engaged in an industrial manufacturing process that uses hazardous chemicals, hazardous materials, or hazardous substances, or that generates hazardous waste appointed by the President of the Manufacturers and Chemical Industry Council of North Carolina.

"(9) An owner or operator of a commercial hazardous waste facility appointed by the Governor.

"(10) A member of the general public appointed by the Governor.

"(d) Appointments. — Appointments to the Task Force shall be made no later than 1 September 2007. A vacancy in the Task Force or as chair of the Task Force resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made.

"(e) Chair; Quorum; Meetings. — The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate one member to serve as cochair of the Task Force. The cochairs shall call the initial meeting of the Task Force on or before 1 October 2007. A majority of the members of the Task Force shall constitute a quorum. The Task Force may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"(f) Duties of Task Force. — The Task Force shall study issues related to the treatment, storage, and disposal of hazardous materials and shall review all current fire code regulations regarding the commercial treatment, storage, and disposal of hazardous materials to ensure that the Code addresses the needs and safety of the citizens of the State. In particular, the Task Force shall:

"(1) Review the facts and issues related to the Environmental Quality Industrial Services facility fire in Apex, North Carolina, on 5 October 2006. The Task Force shall review the investigation report and determine whether the fire could have been prevented by additional, or more specific, State regulations.

"(2) Analyze all fire inspection or investigation reports of fires that have occurred at commercial facilities that treat, store, or dispose of hazardous materials within the past 10 years and determine if there is a trend in violations.

"(3) Review the current State Building Code with respect to allowable hazardous materials quantities and determine if the State Building Code should be amended to provide for an additional classification of mixed waste or unidentifiable materials.

"(4) Analyze the current definitions of high hazard facilities and high hazardous Group H classifications in the State Building Code and determine whether commercial facilities that treat, store, or dispose of hazardous materials should be classified so that mixed wastes and unidentifiable materials can be easily identified.

"(5) Review the current annual fire inspection process at permitted commercial hazardous waste facilities, as defined in G.S. 130A-295.01, that are treatment, storage, and disposal facilities to determine how the annual fire inspection can be conducted in collaboration with the inspection and permitting process of the Department of Environment and Natural Resources.

"(6) Review the sprinkler requirements under Section 903.2.4 of the State Building Code for facilities used to collect, store, process, treat, recycle, recover, or dispose of hazardous substance, as defined in 29 Code of Federal Regulations § 1910.120(a)(3) (1 July 2006 Edition), and determine whether sprinkler design criteria and coverage should be amended.

"(7) Review the fire alarm requirements under Section 903.2.4 of the State Building Code and determine whether the facilities used to collect, store, process, treat, recycle, recover, or dispose of hazardous substance, as defined in 29 Code of Federal Regulations § 1910.120(a)(3) (1 July 2006 Edition), should have a full fire alarm system or, in the alternative, full staffing as recommended by the Department of Environment and Natural Resources. If the Task Force determines that relevant facilities should have full staffing, the Task Force shall recommend the level of knowledge and training that should be required of the staff.

"(8) Determine when any rules recommended by the Task Force should become effective for existing commercial hazardous waste facilities.

"(g) Expenses of Members. — Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"(h) Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer may assign professional and clerical staff and other services and supplies, as needed, for the Task Force to carry out its duties in an effective manner.

"(i) Cooperation by Government Agencies. — The Task Force may call upon any department, agency, institution, or officer of the State or any political subdivision thereof for facilities, data, or other assistance.

"(j) Report. — The Task Force shall submit a report of its findings and recommendations, including legislative proposals, to the 2008 Regular Session of the 2007 General Assembly, the Governor, the North Carolina Building Code Council, and the Environmental Review Commission on or before 1 April 2008. The Task Force shall terminate upon filing its report.

"(k) North Carolina Building Code Council to Adopt Rules. — The North Carolina Building Code Council shall adopt rules or amend the State Building Code to implement the recommendations of the Regulation of Hazardous Materials Facilities Task Force. In particular, the Building Code Council shall adopt rules or amend the State Building Code to require that hazardous materials are classified and identified in a manner that provides State and local inspectors with sufficient information to identify all potential risks to the citizens of the State."

Editor's Note. — Session Laws 2007-107, s. 1.8(d), provides: "The Department of Environment and Natural Resources shall study the need for further regulation of hazardous waste transfer facilities, as defined in G.S. 130A-290(a)(13a), as enacted by subsection (a) of this section, including whether to require these facilities to obtain a permit under Part 2 of Article 9 of Chapter 130A of the General Statutes, pay permit fees, provide contingency plans, and demonstrate financial responsibility. The Department of Environment and Natural Resources shall report its findings and recommendations, including any legislative proposals, to the Environmental Review Commission on or before 15 February 2008."

Session Laws 2007-107, s. 5.1(a), provides: "The Division of Information Technology Services of the Department of Environment and Natural Resources, in collaboration with the Division of Emergency Management of the Department of Crime Control and Public Safety, shall establish a Tier II Hazardous Chemicals Inventory Database and Web-based access application that will accept uploads of Tier II data from local government systems acting as partners in the project and from the University of Texas at Dallas E-Plan repository until all Tier II hazardous chemical inventory is in the database. The database shall include data on sites listed in the planned Toxic Release Inventory exchange and the Department's existing Facilities Registry System. The Facilities Registry System is a database of facilities for which the

Department has environmental concerns, including facilities that are subject to an environmental permit for water, air, waste, land quality, wetlands, public water supply, wastewater treatment, and other environmental permits. The database shall be connected via Web services to the North Carolina Exchange Node. The purposes of this database are to provide a one-stop, real-time information source for all hazardous and toxic materials release sites and all sites that are subject to an environmental permit in order to enhance the operational effectiveness of the Department of Environment and Natural Resources, the Division of Emergency Management of the Department of Crime Control and Public Safety, first responders and emergency management officials, local government officials, and any others with a role in emergency management or planning; to remove the burden of data reentry in multiple systems; to reduce the dependence on paper submissions for Tier II reporting; to extend the Network for the Exchange Node community; and to reuse information already deployed at the Department. The Tier II Hazardous Chemicals Inventory Database and Web-based access application shall be maintained by the Division of Emergency Management of the Department of Crime Control and Public Safety."

CASE NOTES

Cited in County of Wake v. N.C. Dep't of Env't & Natural Res., 155 N.C. App. 225, 573 S.E.2d 572, 2002 N.C. App. LEXIS 1632 (2002), cert. dismissed, 357 N.C. 62, 579 S.E.2d 387 (2003).

OPINIONS OF ATTORNEY GENERAL

Governor does not have authority to issue moratorium on granting of permits for hazardous waste facilities in this State. See opinion of Attorney General to Mr. Tom Karnoski, Hazardous Waste Treatment Commission, 55 N.C.A.G. 73 (1986).

§ 130A-291.1. Septage management program; permit fees.

(a) The Department shall establish and administer a septage management program in accordance with the provisions of this section.

(b) For the protection of the public health, the Commission shall adopt rules governing the management of septage. The rules shall include, but are not limited to, criteria for the sanitary management of septage, including standards for the transportation, storage, treatment, and disposal of septage; operator registration and training; the issuance, suspension, and revocation of permits; and procedures for the payment of annual fees.

(c) No septage management firm shall commence or continue operation that does not have a permit issued by the Department. The permit shall be issued only when the septage management firm satisfies all of the requirements of the rules adopted by the Commission. A septage management firm that commences operation without first having obtained a permit shall cease to operate until the firm obtains a permit under this section and shall pay an initial annual fee equal to twice the amount of the annual fee that would otherwise be applicable under subsection (e) of this section.

(d) Septage shall be treated and disposed only at a wastewater system that has been approved by the Department under rules adopted by the Commission or by the Environmental Management Commission or at a site that is permitted by the Department under this section. A permit shall be issued only if the site satisfies all of the requirements of the rules adopted by the Commission.

(e) A septage management firm that operates one pumper truck shall pay an annual fee of five hundred fifty dollars ($550.00) to the Department. A septage management firm that operates two or more pumper trucks shall pay an annual fee of eight hundred dollars ($800.00) to the Department.

(e1) An individual who operates a septage treatment or disposal facility but who does not engage in the business of pumping, transporting, or disposing of septage shall pay an annual fee of two hundred dollars ($200.00).

(e2) A properly completed application for a permit and the annual fee under this section are due by 1 January of each year. The Department shall mail a notice of the annual fees to each permitted septage management firm and each individual who operates a septage treatment or disposal facility prior to 1 November of each calendar year. A late fee in the amount equal to fifty percent (50%) of the annual permit fee under this section shall be submitted when a properly completed application and annual permit fee are not submitted by 1 January following the 1 November notice. The clear proceeds of civil penalties collected pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e3) The Septage Management Account is established as a nonreverting account within the Department. Fees collected under this section shall be placed in the Septage Management Account and shall be applied only to the costs of the septage management program.

(e4) Permits for new septage management firm operators and permits for septage management firm operators that have not operated a septage management firm in the 24 months immediately preceding the submittal of an application shall be considered probationary for 12 months. The Department may revoke any probationary permit of a firm or an individual that violates any provision of this section, G.S. 130A-291.2, G.S. 130A-291.3, or any rule adopted under these sections. If the Department revokes a probationary permit issued to a firm or individual, the Department shall not issue another permit to that firm or individual, and the firm or individual may not engage in any septage management activity for a period of 12 months.

(e5) The Department shall provide technical and regulatory assistance to permit applicants and permit holders. Assistance may include, but is not limited to, taking soil samples on proposed and permitted septage land application sites and providing required training to permit applicants and permit holders.

(f) All wastewater systems designed to discharge effluent to the surface waters may accept, treat, and dispose septage from permitted septage management firms, unless acceptance of the septage would constitute a violation of the permit conditions of the wastewater system. The wastewater system may charge a reasonable fee for acceptance, treatment, and disposal of septage based on a fee schedule that takes into account septage composition and quantity and that is consistent with other charges for use of that system.

(g) Production of a crop in accordance with an approved nutrient management plan on land that is permitted as a septage land application site is a bona fide farm purpose under G.S. 153A-340.

(h) The Department shall inspect each septage land application site at least twice a year and shall inspect the records associated with each septage land application site at least annually. The Department shall inspect each pump truck used for septage management at least once every two years.

(i) The Department shall approve innovative or alternative septage treatment or storage methods that are demonstrated to protect the public health and the environment.

(j) Septage generated by the operation of a wastewater system permitted under Article 11 of this Chapter may be managed as provided in this section and may be land applied at a septage land application site permitted under this section. (1987 (Reg. Sess., 1988), c. 1058, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 8; 1993, c. 173, s. 4; 2001-505, s. 1.1; 2005-276, s. 6.37(t); 2006-255, s. 5.1(a).)

Editor's Note. — Session Laws 2001-505, s. 1.3, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt temporary and permanent rules to implement Sections 1.1 and 1.2 of this act. The Commission for Health Services [now the Commission for Public Health] and the Department of Environment and Natural Resources shall initiate temporary rule-making proceedings within 30 days of the date this act becomes effective. Temporary rules to implement the provisions of Sections 1.1 and 1.2 of this act become effective 1 January 2002."

Session Laws 2001-505, s. 1.4, provides: "The Department of Environment and Natural Resources shall mail annual notices of fees as required by G.S. 130A-291.1(e2), as amended by Section 1.1 of this act, prior to 1 November 2001. Notices of fees shall state the amount of the fee due under subsections (e) and (e1) of G.S. 130A-291.1, as amended by Section 1.1 of this act."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-255, s. 5.1(b), provides: "Management, including land application, of septage generated by the operation of a wastewater system permitted under Article 11 of Chapter 130A of the General Statutes shall be governed by 40 Code of Federal Regulations Part 503 (July 1, 2003, Edition) and rules adopted by the Commission for Health Services [now the Commission for Public Health] pursuant to G.S. 130A-291.1, as amended by subsection (a) of this section."

Effect of Amendments. — Session Laws 2006-255, s. 5.1(a), effective August 23, 2006, added subsection (j).

§ 130A-291.2. Temporary domestic wastewater holding tanks.

When a permanent domestic wastewater collection and treatment system is not available at a construction site or a temporary special event, a temporary wastewater holding tank of adequate capacity to prevent overflow may be used under a mobile or modular office to accommodate domestic wastewater from a commode and sink. The wastewater shall be removed often enough to prevent the temporary domestic wastewater holding tank from overflowing. The owner or lessee of a temporary construction trailer shall contract with a registered septage management firm or registered portable toilet sanitation firm for the removal of domestic waste. The wastewater shall be removed from the temporary domestic wastewater holding tank by a septage management firm holding a current permit to operate a septage firm. (2001-505, s. 1.2.)

Editor's Note. — Session Laws 2001-505, s. 1.3, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt temporary and permanent rules to implement Sections 1.1 and 1.2 of this act. The Commission for Health Services [now the Commission for Public Health] and the Department of Environment and Natural Resources shall initiate temporary rule-making proceedings within 30 days of the date this act becomes effective. Temporary rules to implement the provisions of Sections 1.1 and 1.2 of this act become effective 1 January 2002."

§ 130A-291.3. Septage operator training required.

(a) Each septage management firm operator shall attend a training course approved pursuant to subsection (d) of this section of no less than four hours of instruction per year. New septage management firm operators and those that have not operated a septage management firm in the 24 months preceding the submittal of an application shall complete the training before commencing operation.

(b) Each septage land application site operator shall attend a training course approved pursuant to subsection (d) of this section of no less than three hours of instruction per year. New septage land application site operators and those that have not operated a septage land application site in the 24 months preceding the submittal of an application shall complete the training before commencing operation.

(c) Upon the completion of the permit requirements under G.S. 130A-291.1 and the training requirements under this section, the Department shall issue the septage management firm a certificate to operate as a registered portable sanitation firm or a registered septage management firm, or both.

(d) The Department shall establish educational committees to develop and approve a training curriculum to satisfy the training requirements under this section. A training committee shall be established to develop a training program for portable sanitation waste; a training committee shall be established to develop a training program for septic tank waste and grease septage; and a training committee shall be established to develop a training program for land application of septage. Each committee shall consist of four industry members, one public health member, two employees of the Department, and one representative of the North Carolina Cooperative Extension Service. (2001-505, s. 1.2.)

Editor's Note. — Session Laws 2001-505, s. 1.3, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt temporary and permanent rules to implement Sections 1.1 and 1.2 of this act. The Commission for Health Services [now the Commission for Public Health] and the Department of Environment and Natural Resources shall initiate temporary rule-making proceedings within 30 days of the date this act becomes effective. Temporary rules to implement the provisions of Sections 1.1 and 1.2 of this act become effective 1 January 2002."

§ 130A-292. Conveyance of land used for commercial hazardous waste disposal facility to the State.

(a) No land may be used for a commercial hazardous waste disposal facility until fee simple title to the land has been conveyed to this State. In consideration for the conveyance, the State shall enter into a lease agreement with the grantor for a term equal to the estimated life of the facility in which the State will be the lessor and the grantor the lessee. The lease agreement shall specify that for an annual rent of fifty dollars ($50.00), the lessee shall be allowed to use the land for the development and operation of a hazardous waste disposal facility. The lease agreement shall provide that the lessor or any person authorized by the lessor shall at all times have the right to enter without a search warrant or permission of the lessee upon any and all parts of the premises for monitoring, inspection and all other purposes necessary to carry out the provisions of this Article. The lessee shall remain fully liable for all damages, losses, personal injury or property damage which may result or arise out of the lessee's operation of the facility, and for compliance with regulatory requirements concerning insurance, bonding for closure and post-closure costs, monitoring and other financial or health and safety requirements as required by applicable law and rules. The State, as lessor, shall be immune from liability except as otherwise provided by statute. The lease shall be transferable with the written consent of the lessor and the consent will not be unreasonably withheld. In the case of a transfer of the lease, the transferee shall be subject to all terms and conditions that the State deems necessary to ensure compliance with applicable laws and rules. If the lessee or any successor in interest fails in any material respect to comply with any applicable law, rule or permit condition, or with any term or condition of the lease, the State may terminate the lease after giving the lessee written notice specifically describing the failure to comply and upon providing the lessee a reasonable time to comply. If the lessee does not effect compliance within the reasonable time allowed, the State may reenter and take possession of the premises.

(b) Notwithstanding the termination of the lease by either the lessee or the lessor for any reason, the lessee shall remain liable for, and be obligated to perform, all acts necessary or required by law, rule, permit condition or the lease for the permanent closure of the site until the site has either been permanently closed or until a substituted operator has been secured and has assumed the obligations of the lessee.

(c) In the event of changes in laws or rules applicable to the facility which make continued operation by the lessee impossible or economically infeasible, the lessee shall have the right to terminate the lease upon giving the State reasonable notice of not less than six months, in which case the lessor shall have the right to secure a substitute lessee and operator.

(d) In the event of termination of the lease by the lessor as provided in subsection (a) of this section, or by the lessee as provided in subsection (c) of this section, the lessee shall be paid the fair market value of any improvements made to the leased premises less the costs to the lessor resulting from termination of the lease and securing a substitute lessee and operator. However, the lessor shall have no obligation to secure a substitute lessee or operator and may require the lessee to permanently close the facility. (1981, c. 704, s. 5; 1983, c. 891, s. 2; 1989, c. 168, s. 12.)

§ 130A-293. Local ordinances prohibiting hazardous waste facilities invalid; petition to preempt local ordinance.

(a) It is the intent of the General Assembly to maintain a uniform system for the management of hazardous waste and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of hazardous waste by means of special, local, or private acts or resolutions, ordinances, property restrictions, zoning regulations, or otherwise. Notwithstanding any authority granted to counties, municipalities, or other local authorities to adopt local ordinances, including but not limited to those imposing taxes, fees, or charges or regulating health, environment, or land use, any local ordinance that prohibits or has the effect of prohibiting the establishment or operation of a hazardous waste facility that the Secretary has preempted pursuant to subsections (b) through (f) of this section, shall be invalid to the extent necessary to effectuate the purposes of this Chapter. To this end, all provisions of special, local, or private acts or resolutions are repealed that:

(1) Prohibit the transportation, treatment, storage, or disposal of hazardous waste within any county, city, or other political subdivision.

(2) Prohibit the siting of a hazardous waste facility within any county, city, or other political subdivision.

(3) Place any restriction or condition not placed by this Article upon the transportation, treatment, storage, or disposal of hazardous waste, or upon the siting of a hazardous waste facility within any county, city, or other political subdivision.

(4) In any manner are in conflict or inconsistent with the provisions of this Article.

(a1) No special, local, or private act or resolution enacted or taking effect hereafter may be construed to modify, amend, or repeal any portion of this Article unless it expressly provides for such by specific references to the appropriate section of this Article. Further to this end, all provisions of local ordinances, including those regulating land use, adopted by counties, municipalities, or other local authorities that prohibit or have the effect of prohibiting the establishment or operation of a hazardous waste facility are invalidated to the extent preempted by the Secretary pursuant to this section.

(b) When a hazardous waste facility would be prevented from construction or operation by a county, municipal, or other local ordinance, the operator of the proposed facility may petition the Secretary to review the matter. After receipt of a petition, the Secretary shall hold a hearing in accordance with the procedures in subsection (c) of this section and shall determine whether or to what extent to preempt the local ordinance to allow for the establishment and operation of the facility.

(c) When a petition described in subsection (b) of this section has been filed with the Secretary, the Secretary shall hold a public hearing to consider the petition. The public hearing shall be held in the affected locality within 60 days after receipt of the petition by the Secretary. The Secretary shall give notice of the public hearing by:

(1) Publication in a newspaper or newspapers having general circulation in the county or counties where the facility is or is to be located or operated, once a week for three consecutive weeks, the first notice appearing at least 30 days prior to the scheduled date of the hearing; and

(2) First class mail to persons who have requested notice. The Secretary shall maintain a mailing list of persons who request notice in advance of the hearing pursuant to this section. Notice by mail shall be complete upon deposit of a copy of the notice in a post-paid wrapper addressed to the person to be notified at the address that appears on the mailing list maintained by the Board, in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c1) Any interested person may appear before the Secretary at the hearing to offer testimony. In addition to testimony before the Secretary, any interested person may submit written evidence to the Secretary for the Secretary's consideration. At least 20 days shall be allowed for receipt of written comment following the hearing.

(d) A local zoning or land-use ordinance is presumed to be valid and enforceable to the extent the zoning or land-use ordinance imposes requirements, restrictions, or conditions that are generally applicable to development, including, but not limited to, setback, buffer, and stormwater requirements, unless the Secretary makes a finding of fact to the contrary. The Secretary shall determine whether or to what extent to preempt local ordinances so as to allow for the establishment and operation of the facility no later than 60 days after conclusion of the hearing. The Secretary shall preempt a local ordinance only if the Secretary makes all of the following findings:

(1) That there is a local ordinance that would prohibit or have the effect of prohibiting the establishment or operation of a hazardous waste facility.

(2) That the proposed facility is needed in order to establish adequate capability to meet the current or projected hazardous waste management needs of this State or to comply with the terms of any interstate agreement for the management of hazardous waste to which the State is a party and therefore serves the interests of the citizens of the State as a whole.

(3) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies or that all State and federal permit requirements have been satisfied and that the permits or approvals have been denied or withheld only because of the local ordinance.

(4) That local citizens and elected officials have had adequate opportunity to participate in the siting process.

(5) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility operator has taken or consented to take reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with applicable local ordinances.

(d1) If the Secretary does not make all of the findings under subsection (d) of this section, the Secretary shall not preempt the challenged local ordinance. The Secretary's decision shall be in writing and shall identify the evidence submitted to the Secretary plus any additional evidence used in arriving at the decision.

(e) The decision of the Secretary shall be final unless a party to the action files a written appeal under Article 4 of Chapter 150B of the General Statutes, as modified by G.S. 7A-29 and this section, within 30 days of the date of the decision. The record on appeal shall consist of all materials and information submitted to or considered by the Secretary, the Secretary's written decision, a complete transcript of the hearing, all written material presented to the Secretary regarding the location of the facility, the specific findings required by subsection (d) of this section, and any minority positions on the specific findings required by subsection (d) of this section. The scope of judicial review shall be that the court may affirm the decision of the Secretary, or may remand the matter for further proceedings, or may reverse or modify the decision if the substantial rights of the parties may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a) or G.S. 150B-30 in view of the entire record as submitted; or
(6) Arbitrary or capricious.

(e1) If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become part of the record, the reasons for the reversal or modification.

(f) In computing any period of time prescribed or allowed by this procedure, the provisions of Rule 6(a) of the Rules of Civil Procedure, G.S. 1A-1, shall apply.

(g) Repealed by Session Laws 1989, c. 168, s. 13. (1981, c. 704, s. 5; 1983, s. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 3-5; 1987, c. 827, s. 249; 1987 (Reg. Sess., 1988), c. 993, s. 28; c. 1082, s. 13; 1989, c. 168, s. 13; 1993, c. 501, s. 13; 2001-474, s. 17; 2007-107, s. 1.10(a).)

Editor's Note. — Session Laws 2007-107, s. 1.10(b), provides: "The Office of the Governor shall seek the advice of units of local government to determine if the criteria that the Secretary of Environment and Natural Resources considers in determining whether or to what extent to preempt local ordinances pursuant to G.S. 130A-293, as amended by subsection (a) of this section, should be further amended. The Office of the Governor shall report its findings and recommendations, including any legislative proposals to the Environmental Review Commission on or before 1 March 2008."

Session Laws 2007-107, s. 6.2, contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, s. 1.10.(a), effective June 26, 2007, substituted "this Article" for "Article 9 of Chapter 130A of the General Statutes" in subdivisions (a)(3) and (a)(4); in subsection (a1), in the first sentence, substituted "this Article" for "Article 9 of Chapter 130A of the General Statutes" the first time it appears, and "this Article" for "this Part" the second time it appears; in the introductory paragraph of subsection (d), added the first sentence and deleted "five" following "makes all" in the last sentence; substituted "all of the findings under subsection (d) of this section" for "all five findings set out above" in subsection (d1); and made minor stylistic changes.

OPINIONS OF ATTORNEY GENERAL

A city or county cannot enact an ordinance which prohibits the establishment of a hazardous waste facility within its city or county limits. See opinion of Attorney General to O.W. Strickland, Head, Solid & Hazardous Waste Management Branch, Environmental Health Section, 49 N.C.A.G. 178 (1980), rendered under former G.S. 130-166.16 et seq.

Governor does not have authority to issue moratorium on granting of permits for hazardous waste facilities in this State. See opinion of Attorney General to Mr. Tom Karnoski, Hazardous Waste Treatment Commission, 55 N.C.A.G. 73 (1986).

§ 130A-294. Solid waste management program.

(a) The Department is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish a statewide solid waste management program. In establishing a program, the Department shall have authority to:

(1) Develop a comprehensive program for implementation of safe and sanitary practices for management of solid waste;

(2) Advise, consult, cooperate and contract with other State agencies, units of local government, the federal government, industries and individuals in the formulation and carrying out of a solid waste management program;

(3) Develop and adopt rules to establish standards for qualification as a "recycling, reduction or resource recovering facility" or as "recycling, reduction or resource recovering equipment" for the purpose of special tax classifications or treatment, and to certify as qualifying those applicants which meet the established standards. The standards shall be developed to qualify only those facilities and equipment exclusively used in the actual waste recycling, reduction or resource recovering process and shall exclude any incidental or supportive facilities and equipment;

(4)a. Develop a permit system governing the establishment and operation of solid waste management facilities. A landfill with a disposal area of 1/2 acre or less for the on-site disposal of land clearing and inert debris is exempt from the permit requirement of this section and shall be governed by G.S. 130A-301.1. The Department shall not approve an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill, excluding demolition landfills as defined in the rules of the Commission, except as provided in subdivisions (3) and (4) of subsection (b1) of this section. No permit shall be granted for a solid waste management facility having discharges that are point sources until the Department has referred the complete plans and specifications to the Environmental Management Commission and has received advice in writing that the plans and specifications are approved in accordance with the provisions of G.S. 143-215.1. If the applicant is a unit of local government, and has not submitted a solid waste management plan that has been approved by the Department pursuant to G.S. 130A-309.09A(b), the Department may deny a permit for a sanitary landfill or a facility that disposes of solid waste by incineration, unless the Commission has not adopted rules pursuant to G.S. 130A-309.29 for local solid waste management plans. In any case where the Department denies a permit for a solid waste management facility, it shall state in writing the reason for denial and shall also state its estimate of the changes in the applicant's proposed activities or plans that will be required for the applicant to obtain a permit.

b. Repealed by Session Laws 2007-550, s. 1(a), effective August 1, 2007.

c. The Department shall deny an application for a permit for a solid waste management facility if the Department finds that:

1. Construction or operation of the proposed facility would be inconsistent with or violate rules adopted by the Commission.
2. Construction or operation of the proposed facility would result in a violation of water quality standards adopted by the Environmental Management Commission pursuant to G.S. 143-214.1 for waters, as defined in G.S. 143-213.
3. Construction or operation of the facility would result in significant damage to ecological systems, natural resources, cultural sites, recreation areas, or historic sites of more than local significance. These areas include, but are not limited to, national or State parks or forests; wilderness areas; historic sites; recreation areas; segments of the natural and scenic rivers system; wildlife refuges, preserves, and management areas; areas that provide habitat for threatened or endangered species; primary nursery areas and critical fisheries habitat designated by the Marine Fisheries Commission; and Outstanding Resource Waters designated by the Environmental Management Commission.
4. Construction or operation of the proposed facility would substantially limit or threaten access to or use of public trust waters or public lands.
5. The proposed facility would be located in a natural hazard area, including a floodplain, a landslide hazard area, or an area subject to storm surge or excessive seismic activity, such that the facility will present a risk to public health or safety.
6. There is a practical alternative that would accomplish the purposes of the proposed facility with less adverse impact on public resources, considering engineering requirements and economic costs.
7. The cumulative impacts of the proposed facility and other facilities in the area of the proposed facility would violate the criteria set forth in sub-sub-subdivisions 2. through 5. of this sub-subdivision.
8. Construction or operation of the proposed facility would be inconsistent with the State solid waste management policy and goals as set out in G.S. 130A-309.04 and with the State solid waste management plan developed as provided in G.S. 130A-309.07.
9. The cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community protected by Title VI of the federal Civil Rights Act of 1964.

(4a) Repealed by Session Laws 2007-550, s. 1(a), effective August 1, 2007.

(5) Repealed by Session Laws 1983, c. 795, s. 3.

(5a) Designate a geographic area within which the collection, transportation, storage and disposal of all solid waste generated within said area shall be accomplished in accordance with a solid waste management plan. Such designation may be made only after the Department has received a request from the unit or units of local government having jurisdiction within said geographic area that such designation be made and after receipt by the Department of a solid waste management plan which shall include:

a. The existing and projected population for such area;

b. The quantities of solid waste generated and estimated to be generated in such area;

c. The availability of sanitary landfill sites and the environmental impact of continued landfill of solid waste on surface and subsurface waters;

d. The method of solid waste disposal to be utilized and the energy or material which shall be recovered from the waste; and

e. Such other data that the Department may reasonably require.

(5b) Authorize units of local government to require by ordinance, that all solid waste generated within the designated geographic area that is placed in the waste stream for disposal be collected, transported, stored and disposed of at a permitted solid waste management facility or facilities serving such area. The provisions of such ordinance shall not be construed to prohibit the source separation of materials from solid waste prior to collection of such solid waste for disposal, or prohibit collectors of solid waste from recycling materials or limit access to such materials as an incident to collection of such solid waste; provided such prohibitions do not authorize the construction and operation of a resource recovery facility unless specifically permitted pursuant to an approved solid waste management plan. If a private solid waste landfill shall be substantially affected by such ordinance then the unit of local government adopting the ordinance shall be required to give the operator of the affected landfill at least two years written notice prior to the effective date of the proposed ordinance.

(5c) Except for the authority to designate a geographic area to be serviced by a solid waste management facility, delegate authority and responsibility to units of local government to perform all or a portion of a solid waste management program within the jurisdictional area of the unit of local government; provided that no authority over or control of the operations or properties of one local government shall be delegated to any other local government.

(5d) Require that an annual report of the implementation of the solid waste management plan within the designated geographic area be filed with the Department.

(6) Charge and collect fees from operators of hazardous waste disposal facilities. The fees shall be used to establish a fund sufficient for each individual facility to defray the anticipated costs to the State for monitoring and care of the facility after the termination of the period during which the facility operator is required by applicable State and federal statutes, regulations or rules to remain responsible for post-closure monitoring and care. In establishing the fees, consideration shall be given to the size of the facility, the nature of the hazardous waste and the projected life of the facility.

(7) Establish and collect annual fees from generators and transporters of hazardous waste, and from storage, treatment, and disposal facilities regulated under this Article as provided in G.S. 130A-294.1.

(a1) A permit for a solid waste management facility may be transferred only with the approval of the Department.

(b) The Commission shall adopt and the Department shall enforce rules to implement a comprehensive statewide solid waste management program. The rules shall be consistent with applicable State and federal law; and shall be designed to protect the public health, safety, and welfare; preserve the environment; and provide for the greatest possible conservation of cultural and natural resources. Rules for the establishment, location, operation, maintenance, use, discontinuance, recordation, post-closure care of solid waste management facilities also shall be based upon recognized public health practices and procedures, including applicable epidemiological research and studies; hydrogeological research and studies; sanitary engineering research and studies; and current technological development in equipment and methods. The rules shall not apply to the management of solid waste that is generated by an individual or individual family or household unit on the individual's property and is disposed of on the individual's property.

(b1)(1) For purposes of this subsection and subdivision (4) of subsection (a) of this section, a "substantial amendment" means either:

a. An increase of ten percent (10%) or more in:

1. The population of the geographic area to be served by the sanitary landfill;
2. The quantity of solid waste to be disposed of in the sanitary landfill; or
3. The geographic area to be served by the sanitary landfill.

b. A change in the categories of solid waste to be disposed of in the sanitary landfill or any other change to the application for a permit or to the permit for a sanitary landfill that the Commission or the Department determines to be substantial.

(2) A person who intends to apply for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall obtain, prior to applying for a permit, a franchise for the operation of the sanitary landfill from each local government having jurisdiction over any part of the land on which the sanitary landfill and its appurtenances are located or to be located. A local government may adopt a franchise ordinance under G.S. 153A-136 or G.S. 160A-319. A franchise granted for a sanitary landfill shall include all of the following:

a. A statement of the population to be served, including a description of the geographic area.

b. A description of the volume and characteristics of the waste stream.

c. A projection of the useful life of the sanitary landfill.

d. An explanation of how the franchise will be consistent with the jurisdiction's solid waste management plan required under G.S. 130A-309.09A, including provisions for waste reduction, reuse, and recycling.

e. The procedures to be followed for governmental oversight and regulation of the fees and rates to be charged by facilities subject to the franchise for waste generated in the jurisdiction of the franchising entity.

f. A facility plan for the sanitary landfill that shall include the boundaries of the proposed facility, proposed development of the facility site in five-year operational phases, the boundaries of all waste disposal units, final elevations and capacity of all waste disposal units, the amount of waste to be received per day in tons, the total waste disposal capacity of the sanitary landfill in tons, a description of environmental controls, and a description of any other waste management activities to be conducted at the facility. In addition, the facility plan shall show the proposed location of soil borrow areas, leachate facilities, and all other facilities and infrastructure, including ingress and egress to the facility.

(2a) A local government may elect to award a preliminary franchise. If a local government elects to award a preliminary franchise, the preliminary franchise shall contain, at a minimum, all of the information described in sub-subdivisions a. through e. of subdivision (2) of this subsection plus a general description of the proposed sanitary landfill, including the approximate number of acres required for the proposed sanitary landfill and its appurtenances and a description of any other solid waste management activities that are to be conducted at the site.

(3) Prior to the award of a franchise for the construction or operation of a sanitary landfill, the board of commissioners of the county or counties in which the sanitary landfill is proposed to be located or is located or, if the sanitary landfill is proposed to be located or is located in a city, the governing board of the city shall conduct a public hearing. The board of commissioners of the county or counties in which the sanitary landfill is proposed to be located or is located or, if the sanitary landfill is proposed to be located or is located in a city, the governing board of the city shall provide at least 30 days' notice to the public of the public hearing. The notice shall include a summary of all the information required to be included in the franchise, and shall specify the procedure to be followed at the public hearing. The applicant for the franchise shall provide a copy of the application for the franchise that includes all of the information required to be included in the franchise, to the public library closest to the proposed sanitary landfill site to be made available for inspection and copying by the public.

(4) An applicant for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall request each local government having jurisdiction over any part of the land on which the sanitary landfill and its appurtenances are located or to be located to issue a determination as to whether the local government has in effect a franchise, zoning, subdivision, or land-use planning ordinance applicable to the sanitary landfill and whether the proposed sanitary landfill, or the existing sanitary landfill as it would be operated under the renewed or substantially amended permit, would be consistent with the applicable ordinances. The request to the local government shall be accompanied by a copy of the permit application and shall be delivered to the clerk of the local government personally or by certified mail. In order to serve as a basis for a determination that an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill is consistent with a zoning, subdivision, or land-use planning ordinance, an ordinance or zoning classification applicable to the real property designated in the permit application shall have been in effect not less than 90 days prior to the date the request for a determination of consistency is delivered to the clerk of the local government. The determination shall be verified or supported by affidavit signed by the chief administrative officer, the chief administrative officer's designee, clerk, or other official designated by the local government to make the determination and, if the local government states that the sanitary landfill as it would be operated under the new, renewed, or substantially amended permit is inconsistent with a franchise, zoning, subdivision, or land-use planning ordinance, shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. A copy of the determination shall be provided to the applicant when the determination is submitted to the Department. The Department shall not act upon an application for a permit under this section until it has received a determination from each local government

requested to make a determination by the applicant; provided that if a local government fails to submit a determination to the Department as provided by this subsection within 15 days after receipt of the request, the Department shall proceed to consider the permit application without regard to a franchise, local zoning, subdivision, and land-use planning ordinances. Unless the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the sanitary landfill as it would be operated under the new, renewed, or substantially amended permit is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the Department shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the sanitary landfill under the permit, comply with all lawfully adopted local ordinances cited in the determination that apply to the sanitary landfill. This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance. This subsection shall not be construed to limit any opportunity a local government may have to comment on a permit application under any other law or rule. This subsection shall not apply to any facility with respect to which local ordinances are subject to review under either G.S. 104E-6.2 or G.S. 130A-293.

(5) As used in this subdivision, "coal-fired generating unit" and "investor-owned public utility" have the same meaning as in G.S. 143-215.107D(a). Notwithstanding subdivisions (a)(4), (b1)(3), or (b1)(4) of this section, no franchise shall be required for a sanitary landfill used only to dispose of waste generated by a coal-fired generating unit that is owned or operated by an investor-owned utility subject to the requirements of G.S. 143-215.107D.

(b2) The Department shall require an applicant for a permit or a permit holder under this Article to satisfy the Department that the applicant or permit holder, and any parent, subsidiary, or other affiliate of the applicant, permit holder, or parent, including any joint venturer with a direct or indirect interest in the applicant, permit holder, or parent:

(1) Is financially qualified to carry out the activity for which the permit is required. An applicant for a permit and permit holders for solid waste management facilities that are not hazardous waste facilities shall establish financial responsibility as required by G.S. 130A-295.2. An applicant for a permit and permit holders for hazardous waste facilities shall establish financial responsibility as required by G.S. 130A-295.04.

(2) Has substantially complied with the requirements applicable to any activity in which the applicant or permit holder, or a parent, subsidiary, or other affiliate of the applicant, permit holder, or parent, or a joint venturer with a direct or indirect interest in the applicant has previously engaged and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment as provided in G.S. 130A-295.3.

(b3) An applicant for a permit or a permit holder under this Article shall satisfy the Department that the applicant has met the requirements of subsection (b2) of this section before the Department is required to otherwise review the application.

(c) The Commission shall adopt and the Department shall enforce rules governing the management of hazardous waste. These rules shall establish a complete and integrated regulatory scheme in the area of hazardous waste management, implement this Part, and shall:

(1) Establish criteria for hazardous waste, identify the characteristics of hazardous waste, and list particular hazardous waste.

(1a) Establish criteria for hazardous constituents, identify the characteristics of hazardous constituents, and list particular hazardous constituents.

(2) Require record keeping and reporting by generators and transporters of hazardous waste and owners and operators of hazardous waste facilities.

(3) Require proper labeling of hazardous waste containers.

(4) Require use of appropriate containers for hazardous waste.

(5) Require maintenance of a manifest system to assure that all hazardous waste is designated for treatment, storage or disposal at a hazardous waste facility to which a permit has been issued.

(6) Require proper transportation of hazardous waste.

(7) Develop treatment storage and disposal standards of performance and techniques to be used by hazardous waste facilities.

(8) Develop standards regarding location, design, ownership and construction of hazardous waste facilities; provided, however, that no hazardous waste disposal facility or polychlorinated biphenyl disposal facility shall be located within 25 miles of any other hazardous waste disposal facility or polychlorinated biphenyl disposal facility.

(9) Require plans to minimize unanticipated damage from treatment, storage or disposal of hazardous waste; and a plan or plans providing for the establishment and/or operation of one or more hazardous waste facilities in the absence of adequate approved hazardous waste facilities established or operated by any person within the State.

(10) Require proper maintenance and operation of hazardous waste facilities, including requirements for ownership by any person or the State, require demonstration of financial responsibility in accordance with this section and G.S. 130A-295.04, provide for training of personnel, and provide for continuity of operation and procedures for establishing and maintaining hazardous waste facilities.

(11) Require owners or operators of hazardous waste facilities to monitor the facilities.

(12) Authorize or require inspection or copying of records required to be kept by owners or operators.

(13) Provide for collection and analysis of hazardous waste samples and samples of hazardous waste containers and labels from generators and transporters and from owners and operators of hazardous waste facilities.

(14) Develop a permit system governing the establishment and operation of hazardous waste facilities.

(15) Develop additional requirements as necessary for the effective management of hazardous waste.

(16) Require the operator of the hazardous waste disposal facility to maintain adequate insurance to cover foreseeable claims arising from the operation of the facility. The Department shall determine what constitutes an adequate amount of insurance.

(17) Require the bottom of a hazardous waste disposal facility to be at least 10 feet above the seasonal high water table and more when necessary to protect the public health and the environment.

(18) Require the operator of a hazardous waste disposal facility to make monthly reports to the board of county commissioners of the county in which the facility is located on the kinds and amounts of hazardous wastes in the facility.

(d) The Commission is authorized to adopt and the Department is authorized to enforce rules where appropriate for public participation in the consideration, development, revision, implementation and enforcement of any permit rule, guideline, information or program under this Article.

(e) Rules adopted under this section may incorporate standards and restrictions which exceed and are more comprehensive than comparable federal regulations.

(f) Within 10 days of receiving an application for a permit or for an amendment to an existing permit for a hazardous waste facility, the Department shall notify the clerk of the board of commissioners of the county or counties in which the facility is proposed to be located or is located and, if the facility is proposed to be located or is located within a city, the clerk of the governing board of the city, that the application has been filed, and shall file a copy of the application with the clerk. Prior to the issuance of a permit or an amendment of an existing permit the Secretary or the Secretary's designee shall conduct a public hearing in the county, or in one of the counties in which the hazardous waste facility is proposed to be located or is located. The Secretary or the Secretary's designee shall give notice of the hearing, and the public hearing shall be in accordance with applicable federal regulations adopted pursuant to RCRA and with Chapter 150B of the General Statutes. Where the provisions of the federal regulations and Chapter 150B of the General Statutes are inconsistent, the federal regulations shall apply.

(g) The Commission shall develop and adopt standards for permitting of hazardous waste facilities. Such standards shall be developed with, and provide for, public participation; shall be incorporated into rules; shall be consistent with all applicable federal and State law, including statutes, regulations and rules; shall be developed and revised in light of the best available scientific data; and shall be based on consideration of at least the following factors:

(1) Hydrological and geological factors, including flood plains, depth to water table, groundwater travel time, soil pH, soil cation exchange capacity, soil composition and permeability, cavernous bedrock, seismic activity, slope, mines, and climate;
(2) Environmental and public health factors, including air quality, quality of surface and groundwater, and proximity to public water supply watersheds;
(3) Natural and cultural resources, including wetlands, gamelands, endangered species habitats, proximity to parks, forests, wilderness areas, nature preserves, and historic sites;
(4) Local land uses;
(5) Transportation factors, including proximity to waste generators, route safety, and method of transportation;
(6) Aesthetic factors, including the visibility, appearance, and noise level of the facility;
(7) Availability and reliability of public utilities; and
(8) Availability of emergency response personnel and equipment.

(h) Rules adopted by the Commission shall be subject to the following requirements:

(1) Repealed by Session Laws 1989, c. 168, s. 20.
(2) Hazardous waste shall be treated prior to disposal in North Carolina. The Commission shall determine the extent of waste treatment required before hazardous waste can be disposed of in a hazardous waste disposal facility.
(3) Any hazardous waste disposal facility hereafter constructed in this State shall meet, at the minimum, the standards of construction imposed by federal regulations adopted under the RCRA at the time the permit is issued.

(4) No hazardous waste disposal facility or polychlorinated biphenyl disposal facility shall be located within 25 miles of any other hazardous waste disposal facility or polychlorinated biphenyl disposal facility.

(5) Repealed by Session Laws 2001-474, s. 23, effective November 29, 2001.

(6) The following shall not be disposed of in a hazardous waste disposal facility: ignitables as defined in the RCRA, polyhalogenated biphenyls of 50 ppm or greater concentration, and free liquids whether or not containerized.

(7) Facilities for disposal or long-term storage of hazardous waste shall have at a minimum the following: a leachate collection and removal system above an artificial impervious liner of at least 30 mils in thickness, a minimum of five feet of clay or clay-like liner with a maximum permeability of 1.0×10^{-7} centimeters per second (cm/sec) below said artificial liner, and a leachate detection system immediately below the clay or clay-like liner.

(8) Hazardous waste shall not be stored at a hazardous waste treatment facility for over 90 days prior to treatment or disposal.

(9) The Commission shall consider any hazardous waste treatment process proposed to it, if the process lessens treatment cost or improves treatment over then current methods or standards required by the Commission.

(10) Prevention, reduction, recycling, and detoxification of hazardous wastes should be encouraged and promoted. Hazardous waste disposal facilities and polychlorinated biphenyl disposal facilities shall be detoxified as soon as technology which is economically feasible is available and sufficient money is available without additional appropriation.

(i) The Department shall develop a comprehensive hazardous waste management plan for the State and shall revise the plan on or before 1 July of even-numbered years. The Department shall report to the Environmental Review Commission on or before 1 October of each year on the implementation of the comprehensive hazardous waste management plan. The report shall include an evaluation of how well the State and private parties are managing and cleaning up hazardous waste. The report shall also include recommendations to the Governor, State agencies, and the General Assembly on ways to: improve waste management; reduce the amount of waste generated; maximize resource recovery, reuse, and conservation; and minimize the amount of hazardous waste which must be disposed of.

(j) Repealed by Session Laws 2007-107, s. 1.1(e), effective October 1, 2007.

(k) Each person who generates hazardous waste who is required to pay a fee under G.S. 130A-294.1, and each operator of a hazardous waste treatment facility which treats waste generated on-site who is required to pay a fee under G.S. 130A-294.1, shall submit to the Department at the time such fees are due, a written description of any program to minimize or reduce the volume and quantity or toxicity of such waste.

(*l*) Disposal of solid waste in or upon water in a manner that results in solid waste entering waters or lands of the State is unlawful. Nothing herein shall be interpreted to affect disposal of solid waste in a permitted landfill.

(m) Demolition debris consisting of used asphalt or used asphalt mixed with dirt, sand, gravel, rock, concrete, or similar nonhazardous material may be used as fill and need not be disposed of in a permitted landfill or solid waste disposal facility. Such demolition debris may not be placed in the waters of the State or at or below the seasonal high water table.

(n) The Department shall encourage research and development and disseminate information on state-of-the-art means of handling and disposing of hazardous waste. The Department may establish a waste information exchange for the State.

(o) The Department shall promote public education and public involvement in the decision-making process for the siting and permitting of proposed hazardous waste facilities. The Department shall assist localities in which facilities are proposed in collecting and receiving information relating to the suitability of the proposed site. At the request of a local government in which facilities are proposed, the Department shall direct the appropriate agencies of State government to develop such relevant data as that locality shall reasonably request.

(p) The Department shall each year recommend to the Governor a recipient for a "Governor's Award of Excellence" which the Governor shall award for outstanding achievement by an industry or company in the area of waste management.

(q) The Secretary shall, at the request of the Governor and under the Governor's direction, assist with the negotiation of interstate agreements for the management of hazardous waste.

(r) The Commission shall, in accordance with the procedures set forth in G.S. 160A-211.1 and G.S. 153A-152.1, review upon appeal specific privilege license tax rates that localities may apply to waste management facilities in their jurisdiction.

(s) The Department is authorized to enter upon any lands and structures upon lands to make surveys, borings, soundings, and examinations as may be necessary to determine the suitability of a site for a hazardous waste facility or hazardous waste disposal facility. The Department shall give 30 days notice of the intended entry authorized by this section in the manner prescribed for service of process by G.S. 1A-1, Rule 4. Entry under this section shall not be deemed a trespass or taking; provided, however, that the Department shall make reimbursement for any damage to land or structures caused by these activities. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 4; c. 764, s. 1; 1977, c. 123; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 2; c. 694, s. 2; 1981, c. 704, s. 6; 1983, c. 795, ss. 3, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 6, 7; c. 1034, s. 73; 1985, c. 582; c. 738, ss. 2, 3; 1985 (Reg. Sess., 1986), c. 1027, s. 31; 1987, c. 597; c. 761; c. 773, s. 1; c. 827, ss. 1, 250; c. 848; 1987 (Reg. Sess., 1988), c. 1111, s. 6; 1989, c. 168, ss. 15-22; c. 317; c. 727, s. 218(86); c. 742, s. 6; 1991, c. 537, s. 1; 1993, c. 86, s. 1; c. 273, s. 1; c. 365, s. 1; c. 473, ss. 1, 2; c. 501, s. 14; 1993 (Reg. Sess., 1994), c. 580, s. 1; c. 722, ss. 1, 2; 1995, c. 502, s. 1; c. 509, s. 70; 1995 (Reg. Sess., 1996), c. 594, ss. 6, 7; 1997-27, s. 2; 2001-357, s. 2; 2001-474, ss. 22, 23, 24, 25; 2002-148, s. 4; 2003-37, s. 1; 2006-256, ss. 1, 2, 3; 2007-107, ss. 1.1(b), 1.1(d), 1.1(e), 2.1(a); 2007-495, s. 14; 2007-550, s. 1(a).)

Moratorium on New Landfills From August 1, 2006, through August 1, 2007. — The preamble to Session Laws 2006-244, provides: "Whereas, North Carolina has experienced severe problems from widespread flooding during the past five years; and

"Whereas, large areas of the State have also experienced severe drought conditions during the past five years; and

"Whereas, groundwater is the source of drinking water for approximately half the population of the State; and

"Whereas, depletion of certain large groundwater aquifers in the State has been documented in recent years; and

"Whereas, protection and enhancement of water quality in the State's rivers and coastal estuaries is the declared public policy of the State; and

"Whereas, North Carolina is home to many rare and endangered species of plants and animals; and

"Whereas, the State has established many parks, natural areas, and wildlife refuges to protect habitats for migrating birds and other species; and

"Whereas, many fragile ecosystems exist in the State which are in need of further study and protection; and

"Whereas, the State recognizes that ecosystems transcend state borders, and that changes affecting the State's water, air, natural habitats, and scenic resources also have impacts outside the State; and

"Whereas, it is the policy of the State to ensure the continued public enjoyment of the natural attractions of the State; and

"Whereas, improperly sited, designed, or operated landfills have the potential to cause serious environmental damage, including groundwater contamination; and

"Whereas, it is essential that the State study the siting, design, and operational requirements for landfills for the disposal of solid waste in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas in order to protect public health and the environment; and

"Whereas, it is critical to the protection of public health and the environment to adequately staff the State solid waste program to review permit applications, ensure compliance with State solid waste management laws and rules, and provide technical assistance on solid waste management issues; and

"Whereas, economic and other factors may cause landfills to be concentrated in minority and low-income communities in the State; and

"Whereas, minority and low-income communities may be at particularly high risk for potential threats to human health and the environment from the siting of landfills in these areas; and

"Whereas, it is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills;"

Session Laws 2006-244, s. 1, provides: "Definitions. — The definitions set forth in G.S. 130A-290 apply throughout this act."

Session Laws 2006-244, s. 2, provides: "Moratorium Established. — There is hereby established a moratorium on consideration of applications for a permit and on the issuance of permits for new landfills in the State. The purposes of this moratorium are to allow the State to study solid waste disposal issues in order to protect public health and the environment. The Department of Environment and Natural Resources shall not consider a permit application nor issue a permit for a new landfill for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste for a period beginning on 1 August 2006 and ending on 1 August 2007."

Session Laws 2006-244, s. 3, provides: "Exceptions. — The moratorium established by Section 2 of this act shall not prohibit consideration of an application for or issuance of:

"(1) An amendment, modification, or other change to a permit for a landfill issued on or before 1 June 2006.

"(2) A permit for a horizontal or vertical expansion of the landfill permitted on or before 1 June 2006.

"(3) A permit to construct a new landfill within the facility boundary identified in the facility plan of a landfill permitted on or before 1 June 2006.

"(4) A permit to operate a new landfill if a permit to construct the new landfill was issued on or before 1 June 2006.

"(5) A permit for a sanitary landfill used only to dispose of waste generated by a coal-fired generating unit that is owned or operated by an investor-owned utility subject to the requirements of G.S. 143-215.107D.

"(6) A permit for a sanitary landfill determined to be necessary by the Secretary of Environment and Natural Resources in order to respond to an imminent hazard to public health or a natural disaster."

Session Laws 2006-244, s. 4(a), provides: "Study. — The Environmental Review Commission, with the assistance of the Division of Waste Management of the Department of Environment and Natural Resources, shall study issues related to solid waste. The Commission shall specifically study measures concerning:

"(1) Financial responsibility requirements for solid waste landfills, including the application of requirements to limited liability companies and other business entity structures of applicants seeking solid waste landfill permits.

"(2) Application of franchise requirements and local government approval for solid waste landfill permits, including adequacy of public notice and comment, community studies, and site designations prior to local government approval.

"(3) Siting, design, and operational requirements for landfills for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste that are proposed in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas.

"(4) Formation of dangerous chemicals and gases in flood-prone landfill environments.

"(5) Traffic considerations for proposed landfills.

"(6) Regulatory oversight and staffing for permitting and compliance of solid waste landfills, and inspection of waste containers on barges, railways, and trucks.

"(7) Compliance with statutory prohibitions on disposal of certain types of solid waste and measures to prevent disposal of hazardous waste in solid waste and construction and demolition landfills.

"(8) Ways to reduce the amount of solid waste disposed of within North Carolina landfills, including statewide tipping fees, bans on the disposal of certain types of waste in landfills, more aggressive recycling requirements, and enhanced regulatory requirements for landfills and other solid waste management facilities."

Session Laws 2006-244, s. 4(b), provides: "Subcommittee. — In order to facilitate the conduct of this study, the Cochairs of the Environmental Review Commission may establish a subcommittee of the Commission. The subcommittee of the Commission may include nonlegislative members who have special knowledge, interest, or expertise in various aspects of solid waste management, appointed in consultation with the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

Session Laws 2006-244, s. 4(c), provides: "Report. — The Commission shall report its findings, together with any recommended legislation, to the 2007 Regular Session of the General Assembly upon its convening."

Session Laws 2006-244, s. 5(a), provides: "Committee Established. — The Joint Select Committee on Environmental Justice is hereby established."

Session Laws 2006-244, s. 5(b), provides: "Membership. — The Committee shall consist of 12 members as follows:

"(1) Four members appointed by the President Pro Tempore of the Senate.

"(2) Four members appointed by the Speaker of the House of Representatives.

"(3) The Director of the Division of Waste Management of the Department of Environment and Natural Resources, or the Director's designee.

"(4) The President of the North Carolina Conference of the NAACP, or the President's designee.

"(5) The Executive Director of the North Carolina Association of County Commissioners, or the Director's designee.

"(6) The Executive Director of the North Carolina League of Municipalities, or the Director's designee."

Session Laws 2006-244, s. 5(c), provides: "Cochairs. — The Committee shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among the irrespective appointees. The Committee shall meet upon the call of the cochairs."

Session Laws 2006-244, s. 5(d), provides: "Quorum. — A quorum of the Committee shall consist of seven members."

Session Laws 2006-244, s. 5(e), provides: "Vacancies. — Any vacancy on the Committee shall be filled by the original appointing authority."

Session Laws 2006-244, s. 5(f), provides: "Purpose and Duties. — The Committee shall study:

"(1) The location of landfills in the State, with historical and current demographic information, including health statistics of the surrounding population of each site where available. The Committee shall identify landfills located in proximity to minority and low-income communities.

"(2) The impacts that landfills located in proximity to minority and low-income communities have on these communities with regard to human health, the environment, and economic development.

"(3) Factors, including economic factors, that may have caused landfills to be concentrated in minority and low-income communities in the State.

"(4) Past enforcement actions taken by the U.S. Environmental Protection Agency or the Department of Environment and Natural Resources for violations affecting human health or the environment at any landfill in the State in order to assess whether enforcement practices for violations at these sites have resulted in uneven enforcement outcomes, and to determine if alternative or stronger enforcement measures could be taken, or in the alternative if other methods could be used to allocate resources, in order to more equitably serve minority and low-income communities.

"(5) Statutes, rules, and policies used by State, regional, and local governments, and a review of the role played by these entities to influence or make siting and land-use decisions concerning landfills in the State.

"(6) Data and methodologies by which State, regional, and local governments might become more specifically aware of situations in which neighborhoods are at particularly high risk for potential threats to human health and the environment from the siting of landfills.

"(7) Approaches to ensure consideration of environmental justice and equity issues when formulating and implementing policies, procedures, and legislation within governmental agencies and other institutions."

Session Laws 2006-244, s. 5(g), provides: "Expenses of Members. — Members of the Committee shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1."

Session Laws 2006-244, s. 5(h), provides: "Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Committee to aid in its work."

Session Laws 2006-244, s. 5(i), provides: "Consultants. — The Committee may hire consultants to assist with the study as provided in G.S. 120-32.02(b)."

Session Laws 2006-244, s. 5(j), provides: "Meetings. — The Committee may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Committee."

Session Laws 2006-244, s. 5(k), provides: "Report. — The Committee shall report its findings and recommendations to the General Assembly and the Environmental Review Commission on or before 1 February 2007, at which time the Committee shall terminate."

Session Laws 2006-244, s. 5(*l*), provides: "Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this act."

Session Laws 2006-256, s. 4, provides, in part, that: "This act does not affect any franchise that has been awarded as of the date on which this act becomes effective (August 23, 2006) unless the franchise provides for a final vote of the governing board of the local government on the franchise and the final vote occurs on or after 1 November 2006, in which case the provisions of G.S. 130A-294(b1), as amended by that act, apply."

Editor's Note. — Session Laws 1989, c. 168, which amended this section, provided in s. 47(c), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 990, s. 6: "(c) All information received pursuant to G.S. 130A-294(k), G.S. 143-215.1(g) and G.S. 143-215.108(c) [now G.S. 143-215.108(g)] shall be transmitted to the Solid Waste Management Division of the Department for review and analysis. The Solid Waste Management Division shall consider this information in the development of the comprehensive hazardous waste management plan required by G.S. 130A-294(i) and shall prepare a report on the feasibility of incorporating waste reduction requirements into existing solid and hazardous waste permitting processes. The Solid Waste Management Division shall report to the Environmental Review Commission as to progress in implementing this section annually beginning 1 January 1993."

Session Laws 1995, c. 502, s. 4, as amended by Session Laws 2001-357, s. 2, provided that the amendment to subdivision (a)(4)a. by s. 1 of that act, which added the sentence beginning "A landfill for the disposal of demolition debris" and ending "governed by G.S. 130A-301.2," expired September 30, 2003.

Session Laws 1997-27, which added subsections (b2) and (b3), in s. 3, provides in part that the act applies to any application for a permit submitted on or after the date on which the act becomes law, April 17, 1997, provided that an applicant for the renewal or modification of a permit for an existing facility or for a permit for the expansion of an existing facility who satisfies G.S. 130A-309.06(b) shall not be required to satisfy G.S. 130A-294(b2)(2), as enacted by Section 2 of the act.

Session Laws 2007-107, s. 6.2, contains a severability clause.

Session Laws 2007-550, provides in its preamble: "Whereas, North Carolina has experienced severe problems from widespread flooding during the past five years; and

"Whereas, large areas of the State have also experienced severe drought conditions during the past five years; and

"Whereas, groundwater is the source of drinking water for approximately half the population of the State; and

"Whereas, groundwater pollution is increasing due to contamination from a variety of sources; and

"Whereas, depletion of certain large groundwater aquifers in the State has been documented in recent years; and

"Whereas, protection and enhancement of water quality in the State's rivers and coastal estuaries is the declared public policy of the State; and

"Whereas, North Carolina is home to many rare and endangered species of plants and animals; and

"Whereas, the State has established many parks, natural areas, and wildlife refuges to protect habitats for migrating birds and other species; and

"Whereas, many fragile ecosystems exist in the State which are in need of further study and protection; and

"Whereas, the State recognizes that ecosystems transcend state borders, and that changes affecting the State's water, air, natural habitats, and scenic resources also have impacts outside the State; and

"Whereas, it is the policy of the State to ensure the continued public enjoyment of the natural attractions of the State; and

"Whereas, improperly sited, designed, or operated landfills have the potential to cause serious environmental damage, including groundwater contamination; and

"Whereas, it is essential that the State study the siting, design, and operational requirements for landfills for the disposal of solid waste in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas in order to protect public health and the environment; and

"Whereas, it is critical to the protection of public health and the environment to adequately staff the State solid waste program to review permit applications, ensure compliance with State solid waste management laws and rules, and provide technical assistance on solid waste management issues; and

"Whereas, it is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills; and

"Whereas, S.L. 2006-244 directed the Environmental Review Commission, with the assistance of the Division of Waste Management of the Department of Environment, to study issues related to solid waste; and

"Whereas, the Environmental Review Commission met at least six times after the 2006 legislative session to discuss items related to solid waste; and

"Whereas, bills have been introduced in the House of Representatives and the Senate during the 2007 Regular Session to address issues related to landfills and management of solid waste that have been the subject of intense discussion by members of the General Assembly and a stakeholder working group; Now, therefore,"

Session Laws 2007-550, s. 17, provides: "The Division of Waste Management and the Division of Pollution Prevention and Environmental Assistance of the Department of Environment and Natural Resources shall jointly develop a proposal for a recycling program for fluorescent lamps. The program will be developed so as to ensure that substantially all of the mercury contained in fluorescent lamps will be recovered so as to facilitate a phaseout of incandescent lamps without damage to public health and the environment from the increased use of mercury lamps as replacements for fluorescent lamps. The Department of Environment and Natural Resources shall report its findings and recommendations, including legislative proposals and cost estimates, to the Environmental Review Commission on or before 1 March 2008."

Session Laws 2007-550, s. 18, provides: "The Environmental Review Commission shall study issues related to the franchise of solid waste management facilities by units of local government. The Environmental Review Commission, with the assistance of the Department of Justice, shall study issues related to the transportation of solid waste by rail or barge, including the extent to which regulation of the transportation of solid waste by rail or barge by state governments may be preempted by federal law. The Environmental Review Commission shall report its findings and recommendations, including any legislative proposals, to the 2008 Regular Session of the General Assembly."

Effect of Amendments. — Session Laws 2006-256, ss. 1 through 3, effective August 23, 2006, and applicable to any application for a preliminary franchise or franchise that is filed with a local government on or after August 23, 2006, redesignated subdivisions (b1)(3) and (b1)(2) as subdivisions (b1)(2) and (b1)(3), respectively; in subdivision (b1)(2), substituted "A person who intends to apply" for "an applicant" at the beginning of the first sentence, in the second sentence, substituted "may adopt" for "shall adopt" and deleted "prior to the submittal by an applicant of an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill" following "G.S. 160A-319" near the end, added "all of the following" at the end of the last sentence; substituted "of" for "on" and inserted "sanitary" in subdivision (b1)(2)c, and added subdivisions (b1)(2)d through (b1)(2)f; added subdivision (b1)(2a); and rewrote subdivision (b1)(3).

Session Laws 2007-107, s. 1.1.(b), (d), and (e), effective October 1, 2007, designated the second paragraph of subsection (b) as a separate subsection (which subsection was subsequently repealed by Session Laws 2007-550, s. 1, effective August 1, 2007, and therefore never went into effect); in subsection (b2), rewrote the introductory paragraph, and added the last two sentences in subdivision (b2)(1); and deleted subsection (j) relating to the Commission's adoption of rules for financial responsibility.

Session Laws 2007-107, s. 2.1.(a), effective June 26, 2007, rewrote subsection (c).

Session Laws 2007-495, s. 14, effective August 30, 2007, substituted "the Secretary's" for "his" following "Secretary or" in the second and third sentences of subsection (f).

Session Laws 2007-550, s. 1, effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date, deleted subdivision (a)(4)b; added subdivision (a)(4)c; deleted subdivision (a)(4a); in subdivision (a)(6), deleted "The Department is authorized to" preceding "Charge and collect"; added subsection (a1); deleted the subsection that had formerly been the second paragraph of subsection (b); in subsubdivision (b1)(2)f, made a stylistic change; in subsection (b2), made a stylistic change; in subdivision (b2)(1), substituted "G.S. 130A-295.2" for "G.S. 130A-294(b0)"; in subdivision (b2)(2), deleted "solid waste management" preceding "activity in which," inserted "or permit holder, or a parent, ... in the applicant," and added "as provided in G.S. 130A-295.3"; in subsection (b3), inserted "or a permit holder," and deleted the former last sentence pertaining to the provision of information that the permittee continues to be financially qualified.

Legal Periodicals. — For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

CASE NOTES

Decision of the North Carolina Department of Environment and Natural Resources Division of Waste Management was not arbitrary or capricious because it articulated the factors that were considered and how those factors were weighed relative to each other before deciding to issue a permit allowing construction of a multi-state solid waste landfill; while county residents who challenged the issuance of that permit argued effectively that more thorough review or different weighing of factors would have been reasonable, the court could not find that the Department's process failed to indicate any course of reasoning and the exercise of judgment. Anson County Citizens Against Chem. Toxins in Underground Storage v. N.C. Dep't of Env't & Natural Res., 167 N.C. App. 341, 606 S.E.2d 350, 2004 N.C. App. LEXIS 2171 (2004).

Since G.S. 130A-294(b2) did not contain specific factors that had to be considered before the North Carolina Department of Environment and Natural Resources Division of Waste Management could issue a permit, the statute granted broad discretion to the Department to determine what factors to consider; because a Department employee testified that he considered at least seven specific criteria, such as the Department's experience with the permitee company, whether and how any violations were resolved, whether out-of-state violations would have violated North Carolina regulations, and the nature and duration of any violations, the Department properly exercised its broad discretion to determine that the permitee company showed compliance with environmental regulations and the Department properly ruled against county residents who challenged the Department's decision to issue a permit allowing construction of a multi-state solid waste landfill in the residents' county. Anson County Citizens Against Chem. Toxins in Underground Storage v. N.C. Dep't of Env't & Natural Res., 167 N.C. App. 341, 606 S.E.2d 350, 2004 N.C. App. LEXIS 2171 (2004).

County was liable to landowner for temporary taking of easement across county's landfill where regulations were promulgated under this section requiring that the facility be secured by means of gates, chains, berms, fences, and other security measures to prevent unauthorized entry. Tolbert v. County of Caldwell, 121 N.C. App. 653, 468 S.E.2d 504 (1996).

Franchise for Operation. — County that began a permitting process for a proposed landfill by submitting its site plan application on December 4, 1992, prior to the effective date of G.S. 294(b1)(3), was not required to secure a franchise for operation of the landfill pursuant to that subsection. County of Wake v. N.C. Dep't of Env't & Natural Res., 155 N.C. App. 225, 573 S.E.2d 572, 2002 N.C. App. LEXIS 1632 (2002), cert. dismissed, 357 N.C. 62, 579 S.E.2d 387 (2003).

Town Was Equitably Estopped from Challenging a Landfill Site Application. — Because of its actions in approving a proposed landfill site, before ultimately withdrawing its approval of the landfill site before ultimately withdrawing a neighboring town to the site was equitably estopped from challenging a county's application for a facility permit. County of Wake v. N.C. Dep't of Env't & Natural Res., 155 N.C. App. 225, 573 S.E.2d 572, 2002 N.C. App. LEXIS 1632 (2002), cert. dismissed, 357 N.C. 62, 579 S.E.2d 387 (2003).

Cited in Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991); County of Durham v. North Carolina Dep't of Env't & Natural Resources, 131 N.C. App. 395, 507 S.E.2d 310 (1998).

OPINIONS OF ATTORNEY GENERAL

Governor does not have authority to issue moratorium on granting of permits for hazardous waste facilities in this State. See opinion of Attorney General to Mr. Tom Karnoski, Hazardous Waste Treatment Commission, 55 N.C.A.G. 73 (1986).

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores and the extent State law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-294.1. Fees applicable to generators and transporters of hazardous waste, and to hazardous waste storage, treatment, and disposal facilities.

(a) It is the intent of the General Assembly that the fee system established by this section is solely to provide funding in addition to federal and State appropriations to support the State's hazardous waste management program.

(b) Funds collected pursuant to this section shall be used for personnel and other resources necessary to:

(1) Provide a high level of technical assistance and waste minimization effort for the hazardous waste management program;
(2) Provide timely review of permit applications;
(3) Insure that permit decisions are made on a sound technical basis and that permit decisions incorporate all conditions necessary to accomplish the purposes of this Part;
(4) Improve monitoring and compliance of the hazardous waste management program;
(5) Increase the frequency of inspections;
(6) Provide chemical, biological, toxicological, and analytical support for the hazardous waste management program; and
(7) Provide resources for emergency response to imminent hazards associated with the hazardous waste management program.

(c) It is the intent of the General Assembly that the total funds collected per year pursuant to this section not exceed thirty percent (30%) of the total funds budgeted from all sources for the hazardous waste management program. This subsection shall not be construed to limit the obligation of any person to pay any fee imposed by this section.

(d) The Hazardous Waste Management Account is established as a nonreverting account within the Department. All fees collected under this section shall be credited to the Account and shall be used for the purposes listed in subsection (b).

(e) A person who generates either one kilogram or more of any acute hazardous waste as listed in 40 C.F.R. § 261.30(d) or § 261.33(e) as revised 1 July 1987, or 1000 kilograms or more of hazardous waste, in any calendar month during the year beginning 1 July and ending 30 June shall pay an annual fee of one thousand dollars ($1,000).

(f) A person who generates 100 kilograms or more of hazardous waste in any calendar month during the year beginning 1 July and ending 30 June but less than 1000 kilograms of hazardous waste in each calendar month during that year shall pay an annual fee of one hundred twenty-five dollars ($125.00).

(g) A person who generates one kilogram or more of acute hazardous waste or 1000 kilograms or more of hazardous waste in any calendar month during the calendar year shall pay, in addition to any fee under subsections (e) and (f) of this section, a tonnage fee of fifty cents ($0.50) per ton or any part thereof of hazardous waste generated during that year up to a maximum of 25,000 tons.

(h) A person who generates less than one kilogram of acute hazardous waste and less than 100 kilograms of hazardous waste in each calendar month during the year beginning 1 July and ending 30 June shall not be liable for payment of a fee under subsections (e) and (f) of this section for that year.

(i) Hazardous waste generated as a result of any type of remedial action or by collection by a local government of hazardous waste from households shall not be subject to a tonnage fee under subsections (g) and (l) of this section.

(j) A person who transports hazardous waste shall pay an annual fee of six hundred dollars ($600.00).

(k) A storage, treatment, or disposal facility shall pay an annual activity fee of one thousand two hundred dollars ($1,200) for each activity.

(*l*) A commercial hazardous waste storage, treatment, or disposal facility shall pay annually, in addition to the fees applicable to all hazardous waste storage, treatment, or disposal facilities, a single tonnage charge of one dollar and seventy-five cents ($1.75) per ton or any part thereof of hazardous waste stored, treated, or disposed of at the facility. A manufacturing facility that receives hazardous waste generated from the use of a product typical of its manufacturing process for the purpose of recycling is exempt from this tonnage charge. A facility must have a permit issued under this Article which includes the recycling activity and specifies the type and amount of waste allowed to be received from off-site for recycling.

(m) An applicant for a permit for a hazardous waste storage, treatment, or disposal facility that proposes to operate as a commercial facility shall pay an application fee for each proposed activity as follows:

(1) Storage facility	$10,000;
(2) Treatment facility	$15,000;
(3) Disposal facility	$25,000.

(n) The Commission may adopt rules setting fees for modifications to permits. Such fees shall not exceed fifty percent (50%) of the application fee.

(o) Annual fees established under this section are due no later than 31 July for the fiscal year beginning 1 July in the same year. Tonnage fees established under this section are due no later than 31 July for the previous calendar year.

(p) The Department shall make an annual report on or before 1 October to the General Assembly and its Fiscal Research Division on the cost of the hazardous waste management program. The report shall include, but is not limited to, beginning fund balance, fees collected under this section, anticipated revenue from all sources, total expenditures by activities and categories for the hazardous waste management program, ending fund balance, any recommended adjustments in the annual and tonnage fees which may be necessary to assure the continued availability of funds sufficient to pay the State's share of the cost of the hazardous waste management program, and any other information requested by the General Assembly. In recommending adjustments in annual and tonnage fees, the Department may propose fees for hazardous waste generators, and for hazardous waste treatment facilities which treat waste generated on-site, which are designed to encourage reductions in the volume or quantity and toxicity of hazardous waste. (1987, c. 773, ss. 2, 4-8; 1987 (Reg. Sess., 1988), c. 1020, s. 2; 1989, c. 168, s. 23; c. 724, s. 4; 1991, c. 286, s. 1; 1991 (Reg. Sess., 1992), c. 890, s. 10; c. 1039, s. 9; 2003-284, s. 35.2(a), (b); 2007-495, s. 24.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 27.10, provides: "Beginning in 1997, the Department of Environment, Health and Natural Resources (now the Department of Environment and Natural Resources) shall report on the generation, storage, treatment, and disposal of hazardous waste in North Carolina no more often than it is required to report under federal law or federal regulation."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

Effect of Amendments. — Session Laws 2007-495, s. 24, effective August 30, 2007, in subsection (p), inserted "on or before 1 October" following "shall make an annual report" in the first sentence; and made minor stylistic changes.

CASE NOTES

Fee Not Appropriate. — The legislature did not intend for wastewater treated in elementary neutralization systems and discharged pursuant to National Pollution Discharge Elimination System permits to be assessed a tonnage fee as per subsection (g) of this section. In re E.I. DuPont de Nemours & Co., 109 N.C. App. 435, 428 S.E.2d 195 (1993).

§ 130A-295. Additional requirements for hazardous waste facilities.

(a) An applicant for a permit for a hazardous waste facility shall satisfy the Department that:

(1) Any hazardous waste facility constructed or operated by the applicant, or any parent or subsidiary corporation if the applicant is a corporation, has been operated in accordance, with sound waste management practices and in substantial compliance with federal and state laws, regulations and rules; and

(2) The applicant, or any parent or subsidiary corporation if the applicant is a corporation, is financially qualified to operate the proposed hazardous waste facility.

(b) An applicant for a permit for a hazardous waste facility shall satisfy the Department that he has met the requirements of subsection (a) of this section before the Department is required to otherwise review the application. In order to continue to hold a permit under this Chapter, a permittee must remain financially qualified and must provide any information requested by the Department to demonstrate that he continues to be financially qualified.

(c) No permit for any new commercial hazardous waste treatment, storage, or disposal facility shall be issued or become effective, and no permit for a commercial hazardous waste treatment, storage, or disposal facility shall be modified until the applicant has satisfied the Department that such facility is needed to meet the current or projected hazardous waste management needs of this State or to comply with the terms of any interstate agreement for the management of hazardous waste to which the State is a party. The Commission shall adopt rules to implement this subsection.

(d) At least 120 days prior to submitting an application, an applicant for a permit for a hazardous waste facility shall provide to the county in which the facility is located, to any municipality with planning jurisdiction over the site of the facility, and to all emergency response agencies that have a role under the contingency plan for the facility all of the following information:

(1) Information on the nature and type of operations to occur at the facility.

(2) Identification of the properties of the hazardous waste to be managed at the facility.

(3) A copy of the draft contingency plan for the facility that includes the proposed role for each local government and each emergency response agency that received information under this subsection.

(4) Information on the hazardous waste locations within the facility.

(e) Within 60 days of receiving the information, each local government and emergency response agency that receives information under subsection (d) of this section shall respond to the applicant in writing as to the adequacy of the contingency plan and the availability and adequacy of its resources and equipment to respond to an emergency at the facility that results in a release of hazardous waste or hazardous waste constituents into the environment according to the role set forth for the local government or emergency response agency under the contingency plan.

(f) An applicant for a permit for a hazardous waste facility shall include documentation that each local government and emergency response agency received the information required under subsection (d) of this section, the written responses the applicant received under subsection (e) of this section, and verification by each that its resources and equipment are available and adequate to respond to an emergency at the facility in accordance with its role as set forth in the contingency plan. If the applicant does not receive a timely verification from a local government or emergency response agency notified under subsection (d) of this section, the Department shall verify the adequacy of resources and equipment for emergency response during the course of review of the permit application, taking into account any contracts entered into by the applicant for such emergency response resources.

(g) At each two-year interval after a permit for a hazardous waste facility is issued, the permit holder shall verify that the resources and equipment of each local government and emergency response agency are available and adequate to respond to an emergency at the facility in accordance with its role as set forth in the contingency plan and shall submit this verification to the Department. (1981, c. 704, s. 7; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, s. 8; 1987, § 461, s. 3; 1989, c. 168, s. 24; 2007-107, s. 1.2(a).)

Editor's Note. — Session Laws 2007-107, s. 1.2(b), provides, in part: "An applicant shall provide the information required under G.S. 130A-295(d), and enacted by this section, as it relates to an application pending on the date this section becomes effective within 30 days after this section becomes effective."

Session Laws 2007-107, s. 6.2, contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, s. 1.2(a), effective June 26, 2007, and applicable to applications pending on June 26, 2007, added subsections (d) through (g).

§ 130A-295.01. Additional requirement for commercial hazardous waste facilities.

(a) As used in this section:

(1) "Commercial hazardous waste facility" means any hazardous waste facility that accepts hazardous waste from the general public or from another person for a fee, but does not include any facility owned or operated by a generator of hazardous waste solely for his own use, and does not include any facility owned by the State or by any agency or subdivision thereof solely for the management of hazardous waste generated by agencies or subdivisions of the State.

(2) "New", when used in connection with "facility", refers to a planned or proposed facility, or a facility that has not been placed in operation, but does not include facilities that have commenced operations as of 22 June 1987, including facilities operated under interim status.

(3) "Modified", when used in connection with "permit", means any change in any permit in force on or after 22 June 1987 that would either expand the scope of permitted operations, or extend the expiration date of the permit, or otherwise constitute a Class 2 or Class 3 modification of the permit as defined in 40 Code of Federal Regulations § 270.41 (1 July 2006).

(4) "7Q10 conditions", when used in connection with "surface water," refers to the minimum average flow for a period of seven consecutive days that has an average occurrence of once in 10 years as referenced in 15 NCAC 2B.0206(a)(3) as adopted 1 February 1976.

(b) No permit for any new commercial hazardous waste facility shall be issued or become effective, and no permit for a commercial hazardous waste facility shall be modified, until the applicant has satisfied the Department that such facility meets, in addition to all other applicable requirements, the following requirements:

(1) The facility shall not discharge directly a hazardous or toxic substance into a surface water that is upstream from a public drinking water supply intake in North Carolina, unless there is a dilution factor of 1000 or greater at the point of discharge into the surface water under 7Q10 conditions.

(2) The facility shall not discharge indirectly through a publicly owned treatment works (POTW) a hazardous or toxic substance into a

surface water that is upstream from a public drinking water supply intake in North Carolina, unless there is a dilution factor of 1000 or greater, irrespective of any dilution occurring in a wastewater treatment plant, at the point of discharge into the surface water under 7Q10 conditions.

(c) The Department shall not issue a permit for a commercial hazardous waste facility for a period of more than five years. A permit holder for a commercial hazardous waste facility who intends to apply for renewal of the permit shall submit an application for the renewal of the permit at least one year before the permit expires unless the Department approves a shorter period of time.

(d) The owner or operator of a commercial hazardous waste facility shall maintain a record of information at an off-site location that identifies the generators of the waste and the quantity, type, location, and hazards of the waste at the facility and shall make this information available in a form and manner to be determined by the Department, accessible to the Department, to the county in which the facility is located, to any municipality with planning jurisdiction over the site of the facility, and to emergency response agencies that have a role under the contingency plan for the facility.

(e)(1) Within 10 days of filing an application for a permit for a commercial hazardous waste facility, the applicant shall notify every person who resides or owns property located within one-fourth mile of any property boundary of the facility that the application has been filed. The notice shall be by mail to residents and by certified mail to property owners, or by any other means approved by the Department, shall be in a form approved by the Department, and shall include all of the following:

a. The location of the facility.

b. A description of the facility.

c. The hazardous and nonhazardous wastes that are to be received and processed at the facility.

d. A description of the emergency response plan for the facility.

(2) The permit holder for a commercial hazardous waste facility shall publish a notice that includes the information set out in subdivision (1) of this subsection annually beginning one year after the permit is issued. The notice shall be published in a form and manner approved by the Department in a newspaper of general circulation in the community where the facility is located.

(3) The permit holder for a commercial hazardous waste facility shall provide the information set out in subdivision (1) of this subsection by mail to the persons described in subdivision (1) of this subsection at the midpoint of the period for which the permit is issued.

(4) Each commercial hazardous waste facility applicant and permit holder shall provide documentation to demonstrate to the Department that the requirements set out in subdivisions (1), (2), and (3) of this subsection have been met.

(f) No later than 31 January of each year, the owner or operator of a commercial hazardous waste facility shall report to the Department any increase or decrease in the number of sensitive land uses and any increase or decrease in estimated population density based on information provided by the local government that has planning jurisdiction over the site on which the facility is located that occurred during the previous calendar year in the area located within one-fourth mile of any property boundary of the facility. Changes shall be recorded in the operating record of the facility. As used in this subsection, “sensitive land use” includes residential housing, places of assembly, places of worship, schools, day care providers, and hospitals. Sensitive land use does not include retail businesses.

(g) The owner or operator of a commercial hazardous waste facility shall provide a security and surveillance system at the facility 24 hours a day, seven days a week in order to continuously monitor site conditions and to control entry. The security and surveillance system shall be capable of promptly detecting unauthorized access to the facility; monitoring conditions; identifying operator errors; and detecting any discharge that could directly or indirectly cause a fire, explosion, or release of hazardous waste or hazardous waste constituents into the environment or threaten human health. The requirements of this subsection may be satisfied either by employing trained facility personnel or by providing an electronic security and surveillance system which may include television, motion detectors, heat-sensing equipment, combustible gas monitors, or any combination of these, as approved by the Department.

(h) The operator of a commercial hazardous waste facility shall install an on-site wind monitor approved by the Department. The wind monitor required shall be located so that the real-time wind direction can be determined from a remote location in the event of a release of hazardous waste or hazardous waste constituents into the environment. (1987, c. 437, s. 1; 2007-107, ss. 1.3(a), 1.4(a), 1.5(a), 1.6(a), 1.7(a), 1.9(a), 2.1(b); 2007-495, s. 15(a)-(e).)

Editor's Note. — Session Laws 1987, c. 437, which enacted this section, in s. 2 provided: "The provisions of this act are severable. If the Administrator of the United States Environmental Protection Agency concludes; pursuant to the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6926; and Title 40, Part 271, Code of Federal Regulations G.S. 271.22 and .23, or in accordance with other applicable law and regulations; that any provision of this act will result in the withdrawal of approval of the North Carolina hazardous waste program, such provision is void. The Secretary, his designee, or other State official shall, upon receipt of notice of a decision by the Administrator that any provision of this act will result in withdrawal of program approval, certify to the Secretary of State that such provision is void. In the event that any provision of this act is voided pursuant to this section, it shall be revived only upon a subsequent reversal by the Administrator of his decision based on his determination that such provision is not in conflict with Environmental Protection Agency requirements for State program approval, or upon a reversal of the Administrator's initial decision by administrative or judicial review. The voiding of any provision of this act shall not affect other provisions of the act which can be given effect without the voided provision."

Session Laws 2007-107, s. 5.3(b), provides: "The University of North Carolina may study the emission and transport of pollutants at fires at commercial hazardous waste facilities, as defined in G.S. 130A-295.01, and may study the human health and economic impacts of fires at commercial hazardous waste facilities."

Session Laws 2007-107, s. 6.2 contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, ss. 1.3.(a), 1.4.(a), 1.6.(a), 1.7(a) and 1.9.(a), effective October 1, 2007, added subsections (c) through (g), (i) and (k).

Session Laws 2007-107, ss. 1.5(a), 1.7(a) and 2.1(b), effective June 26, 2007, in subdivision (a)(1), deleted "treatment" following "Commercial hazardous waste" and "any hazardous waste," and substituted "management of hazardous waste" for "treatment of hazardous waste" near the end of the subdivision; in subdivision (a)(3), substituted "Class 2 or Class 3 modification" for "major modification" and "40 Code of Federal Regulations § 270.41 (1 July 2006)" for "Title 40, Part 270.41 of the Code of Federal Regulations (1 July 1986)"; deleted "treatment" following "hazardous waste" both times it appears in the introductory paragraph of subsection (b); added subsections (h) and (j); and made minor stylistic and punctuation changes.

Session Laws 2007-107, s. 1.9(a), effective October 1, 2007, added subsection (h).

Session Laws 2007-107, s. 2.1(b), effective June 26, 2007, deleted "treatment" preceding "facilities" in the section heading, rewrote subsection (a), and deleted "treatment" preceding "facility" twice in subsection (b).

Session Laws 2007-495, s. 15(a), recodified subsection (g), as enacted by Session Laws 2007-107, s. 1.7, as subsection (c).

Session Laws 2007-495, s. 15(b), recodified subsection (c), as enacted by Session Laws 2007-107, s. 1.3, as subsection (d).

Session Laws 2007-495, s. 15(c), redesignated subsections (d) through (g), as enacted by Session Laws 2007-107, s. 1.4, as subdivisions (e)(1) through (e)(4), respectively; and redesignated subdivisions (d)(1) through (4), as subdivisions (e)(1)a through d, respectively.

Session Laws 2007-495, s. 15(d), recodified subsection (e), as enacted by Session Laws 2007-107, s. 1.5(a), as subsection (f).

Session Laws 2007-495, s. 15(e), recodified subsection (f), as enacted by Session Laws 2007-107, s. 1.6, as subsection (g).

§ 130A-295.02. Resident inspectors required at commercial hazardous waste facilities; recovery of costs for same.

(a) The Division shall employ full-time resident inspectors for each commercial hazardous waste facility located within the State. Such inspectors shall be employed and assigned so that at least one inspector is on duty at all times during which any component of the facility is in operation, is undergoing any maintenance or repair, or is undergoing any test or calibration. Resident inspectors shall be assigned to commercial hazardous waste management facilities so as to protect the public health and the environment, to monitor all aspects of the operation of such facilities, and to assure compliance with all laws and rules administered by the Division and by any other division of the Department. Such inspectors may also enforce laws or rules administered by any other agency of the State pursuant to an appropriate memorandum of agreement entered into by the Secretary and the chief administrative officer of such agency. The Division may assign additional resident inspectors to a facility depending upon the quantity and toxicity of waste managed at a facility, diversity of types of waste managed at the facility, complexity of management technologies utilized at the facility, the range of components which are included at the facility, operating history of the facility, and other factors relative to the need for on-site inspection and enforcement capabilities. The Division, in consultation with other divisions of the Department, shall define the duties of each resident inspector and shall determine whether additional resident inspectors are needed at a particular facility to meet the purposes of this section.

(b) The Division shall establish requirements pertaining to education, experience, and training for resident inspectors so as to assure that such inspectors are fully qualified to serve the purposes of this section. The Division shall provide its resident inspectors with such training, equipment, facilities, and supplies as may be necessary to fulfill the purposes of this section.

(c) As a condition of its permit, the owner or operator of each commercial hazardous waste facility located within the State shall provide and maintain such appropriate and secure offices and laboratory facilities as the Department may require for the use of the resident inspectors required by this section.

(d) Resident inspectors assigned to a commercial hazardous waste facility shall have unrestricted access to all operational areas of such facility at all times. For the protection of resident inspectors and the public, the provisions of G.S. 143-215.107(f) shall not apply to commercial hazardous waste facilities to which a resident inspector is assigned.

(e) No commercial hazardous waste facility shall be operated, undergo any maintenance or repair, or undergo any testing or calibration unless an inspector employed by the Division is present at the facility.

(f) The requirements of this section are intended to enhance the ability of the Department to protect the public health and the environment by providing the Department with the authority and resources necessary to maintain a rigorous inspection and enforcement program at commercial hazardous waste management facilities. The requirements of this section are intended to be supplementary to other requirements imposed on hazardous waste facilities. This section shall not be construed to relieve either the owner or the operator of any such facility or the Department from any other requirement of law or to require any unnecessary duplication of reporting or monitoring requirements.

(g) For the purpose of enforcing the laws and rules enacted or adopted for the protection of the public health and the environment, resident inspectors employed pursuant to this section may be commissioned as special peace officers as provided in G.S. 113-28.1. The provisions of Article 1A of Chapter 113 of the General Statutes shall apply to resident inspectors commissioned as special peace officers pursuant to this subsection.

(h) The Department shall determine the full cost of the employment and assignment of resident inspectors at each commercial hazardous waste facility located within the State. Such costs shall include, but are not limited to, costs incurred for salaries, benefits, travel, training, equipment, supplies, telecommunication and data transmission, offices and other facilities other than those provided by the owner or operator, and administrative expenses. The Department shall establish and revise as necessary a schedule of fees to be assessed on the users of each such facility to recover the actual cost of the resident inspector program at that facility. The operator of each such facility shall serve as the collection agent for such fees, shall account to the Department on a monthly basis for all fees collected, and shall deposit with the Department all funds collected pursuant to this section within 15 days following the last day of the month in which such fees are collected. Fees collected under this section shall be credited to the General Fund as nontax revenue.

(i) The Division shall establish and revise as necessary a program for assigning resident inspectors to commercial hazardous waste facilities so that scheduled rotation or equivalent oversight procedures ensure that each resident inspector will maintain objectivity.

(j) For purposes of this subsection, special purpose commercial hazardous waste facilities include: a facility that manages limited quantities of hazardous waste; a facility that limits its hazardous waste management activities to reclamation or recycling, including energy or materials recovery or a facility that stores hazardous waste primarily for use at such facilities; or a facility that is determined to be low risk under rules adopted by the Commission pursuant to this subsection. The Commission shall adopt rules to determine whether a commercial hazardous waste facility is a special purpose commercial hazardous waste facility and to establish classifications of special purpose commercial hazardous waste facilities. The rules to determine whether a commercial hazardous waste facility is a special purpose commercial hazardous waste facility and to establish classifications of special purpose commercial hazardous waste facilities shall be based on factors including, but not limited to, the size of the facility, the type of treatment or storage being performed, the nature and volume of waste being treated or stored, the uniformity, similarity, or lack of diversity of the waste streams, the predictability of the nature of the waste streams and their treatability, whether the facility utilizes automated monitoring or safety devices that adequately perform functions that would otherwise be performed by a resident inspector, the fact that reclamation or recycling is being performed at the facility, and the compliance history of the facility and its operator. Based on the foregoing factors and any increase or decrease in the number of sensitive land uses over time or in estimated population density over time reported pursuant to G.S. 130A-295.01(f), rules adopted pursuant to this subsection shall establish times and frequencies for the presence of a resident inspector on less than a full-time basis at special purpose commercial hazardous waste facilities and specify a minimum number of additional inspections at special purpose hazardous waste [facilities].

during such times as the facility is subject to inspection

Special purpose commercial hazardous waste facilities that utilize hazardous waste as a fuel source shall be inspected a minimum of 40 hours per week, unless compliance data for these facilities can be electronically monitored and recorded off-site by the Department. The Department, considering the benefits provided by electronic monitoring, shall determine the number of hours of on-site inspection required at these facilities. The Department shall maintain records of all inspections at special purpose commercial hazardous waste facilities. Such records shall contain sufficient detail and shall be arranged ina readily understandable format so as to facilitate determination at any time as to whether the special purpose commercial hazardous waste facility is in compliance with the requirements of this subsection and of rules adopted pursuant to this subsection. Notwithstanding any other provision of this section, special purpose commercial hazardous waste facilities shall be subject to inspection at all times during which the facility is in operation, undergoing any maintenance or repair, or undergoing any test or calibration.

(k) For purposes of this section, a facility that utilizes hazardous waste as a fuel or that has used hazardous waste as a fuel within the preceding calendar year, and that is an affiliate of and adjacent or contiguous to a commercial hazardous waste facility, shall be subject to inspection as a special purpose commercial hazardous waste facility under subsection (j) of this section as if the facility that utilizes hazardous waste as a fuel were a part of the commercial hazardous waste facility.

(*l*) As used in this section, the words "affiliate", "parent", and "subsidiary" have the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1990 Edition).

(m) The Department shall report annually on or before 1 October to the Environmental Review Commission on the implementation of the resident inspectors program. (1989 (Reg. Sess., 1990), c. 1082, s. 1; 1991, c. 20, s. 2; c. 403, s. 4; c. 450, s. 2; 1993, c. 511, s. 1; c. 513, s. 2(b); c. 553, s. 41; 1995, c. 327, s. 1; 2006-79, s. 16; 2007-107, s. 1.5(b).)

Editor's Note. — This section was amended by Session Laws 2007-107, s. 1.5(b), in the coded bill drafting format provided by G.S. 120-20.1. The extra words "during such times as the facility is subject to inspection" following the fifth sentence in subsection (j) were part of the section as it existed prior to the 2007 amendment, but were omitted by S.L. 2007-107; consequently, they were not stricken through per code drafting guidelines. Subsection (j) has been set out in the form above at the direction of the Revisor of Statutes.

The reference in subsection (j) to G.S. 130A-295.01(f) had been a reference to G.S. 130A-295.01(e), which was subsequently recodified as G.S. 130A-295.01(f) by Session Laws 2007-495, s. 15(d). The reference in subsection (j) has been changed to "G.S. 130A-295.01(f)" at the direction of the Revisor of Statutes.

Session Laws 2007-107, s. 6.2 contains a severability clause.

Effect of Amendments. — Session Laws 2006-79, s. 16, effective July 10, 2006, substituted "October" for "September" in subsection (m).

Session Laws 2007-107, s. 1.5(b), effective June 26, 2007, rewrote subsection (j).

§ 130A-295.03. Additional requirement for hazardous waste disposal facilities; hazardous waste to be placed in containers.

(a) For purposes of this section, the term "container" means any portable device into which waste is placed for storage, transportation, treatment, disposal, or other handling, and includes the first enclosure which encompasses the waste.

(b) All hazardous waste shall be placed in containers for disposal, except as the Commission shall provide for by rule. The Commission shall adopt standards for the design and construction of containers for disposal. Standards for containers may vary for different types of waste. The standards for disposal containers may supplement or duplicate any of the performance or engineering standards for hazardous waste disposal facilities required under State or federal law; however, the performance or engineering standards for hazardous waste disposal facilities are separate and cumulative, and the performance or engineering standards for hazardous waste disposal facilities and containers may not substitute for or replace one another. (1991, c. 450, s. 1; c. 761, s. 22.)

§ 130A-295.04. Financial responsibility requirements for applicants for a permit and permit holders for hazardous waste facilities.

(a) In addition to any other financial responsibility requirements for solid waste management facilities under this Part, the applicant for a permit or a permit holder for a hazardous waste facility shall establish financial assurance that will ensure that sufficient funds are available for facility closure, post-closure maintenance and monitoring, any corrective action that the Department may require, and to satisfy any potential liability for sudden and nonsudden accidental occurrences, even if the applicant or permit holder becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State.

(b) To establish sufficient availability of funds under this section, the applicant for a permit or a permit holder for a hazardous waste facility may use insurance, financial tests, third-party guarantees by persons who can pass the financial test, guarantees by corporate parents who can pass the financial test, irrevocable letters of credit, trusts, surety bonds, or any other financial device, or any combination of the foregoing, shown to provide protection equivalent to the financial protection that would be provided by insurance if insurance were the only mechanism used.

(c) The applicant for a permit or a permit holder for a hazardous waste facility, and any parent, subsidiary, or other affiliate of the applicant, permit holder, or parent, including any joint venturer with a direct or indirect interest in the applicant, permit holder, or parent, shall be a guarantor of payment for closure, post-closure maintenance and monitoring, any corrective action that the Department may require, and to satisfy any potential liability for sudden and nonsudden accidental occurrences arising from the operation of the hazardous waste facility.

(d) In addition to any other financial assurance requirements for hazardous waste management facilities under this section, an applicant for a permit or a permit holder for a commercial hazardous waste facility shall establish financial assurance that will ensure that sufficient funds are available for corrective action and for off-site screening for potential migration of contaminants in the event of a release of hazardous waste or hazardous waste constituents into the environment in an amount approved by the Department. The applicant for a permit or a permit holder may not use a financial test or captive insurance to establish financial assurance under this subsection.

(e) The Department may require an applicant for a permit for a hazardous waste facility to provide cost estimates for facility closure, post-closure maintenance and monitoring, and any corrective action that the Department may require to the Department. The Department may require an applicant for a permit for a commercial hazardous waste facility to provide cost estimates for off-site screening for potential migration of contaminants in the event of a release of hazardous waste or hazardous waste constituents into the environment.

(f) Assets used to meet the financial assurance requirements of this section shall be in a form that will allow the Department to readily access funds for the purposes set out in this section. Assets used to meet financial assurance requirements of this section shall not be accessible to the permit holder except as approved by the Department.

(g) The Department may provide a copy of any filing that an applicant for a permit or a permit holder for a hazardous waste facility submits to the

Department to meet the financial responsibility requirements under this section to the State Treasurer. The State Treasurer shall review the filing and provide the Department with a written opinion as to the adequacy of the filing to meet the purposes of this section, including any recommended changes.

(h) In order to continue to hold a permit for a hazardous waste facility, a permit holder must maintain financial responsibility as required by this Part and must provide any information requested by the Department to establish that the permit holder continues to maintain financial responsibility.

(i) An applicant for a permit or a permit holder for a hazardous waste facility shall satisfy the Department that the applicant or permit holder has met the financial responsibility requirements of this Part before the Department is required to otherwise review the application.

(j) The Commission may adopt rules regarding financial responsibility in order to implement this section. (2007-107, s. 1.1(a))

Editor's Note. — Session Laws 2007-107, s. 1.1(h), made this section effective October 1, 2007.

Session Laws 2007-107, s. 6.2, contains a severability clause.

§ 130A-295.05. Hazardous waste transfer facilities.

(a) The owner or operator of a hazardous waste transfer facility in North Carolina shall register the facility with the Department and shall obtain a hazardous waste transfer facility identification number for the facility. In order to obtain a hazardous waste transfer facility identification number for the facility, the owner or operator of the facility shall provide all of the following information to the Department at the time of registration:

(1) The location of the hazardous waste transfer facility.
(2) The name of the owner of the property on which the hazardous waste transfer facility is located.

(b) Except during transportation emergencies as determined by the Department, the temporary storage, consolidation, or commingling of hazardous waste may occur only at a hazardous waste transfer facility that has been issued a facility identification number by the Department.

(c) A hazardous waste transporter and the owner or operator of a hazardous waste transfer facility shall conduct all operations at any hazardous waste transfer facility in compliance with the requirements of 40 Code of Federal Regulations Part 263 (1 July 2006), 49 U.S.C. § 5101, et seq., and any laws, regulations, or rules enacted or adopted pursuant to these federal laws. Except as preempted under 49 U.S.C. § 5125, a hazardous waste transporter and the owner or operator of a hazardous waste transfer facility shall also conduct all operations at any hazardous waste transfer facility in compliance with all applicable State laws or rules.

(d) A hazardous waste transporter shall notify the Department, on a form prescribed by the Department, of every hazardous waste transfer facility in North Carolina that the transporter uses. A hazardous waste transporter shall retain all records that are required to be maintained for at least three years.

(e) The owner or operator of a hazardous waste transfer facility shall notify the Department, on a form prescribed by the Department, of every hazardous waste transporter that makes use of the facility. The owner or operator of a hazardous waste transfer facility shall retain all records that are required to be maintained for at least three years. (2007-107, s. 1.8(c).)

Editor's Note. — Session Laws 2007-107, s. 1.8(e) made this section effective October 1, 2007.

Session Laws 2007-107, s. 1.8(d), provides: "The Department of Environment and Natural Resources shall study the need for further regulation of hazardous waste transfer facilities, as defined in G.S. 130A-290(a)(13a), as enacted by subsection (a) of this section, including whether to require these facilities to obtain a permit under Part 2 of Article 9 of Chapter 130A of the General Statutes, pay permit fees, provide contingency plans, and demonstrate financial responsibility. The Department of Environment and Natural Resources shall report its findings and recommendations, including any legislative proposals, to the Environmental Review Commission on or before 15 February 2008."

Session Laws 2007-107, s. 6.2, contains a severability clause.

§ 130A-295.1. (See Editor's note) Limitations on permits for sanitary landfills.

Editor's Note. — G.S. 130A-295.1 was enacted as a provision in an appropriations bill (Session Laws 1985, c. 757, s. 157) and the Revisor of Statutes directed its codification and assigned it G.S. section number § 130A-295.1. Session Laws 1985, c. 757, s. 210 provided: "Except for statutory changes and other provisions that are clearly intended to have an effect beyond the 1985-87 fiscal biennium, the textual provisions of this act apply only to funds appropriated for and activities occurring during the 1985-87 fiscal biennium." The Revisor of Statutes has directed that the section now be removed as inapplicable pursuant to s. 210.

§ 130A-295.2. Financial responsibility requirements for applicants and permit holders for solid waste management facilities.

(a) As used in this section:

(1) "Financial assurance" refers to the ability of an applicant or permit holder to pay the costs of assessment and remediation in the event of a release of pollutants from a facility, closure of the facility in accordance with all applicable requirements, and post-closure monitoring and maintenance of the facility.

(2) "Financial qualification" refers to the ability of an applicant or permit holder to pay the costs of proper design, construction, operation, and maintenance of the facility.

(3) "Financial responsibility" encompasses both financial assurance and financial qualification.

(b) The Commission may adopt rules governing financial responsibility requirements for applicants for permits and for permit holders to ensure the availability of sufficient funds for the proper design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of solid waste management facilities and for any corrective action the Department may require during the active life of a facility or during the closure and post-closure periods.

(c) The Department may provide a copy of any filing that an applicant for a permit or a permit holder submits to the Department to meet the financial responsibility requirements under this section to the State Treasurer. The State Treasurer shall review the filing and provide the Department with a written opinion as to the adequacy of the filing to meet the purposes of this section, including any recommended changes.

(d) The Department may, in its sole discretion, require an applicant for a permit to construct a facility to demonstrate its financial qualification for the design, construction, operation, and maintenance of a facility. The Department may require an applicant for a permit for a solid waste management facility to provide cost estimates for site investigation; land acquisition, including financing terms and land ownership; design; construction of each five-year phase, if applicable; operation; maintenance; closure; and post-closure monitoring and maintenance of the facility to the Department. The Department may allow an applicant to demonstrate its financial qualifications for only the first five-year phase of the facility. If the Department allows an applicant for a permit to demonstrate its financial qualification for only the first five-year phase of the facility, the Department shall require the applicant or permit holder to demonstrate its financial qualification for each successive five-year phase of the facility when applying for a permit to construct each successive phase of the facility.

(e) If the Department requires an applicant for a permit or a permit holder for a solid waste management facility to demonstrate its financial qualification, the applicant or permit holder shall provide an audited, certified financial statement. An applicant who is required to demonstrate its financial qualification may do so through a combination of cash deposits, insurance, and binding loan commitments from a financial institution licensed to do business in the State and rated AAA by Standard & Poor's, Moody's Investor Service, or Fitch, Inc. If assets of a parent, subsidiary, or other affiliate of the applicant or a permit holder, or a joint venturer with a direct or indirect interest in the applicant or permit holder, are proposed to be used to demonstrate financial qualification, then the party whose assets are to be used must be designated as a joint permittee with the applicant on the permit for the facility.

(f) The applicant and permit holder for a solid waste management facility shall establish financial assurance by a method or combination of methods that will ensure that sufficient funds for closure, post-closure maintenance and monitoring, and any corrective action that the Department may require will be available during the active life of the facility, at closure, and for any post-closure period of time that the Department may require even if the applicant or permit holder becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State. Rules adopted by the Commission may allow a business entity that is an applicant for a permit or a permit holder to establish financial assurance through insurance, irrevocable letters of credit, trusts, surety bonds, or any other financial device, or any combination of the foregoing shown to provide protection equivalent to the financial protection that would be provided by insurance if insurance were the only mechanism used. Assets used to meet the financial assurance requirements of this section shall be in a form that will allow the Department to readily access funds for the purposes set out in this section. Assets used to meet financial assurance requirements of this section shall not be accessible to the permit holder except as approved by the Department.

(g) In order to continue to hold a permit under this Article, a permit holder must maintain financial responsibility and must provide any information requested by the Department to establish that the permit holder continues to maintain financial responsibility. A permit holder shall notify the Department of any significant change in the: (i) identity of any person or structure of the business entity that holds the permit for the facility; (ii) identity of any person or structure of the business entity that owns or operates the facility; or (iii) assets of the permit holder, owner, or operator of the facility. The permit holder shall notify the Department within 30 days of a significant change. A change shall be considered significant if it has the potential to affect the financial responsibility of the permit holder, owner, or operator, or if it would result in a change in the identity of the permit holder, owner, or operator for purposes of either financial responsibility or environmental compliance review. Based on its review of the changes, the Department may require the permit holder to reestablish financial responsibility and may modify or revoke a permit, or require issuance of a new permit.

(h) To meet the financial assurance requirements of this section, the owner or operator of a sanitary landfill shall establish financial assurance sufficient to cover a minimum of three million dollars ($3,000,000) in costs for potential assessment and corrective action at the facility. The Department may require financial assurance in a higher amount and may increase the amount of financial assurance required of a permit holder at any time based upon the types of waste disposed in the landfill, the projected amount of waste to be disposed in the landfill, the location of the landfill, potential receptors of releases from the landfill, and inflation. The financial assurance requirements of this subsection are in addition to the other financial responsibility requirements set out in this section.

(i) The Commission may adopt rules under which a unit of local government and a solid waste management authority created pursuant to Article 22 of Chapter 153A of the General Statutes may meet the financial responsibility requirements of this section by either a local government financial test or a capital reserve fund requirement. (2007-550, s. 5(a).)

Editor's Note. — Session Laws 2007-550, s. 5(c), made this section effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date.

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-295.3. Environmental compliance review requirements for applicants and permit holders.

(a) For purposes of this section, "applicant" means an applicant for a permit and a permit holder and includes the owner or operator of the facility, and, if the owner or operator is a business entity, applicant also includes: (i) the parent, subsidiary, or other affiliate of the applicant; (ii) a partner, officer, director, member, or manager of the business entity, parent, subsidiary, or other affiliate of the applicant; and (iii) any person with a direct or indirect interest in the applicant, other than a minority shareholder of a publicly traded corporation who has no involvement in management or control of the corporation or any of its parents, subsidiaries, or affiliates.

(b) The Department shall conduct an environmental compliance review of each applicant for a new permit, permit renewal, and permit amendment under this Article. The environmental compliance review shall evaluate the environmental compliance history of the applicant for a period of five years prior to the date of the application and may cover a longer period at the discretion of the Department. The environmental compliance review of an applicant may include consideration of the environmental compliance history of the parents, subsidiaries, or other affiliates of an applicant or parent that is a business entity, including any business entity or joint venturer with a direct or indirect interest in the applicant, and other facilities owned or operated by any of them. The Department shall determine the scope of the review of the environmental compliance history of the applicant, parents, subsidiaries, or other affiliates of the applicant or parent, including any business entity or joint venturer with a direct or indirect interest in the applicant, and of other facilities owned or operated by any of them. An applicant for a permit shall provide environmental compliance history information for each facility, business entity, joint venture, or other undertaking in which any of the persons listed in this subsection is or has been an owner, operator, officer, director, manager, member, or partner, or in which any of the persons listed in this subsection has had a direct or indirect interest as requested by the Department.

(c) The Department shall determine the extent to which the applicant, or a parent, subsidiary, or other affiliate of the applicant or parent, or a joint venturer with a direct or indirect interest in the applicant, has substantially complied with the requirements applicable to any activity in which any of these entities previously engaged, and has substantially complied with federal and State laws, regulations, and rules for the protection of the environment. The Department may deny an application for a permit if the applicant has a history of significant or repeated violations of statutes, rules, orders, or permit terms or conditions for the protection of the environment or for the conservation of natural resources as evidenced by civil penalty assessments, administrative or judicial compliance orders, or criminal penalties.

(d) A permit holder shall notify the Department of any significant change in its environmental compliance history or other information required by G.S. 130-295.2(g). The Department may reevaluate the environmental compliance history of a permit holder and may modify or revoke a permit or require issuance of a new permit. (2007-550, s. 6(a).)

Editor's Note. — Session Laws 2007-550, s. 6(c), made this section effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date.

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-295.4. Combustion products landfills.

(a) The definitions set out in G.S. 130A-290(a) apply to this section.

(b) The Department may permit a combustion products landfill to be constructed partially or entirely within areas that have been formerly used for the storage or disposal of combustion products at the same facility as the coal-fired generating unit that generates the combustion products, provided the landfill is constructed with a bottom liner system consisting of three components in accordance with this section. Of the required three components, the upper two components shall consist of two separate flexible membrane liners, with a leak detection system between the two liners. The third component shall consist of a minimum of two feet of soil underneath the bottom of those liners, with the soil having a maximum permeability of 1 x 10-^{7}7 centimeters per second. The flexible membrane liners shall have a minimum thickness of thirty one-thousandths of an inch (0.030″), except that liners consisting of high-density polyethylene shall be at least sixty one-thousandths of an inch (0.060″) thick. The lower flexible membrane liner shall be installed in direct and uniform contact with the compacted soil layer. The Department may approve an alternative to the soil component of the composite liner system if the Department finds, based on modeling, that the alternative liner system will provide an equivalent or greater degree of impermeability.

(c) An applicant for a permit for a combustion products landfill shall develop and provide to the Department a response plan, which shall describe the circumstances under which corrective measures are to be taken at the landfill in the event of the detection of leaks in the leak detection system between the upper two liner components at amounts exceeding an amount specified in the response plan (as expressed in average gallons per day per acre of landfill, defined as an Action Leakage Rate). The response plan shall also describe the remedial actions that the landfill is required to undertake in response to detection of leakage in amounts in excess of the Action Leakage Rate. The Department shall review the response plan as a part of the permit application for the landfill. Compliance with performance of the landfill to prevent releases of waste to the environment may be determined based on leakage rate rather than monitoring well data. (2007-550, s. 7(b).)

Editor's Note. — Session Laws 2007-550, s. 7(c), made this section effective August 1, 2007.

Session Laws 2007-550, s. 7(c), further provides in part that any permit issued for a combustion products landfill as described in Session Laws 2007-550, s. 7 shall, for purposes of Session Laws 2007-550, be considered to have been permitted on property described in a solid waste management facility permit that is in effect on August 1, 2007.

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-295.5. Traffic study required for certain solid waste management facilities.

(a) An applicant for a permit for a sanitary landfill or for a transfer station shall conduct a traffic study of the impacts of the proposed facility. The Department shall include as a condition of a permit for a sanitary landfill or for a transfer station a requirement that the permit holder mitigate adverse impacts identified by the traffic study. The study shall include all of the following at a minimum:

(1) Identification of routes from the nearest limited access highway used to access the proposed facility.

(2) Daily and hourly traffic volumes that will result along each approach route between the nearest limited access highway and the proposed facility.

(3) A map identifying land uses located along the identified approach routes, including, but not limited to, residential, commercial, industrial development, and agricultural operations. The map shall identify residences, schools, hospitals, nursing homes, and other significant buildings that front the approach routes.

(4) Identification of locations on approach routes where road conditions are inadequate to handle the increased traffic associated with the proposed facility and a description of the mitigation measures proposed by the applicant to address the conditions.

(5) A description of the potential adverse impacts of increased traffic associated with the proposed facility and the mitigation measures proposed by the applicant to address these impacts.

(6) An analysis of the impact of any increase in freight traffic on railroads and waterways.

(b) An applicant for a permit for a sanitary landfill or for a transfer station may satisfy the requirements of subsection (a) of this section by obtaining a certification from the Division Engineer of the Department of Transportation that the proposed facility will not have a substantial impact on highway traffic. (2007-550, s. 8(a).)

Editor's Note. — Session Laws 2007-550, s. 8(b), made this section effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date.

Session Laws 2007-550, s. 8(b) further provides in part: "The section shall not apply to:

"(1) Identification of routes from the nearest limited access highway used to access the proposed facility.

"(2) Daily and hourly traffic volumes that will result along each approach route between the nearest limited access highway and the proposed facility.

"(3) A map identifying land uses located along the identified approach routes, including, but not limited to, residential, commercial, industrial development, and agricultural operations. The map shall identify residences, schools, hospitals, nursing homes, and other significant buildings that front the approach routes.

"(4) Identification of locations on approach routes where road conditions are inadequate to handle the increased traffic associated with the proposed facility and a description of the mitigation measures proposed by the applicant to address the conditions.

"(5) A description of the potential adverse impacts of increased traffic associated with the proposed facility and the mitigation measures proposed by the applicant to address these impacts.

"(6) An analysis of the impact of any increase in freight traffic on railroads and waterways.

"(b) An applicant for a permit for a sanitary landfill or for a transfer station may satisfy the requirements of subsection (a) of this section by obtaining a certification from the Division Engineer of the Department of Transportation that the proposed facility will not have a substantial impact on highway traffic."

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-295.6. Additional requirements for sanitary landfills.

(a) The Department shall conduct a study of the environmental impacts of any proposed sanitary landfill. The study shall meet all of the requirements set forth in G.S. 113A-4 and rules adopted pursuant to G.S. 113A-4. If an environmental impact statement is required, the Department shall publish notice of the draft environmental impact statement and shall hold a public hearing in the county where the landfill will be located no sooner than 30 days following the public notice. The Department shall consider the study of environmental impacts and any mitigation measures proposed by the applicant in deciding whether to issue or deny a permit. An applicant for a permit for a sanitary landfill shall pay all costs incurred by the Department to comply with this subsection including the costs of any special studies that may be required.

(b) The Department shall require a buffer between any perennial stream or wetland and the nearest waste disposal unit of a sanitary landfill of at least 200 feet. The Department may approve a buffer of less than 200 feet, but in no case less than 100 feet, if it finds all of the following:

(1) The proposed sanitary landfill or expansion of the sanitary landfill will serve a critical need in the community.

(2) There is no feasible alternative location that would allow siting or expansion of the sanitary landfill with 200-foot buffers.

(c) A waste disposal unit of a sanitary landfill shall not be constructed within:

(1) A 100-year floodplain or land removed from a 100-year floodplain designation pursuant to 44 Code of Federal Regulations Part 72 (1 October 2006 Edition) as a result of man-made alterations within the floodplain such as the placement of fill, except as authorized by variance granted under G.S. 143-215.54A(b). This subdivision does not apply to land removed from a 100-year floodplain designation (i) as a result of floodplain map corrections or updates not resulting from man-made alterations of the affected areas within the floodplain, or (ii) pursuant to 44 Code of Federal Regulations Part 70 (1 October 2006 Edition) by a letter of map amendment.

(2) A wetland, unless the applicant or permit holder can show all of the following, as to the waste disposal unit:

a. Where applicable under section 404 of the federal Clean Water Act or applicable State wetlands laws, the presumption that a practicable alternative to the proposed waste disposal unit is available which does not involve wetlands is clearly rebutted;

b. Construction of the waste disposal unit will not do any of the following:

1. Cause or contribute to violations of any applicable State water quality standard.

2. Violate any applicable toxic effluent standard or prohibition under section 307 of the federal Clean Water Act.

3. Jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of a critical habitat, protected under the federal Endangered Species Act of 1973.

4. Violate any requirement under the federal Marine Protection, Research, and Sanctuaries Act of 1972.

c. Construction of the waste disposal unit will not cause or contribute to significant degradation of wetlands.

d. To the extent required under section 404 of the federal Clean Water Act or applicable State wetlands laws, any unavoidable wetlands impacts will be mitigated.

(d) The Department shall not issue a permit to construct any disposal unit of a sanitary landfill if, at the earlier of (i) the acquisition by the applicant or permit holder of the land or of an option to purchase the land on which the waste disposal unit will be located, (ii) the application by the applicant or permit holder for a franchise agreement, or (iii) at the time of the application for a permit, any portion of the proposed waste disposal unit would be located within:

(1) Five miles of the outermost boundary of a National Wildlife Refuge.

(2) One mile of the outermost boundary of a State gameland owned, leased, or managed by the Wildlife Resources Commission pursuant to G.S. 113-306.

(3) Two miles of the outermost boundary of a component of the State Parks System.

(e) A sanitary landfill for the disposal of construction and demolition debris waste shall be constructed with a liner system that consists of a flexible membrane liner over two feet of soil with a maximum permeability of 1×10^{-5}centimeters per second. The flexible membrane liner shall have a minimum thickness of thirty one-thousandths of an inch (0.030″), except that a liner that consists of high-density polyethylene shall be at least sixty one-thousandths of an inch (0.060″) thick. The flexible membrane liner shall be installed in direct and uniform contact with the soil layer. The Department may approve an alternative to the soil component of the liner system if the Department finds, based on modeling, that the alternative liner system will provide an equivalent or greater degree of impermeability.

(f) A sanitary landfill, other than a sanitary landfill for the disposal of construction and demolition debris waste, shall be constructed so that the post-settlement bottom elevation of the liner system, or the post-settlement bottom elevation of the waste if no liner system is required, is a minimum of four feet above both the seasonal high groundwater table and the bedrock datum plane contours. A sanitary landfill for the disposal of construction and demolition debris waste shall be constructed so that the post-settlement bottom elevation of the flexible membrane liner component of the liner system is a minimum of four feet above both the seasonal high groundwater table and the bedrock datum plane contours.

(g) A permit holder for a sanitary landfill shall develop and implement a waste screening plan. The plan shall identify measures adequate to ensure compliance with State laws and rules and any applicable local ordinances that prohibit the disposal of certain items in landfills. The plan shall address all sources of waste generation. The plan is subject to approval by the Department.

(h) The following requirements apply to any sanitary landfill for which a liner is required:

(1) A geomembrane base liner system shall be tested for leaks and damage by methods approved by the Department that ensure that the entire liner is evaluated.

(2) A leachate collection system shall be designed to return the head of the liner to 30 centimeters or less within 72 hours. The design shall be based on the precipitation that would fall on an empty cell of the sanitary landfill as a result of a 25-year-24-hour storm event. The leachate collection system shall maintain a head of less than 30 centimeters at all times during leachate recirculation. The Depart-

ment may require the operator to monitor the head of the liner to demonstrate that the head is being maintained in accordance with this subdivision and any applicable rules.

(3) All leachate collection lines shall be designed and constructed to permanently allow cleaning and remote camera inspection. All leachate collection lines shall be cleaned at least once a year, except that the Department may allow leachate collection lines to be cleaned once every two years if: (i) the facility has continuous flow monitoring; and (ii) the permit holder demonstrates to the Department that the leachate collection lines are clear and functional based on at least three consecutive annual cleanings. Remote camera inspections of the leachate collection lines shall occur upon completion of construction, at least once every five years thereafter, and following the clearing of blockages.

(4) Any pipes used to transmit leachate shall provide dual containment outside of the disposal unit. The bottom liner of a sanitary landfill shall be constructed without pipe penetrations.

(i) The Department shall not issue a permit for a sanitary landfill that authorizes:

(1) A capacity of more than 55 million cubic yards of waste.

(2) A disposal area of more than 350 acres.

(3) A maximum height, including the cap and cover vegetation, of more than 250 feet above the mean natural elevation of the disposal area.

(j) This section does not apply to landfills for the disposal of land clearing and inert debris or to Type I or Type II compost facilities. (2007-543, s. 1(a)-(c); 2007-550, s. 9(a), (c).)

Reimbursement for Costs of Application for Solid Waste Management Permit. — Session Laws 2007-543, s. 3(a)-(g), provides: "(a) Declaration of Purpose and Intent. — Notwithstanding that an applicant for a permit does not have a reasonable expectation that the law governing the permit will remain unchanged and that the applicant acquires no vested right by virtue of having made an application, the General Assembly finds that it is in the public interest to provide for the potential compensation of certain applicants who submitted an application for a permit for a solid waste management facility prior to 1 August 2006 and whose application would be denied under G.S. 130A-295.6(d).

"(b) Reimbursement of Application Costs. — An applicant for a permit for a sanitary landfill may request reimbursement for the reasonable costs for preparation of the permit application incurred prior to 1 August 2006 if the permit would be denied under G.S. 130A-295.6(d).

"(c) Eligibility for Reimbursement. — To be eligible for reimbursement under this section, the request for reimbursement shall demonstrate all of the following:

"(1) The application for a permit to construct a sanitary landfill was submitted to the Department on or before 1 August 2006.

"(2) The applicant obtained a landfill franchise from the local government with jurisdiction over the site of the proposed landfill on or before 1 August 2006.

"(3) The Department did not grant the permit application in whole or in part.

"(4) The Department did not deny the permit application before 1 August 2007.

"(5) The applicant did not withdraw the permit application before 1 August 2007.

"(6) That the applicant had a reasonable expectation that the application for a permit would have been approved but for the enactment of G.S. 130A-295.6(d).

"(d) Costs Eligible for Reimbursement. — Costs that are necessary for the preparation of the permit application and that are reasonably incurred are eligible for reimbursement under this section. These costs may include site studies, facility plans, construction and engineering plans, construction quality assurance plans, geologic and hydrologic investigations, operation plans, wildlife or wildlife management studies, closure and post-closure plans, information required by the Department to satisfy financial assurance and financial responsibility requirements, and other information required by the Department in the permit review. These costs may also include the reasonable fees of environmental consultants, engineers, geologists, other professionals whose services were necessary to prepare the permit application or to respond to information requests from the Department, and legal costs to obtain a landfill franchise or other approval from the local government with jurisdiction over the site of the proposed sanitary landfill.

"(e) Costs Not Eligible for Reimbursement. — None of the following costs incurred by or on behalf of the applicant is eligible for reimbursement:

"(1) The costs of acquiring interests in land for construction of the proposed sanitary landfill.

"(2) Legal or lobbying costs incurred in attempting to influence an administrative or legislative body.

"(f) Request for Reimbursement. — The request for reimbursement shall be submitted to the Department no later than 31 December 2007 with information necessary to document the reasonable and necessary costs eligible for reimbursement under this section. The Department shall review the request for reimbursement and notify the applicant and the Secretary of Revenue of the costs approved for reimbursement under this section. The Secretary of Revenue shall reimburse the approved costs from the proceeds of the tax imposed under G.S. 105-187.61 subject to availability of funds. Approved reimbursement costs shall be paid from the proceeds of the tax prior to crediting or distributing the proceeds of the tax as provided in G.S. 105-187.63.

"(g) Waiver and Covenant Not to Sue. — An applicant for a permit for a sanitary landfill who accepts reimbursement of costs under this section waives the right to seek reimbursement of those costs under any other provision of law. Prior to receiving any reimbursement under this section, the applicant shall execute a covenant not to sue the State of North Carolina or any political subdivision of the State for any costs described in subsections (d) and (e) of this section."

Session Laws 2007-543, s. 4, is a severability clause.

Editor's Note. — Session Laws 2007-550, s. 9(b), as amended by Session Laws 2007-543, s. 1(b), made this section effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date, except that G.S. 130A-295.6(d), as enacted by this section, becomes effective August 1, 2007 and applies to any application for a permit for a solid waste management facility that is submitted on or after that date. G.S. 130A-295.6(d) applies to any application for a permit for a solid waste management facility that is pending on August 1, 2007 on the basis of the boundaries of the lands described in subdivisions (1), (2), and (3) of G.S. 130A-295.6(d) as of August 1, 2007. To the extent that G.S. 130A-295.6, as enacted by this section, imposes requirements that are more stringent than those in effect prior to August 1, 2007, the more stringent requirements do not apply to:

"(1) An amendment, modification, or other change to a permit for a landfill issued on or before June 1, 2006.

"(2) A permit for a horizontal or vertical expansion of the landfill permitted on or before June 1, 2006.

"(3) A permit to construct a new landfill within the facility boundary identified in the facility plan of a landfill permitted on or before June 1, 2006.

"(4) A permit to operate a new landfill if a permit to construct the new landfill was issued on or before June 1, 2006.

"(5) A permit for a sanitary landfill used only to dispose of waste generated by a coal-fired generating unit that is owned or operated by an investor-owned utility subject to the requirements of G.S. 143-215.107D.

"(6) A permit for a sanitary landfill determined to be necessary by the Secretary of Environment and Natural Resources in order to respond to an imminent hazard to public health or a natural disaster."

Session Laws 2007-550, s. 9(c), as added by Session Laws 2007-543, s. 1(c), effective August 31, 2007, has been codified as subsection (j) of this section at the direction of the revisor of statutes.

Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-543, s. 1, effective August 31, 2007, substituted "at the earlier of (i) the acquisition by the applicant or permit holder of the land or of an option to purchase the land on which the waste disposal unit will be located, (ii) the application by the applicant or permit holder for a franchise agreement, or (iii) at the time of the application for a permit" for "at the time the application is determined to be complete under G.S. 130A-295.8(e)" in the introductory paragraph of subsection (d).

§ 130A-295.7: Reserved for future codification purposes.

§ 130A-295.8. Fees applicable to permits for solid waste management facilities.

(a) The Solid Waste Management Account is established as a nonreverting account within the Department. All fees collected under this section shall be credited to the Account and shall be used to support the solid waste management program established pursuant to G.S. 130A-294.

(b) As used in this section:

(1) "New permit" means any of the following:

a. An application for a permit for a solid waste management facility that has not been previously permitted by the Department. The term includes one site suitability review, the initial permit to construct, and one permit to operate the constructed portion of a phase included in the permit to construct.

b. An application that proposes to expand the boundary of a permitted waste management facility for the purpose of expanding the permitted activity.

c. An application that includes a proposed expansion to the boundary of a waste disposal unit within a permitted solid waste management facility.

d. An application for a substantial amendment to a solid waste permit, as defined in G.S. 130A-294.

(2) "Permit amendment" means any of the following:

a. An application for a permit to construct and one permit to operate for the second and subsequent phases of landfill development described in the approved facility plan for a permitted solid waste management facility.

b. An application for the five-year renewal of a permit for a permitted solid waste management facility or for a permit review of a permitted solid waste management facility.

c. Any application that proposes a change in ownership or corporate structure of a permitted solid waste management facility.

(3) "Permit modification" means any of the following:

a. An application for any change to the plans approved in a permit for a solid waste management facility that does not constitute a "permit amendment" or a "new permit".

b. A second or subsequent permit to operate for a constructed portion of a phase included in the permit to construct.

(c) An applicant for a permit shall pay an application fee upon submission of an application according to the following schedule:

(1) Municipal Solid Waste Landfill accepting less than 100,000 tons/year of solid waste, New Permit — $25,000.

(2) Municipal Solid Waste Landfill accepting less than 100,000 tons/year of solid waste, Amendment — $15,000.

(3) Municipal Solid Waste Landfill accepting less than 100,000 tons/year of solid waste, Modification — $1,500.

(4) Municipal Solid Waste Landfill accepting 100,000 tons/year or more of solid waste, New Permit — $50,000.

(5) Municipal Solid Waste Landfill accepting 100,000 tons/year or more of solid waste, Amendment — $30,000.

(6) Municipal Solid Waste Landfill accepting 100,000 tons/year or more of solid waste, Modification — $3,000.

(7) Construction and Demolition Landfill accepting less than 100,000 tons/year of solid waste, New Permit — $15,000.

(8) Construction and Demolition Landfill accepting less than 100,000 tons/year of solid waste, Amendment — $9,000.

(9) Construction and Demolition Landfill accepting less than 100,000 tons/year of solid waste, Modification — $1,500.

(10) Construction and Demolition Landfill accepting 100,000 tons/year or more of solid waste, New Permit — $30,000.

(11) Construction and Demolition Landfill accepting 100,000 tons/year or more of solid waste, Amendment — $18,500.

(12) Construction and Demolition Landfill accepting 100,000 tons/year or more of solid waste, Modification — $2,500.
(13) Industrial Landfill accepting less than 100,000 tons/year of solid waste, New Permit — $15,000.
(14) Industrial Landfill accepting less than 100,000 tons/year of solid waste, Amendment — $9,000.
(15) Industrial Landfill accepting less than 100,000 tons/year of solid waste, Modification — $1,500.
(16) Industrial Landfill accepting 100,000 tons/year or more of solid waste, New Permit — $30,000.
(17) Industrial Landfill accepting 100,000 tons/year or more of solid waste, Amendment — $18,500.
(18) Industrial Landfill accepting 100,000 tons/year or more of solid waste, Modification — $2,500.
(19) Tire Monofill, New Permit — $1,750.
(20) Tire Monofill, Amendment — $1,250.
(21) Tire Monofill, Modification — $500.
(22) Treatment and Processing, New Permit — $1,750.
(23) Treatment and Processing, Amendment — $1,250.
(24) Treatment and Processing, Modification — $500.
(25) Transfer Station, New Permit — $5,000.
(26) Transfer Station, Amendment — $3,000.
(27) Transfer Station, Modification — $500.
(28) Incinerator, New Permit — $1,750.
(29) Incinerator, Amendment — $1,250.
(30) Incinerator, Modification — $500.
(31) Large Compost Facility, New Permit — $1,750.
(32) Large Compost Facility, Amendment — $1,250.
(33) Large Compost Facility, Modification — $500.
(34) Land Clearing and Inert, New Permit — $1,000.
(35) Land Clearing and Inert, Amendment — $500.
(36) Land Clearing and Inert, Modification — $250.

(d) A permitted solid waste management facility shall pay an annual permit fee on or before 1 August of each year according to the following schedule:

(1) Municipal Solid Waste Landfill — $3,500.
(2) Post-Closure Municipal Solid Waste Landfill — $1,000.
(3) Construction and Demolition Landfill — $2,750.
(4) Post-Closure Construction and Demolition Landfill — $500.
(5) Industrial Landfill — $2,750.
(6) Post-Closure Industrial Landfill — $500.
(7) Transfer Station — $750.
(8) Treatment and Processing Facility — $500.
(9) Tire Monofill — $500.
(10) Incinerator — $500.
(11) Large Compost Facility — $500.
(12) Land Clearing and Inert Debris Landfill — $500.

(e) The Department shall determine whether an application for a permit for a solid waste management facility that is subject to a fee under this section is complete within 90 days after the Department receives the application for the permit. A determination of completeness means that the application includes all required components but does not mean that the required components provide all of the information that is required for the Department to make a decision on the application. If the Department determines that an application is not complete, the Department shall notify the applicant of the components needed to complete the application. An applicant may submit additional information to the Department to cure the deficiencies in the application. The

Department shall make a final determination as to whether the application is complete within the later of: (i) 90 days after the Department receives the application for the permit less the number of days that the applicant uses to provide the additional information; or (ii) 30 days after the Department receives the additional information from the applicant. The Department shall issue a draft permit decision on an application for a permit within one year after the Department determines that the application is complete. The Department shall hold a public hearing and accept written comment on the draft permit decision for a period of not less than 30 or more than 60 days after the Department issues a draft permit decision. The Department shall issue a final permit decision on an application for a permit within 90 days after the comment period on the draft permit decision closes. The Department and the applicant may mutually agree to extend any time period under this subsection. If the Department fails to act within any time period set out in this subsection, the applicant may treat the failure to act as a denial of the permit and may challenge the denial as provided in Chapter 150B of the General Statutes. (2007-550, s. 13(a).)

Editor's Note. — Session Laws 2007-550, s. 13(b), made this section effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date, except that during the period 1 August 2007 through 1 August 2008 the Department shall determine whether an application or a permit for a solid waste management facility is complete within 270 days after the Department receives the application for the permit.

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-295.9. (Effective July 1, 2008) Solid waste disposal tax; use of proceeds.

It is the intent that the proceeds of the solid waste disposal tax imposed by Article 5G of Chapter 105 of the General Statutes shall be used only for the following purposes:

(1) Funds credited pursuant to G.S. 105-187.63(1) to the Inactive Hazardous Sites Cleanup Fund shall be used by the Department of Environment and Natural Resources to fund the assessment and remediation of pre-1983 landfills. Up to seven percent (7%) of the funds credited under this subdivision may be used to fund staff to administer contracts for the assessment and remediation of pre-1983 landfills.

(2) Funds credited pursuant to G.S. 105-187.63(3) to the Solid Waste Management Trust Fund shall be used by the Department of Environment and Natural Resources to fund grants to State agencies and units of local government to initiate or enhance local recycling programs and to provide for the management of difficult to manage solid waste, including abandoned mobile homes and household hazardous waste. Up to seven percent (7%) of the funds credited under this subdivision may be used by the Department to administer this Part. (2007-550, s. 14(b).)

Cross References. — As to solid waste disposal tax, generally, see G.S. 105-187.60 et seq.

Editor's Note. — Session Laws 2007-550, s. 14(e), made this section effective July 1, 2008.

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-296: Repealed by Session Laws 1993, c. 501, s. 15.

§ 130A-297. Receipt and distribution of funds.

The Department may accept loans and grants from the federal government and other sources for carrying out the purposes of this Article, and shall adopt reasonable policies governing the administration and distribution of funds to units of local government, other State agencies, and private agencies, institutions or individuals for studies, investigations, demonstrations, surveys, planning, training, and construction or establishment of solid waste management facilities. (1969, c. 899; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1216; 1983, c. 1891, s. 2.)

§ 130A-298. Hazardous waste fund.

A nonreverting hazardous waste fund is established within the Department which shall be available to defray the cost to the State for monitoring and care of hazardous waste disposal facilities after the termination of the period during which the facility operator is required by applicable State and federal statutes, rules or regulations to remain responsible for post-closure monitoring and care. The establishment of this fund shall in no way be construed to relieve or reduce the liability of facility operators or any persons for damages caused by the facility. The fund shall be maintained by fees collected pursuant to the provisions of G.S. 130A-294(a)(6). (1981, c. 704, s. 7; 1983, c. 891, s. 2; 1989, c. 168, s. 25.)

§ 130A-299. Single agency designation.

The Department is designated as the single State agency for purposes of RCRA or any State or federal legislation enacted to promote the proper management of solid waste. (1969, c. 899; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1216; 1983, c. 891, s. 2; 1989, c. 168, s. 26.)

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores and the extent State law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-300. Effect on laws applicable to water pollution control.

This Article shall not be construed as amending, repealing or in any manner abridging or interfering with those sections of the General Statutes of North Carolina relative to the control of water pollution as now administered by the Environmental Management Commission nor shall the provisions of this Article be construed as being applicable to or in any way affecting the authority of the Environmental Management Commission to control the discharges of wastes to the waters of the State as provided in Articles 21 and 21A, Chapter 143 of the General Statutes. (1977, 2nd Sess., c. 1216; 1983, c. 891, s. 2.)

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic

Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores and the extent State law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-301. Recordation of permits for disposal of waste on land and Notice of Open Dump.

(a) Whenever the Department approves a permit for a sanitary landfill or a facility for the disposal of hazardous waste on land, the owner of the facility shall be granted both an original permit and a copy certified by the Secretary. The permit shall include a legal description of the site that would be sufficient as a description in an instrument of conveyance.

(b) The owner of a facility granted a permit for a sanitary landfill or a facility for the disposal of hazardous waste on land shall file the certified copy of the permit in the office of the register of deeds in the county or counties in which the land is located.

(c) The register of deeds shall record the certified copy of the permit and index it in the grantor index under the name of the owner of the land.

(d) The permit shall not be effective unless the certified copy is filed as required under subsection (b) of this section.

(e) When a sanitary landfill or a facility for the disposal of hazardous waste on land is sold, leased, conveyed or transferred, the deed or other instrument of transfer shall contain in the description section in no smaller type than that used in the body of the deed or instrument a statement that the property has been used as a sanitary landfill or a disposal site for hazardous waste and a reference by book and page to the recordation of the permit.

(f) When the Department determines that an open dump exists, the Department shall notify the owner or operator of the open dump of applicable requirements to take remedial action at the site of the open dump to protect public health and the environment. If the owner or operator fails to take remedial action, the Department may record a Notice of Open Dump in the office of the register of deeds in the county or counties where the open dump is located. Not less than 30 days before recording the Notice of Open Dump, the Department shall notify the owner or operator of its intention to file a Notice of Open Dump. The Department may notify the owner or operator of its intention to file a Notice of Open Dump at the time it notifies the owner or operator of applicable requirements to take remedial action. An owner or operator may challenge a decision of the Department to file a Notice of Open Dump by filing a contested case under Article 3 of Chapter 150B of the General Statutes. If an owner or operator challenges a decision of the Department to file a Notice of Open Dump, the Department shall not file the Notice of Open Dump until the contested case is resolved, but may file a notice of pending litigation under Article 11 of Chapter 1 of the General Statutes. This power is additional and supplemental to any other power granted to the Department. This subsection does not repeal or supersede any statute or rule requiring or authorizing record notice by the owner.

(1) The Department shall file the Notice of Open Dump in the office of the register of deeds in substantially the following form:

> **"NOTICE OF OPEN DUMP**
> The Division of Waste Management of the North Carolina Department of Environment and Natural Resources has determined that an open dump exists on the property described below. The Department provides the following information regarding this open dump as a public service. This Notice is filed pursuant to G.S. 130A-301(f).

Name(s) of the record owner(s): ______________________________
Description of the real property: ______________________________
Description of the particular area where the open dump is located: _
Any person who has questions regarding this Notice should contact the Division of Waste Management of the North Carolina Department of Environment and Natural Resources. The contact person for this Notice is: ______________ who may be reached by telephone at ______________ or by mail at ______________. Requests for inspection and copying of public records regarding this open dump may be directed to ______________ who may be reached by telephone at ______________ or by mail at ______________.

____
Secretary of Environment and Natural Resources by ______________ Date: ______________________________."

(2) The description of the particular area where the open dump is located shall be based on the best information available to the Department but need not be a survey plat that meets the requirements of G.S. 47-30 unless a survey plat that meets those requirements and that is approved by the Department is furnished by the owner or operator.

(3) The register of deeds shall record the Notice of Open Dump and index it in the grantor index under the name of the record owner or owners. After recording the Notice of Open Dump, the register of deeds shall return the Notice of Open Dump to the Department in care of the person listed as the contact person in the Notice of Open Dump.

(4) When the owner removes all solid waste from the open dump site to the satisfaction of the Department, the Department shall file a Cancellation of the Notice of Open Dump. The Cancellation shall be in a form similar to the original Notice of Open Dump and shall state that all the solid waste that constituted the open dump has been removed to the satisfaction of the Department. The Cancellation shall be filed and indexed in the same manner as the original Notice of Open Dump. (1973, c. 444; c. 476, s. 128; 1977, 2nd Sess., c. 1216; 1981, c. 480, s. 3; 1983, c. 891, s. 2; 1997-330, s. 2; 1997-443, s. 11A.119(b).)

§ 130A-301.1. Land clearing and inert debris landfills with a disposal area of 1/2 acre or less; recordation.

(a) No landfill for the on-site disposal of land clearing and inert debris shall, at the time the landfill is sited, be sited 50 feet or less from a boundary of an adjacent property.

(b) The owner of a landfill for the on-site disposal of land clearing and inert debris shall file a certified copy of a survey of the property on which the landfill is located in the register of deeds' office in the county in which the property is located, which survey shall accurately show the location of the landfill and the record owner of the land on which the landfill is situated.

(c) Prior to the lease or conveyance of any lot or tract of land which directly abuts or is contiguous to the disposal area used for land clearing and inert debris, the owner of the lot or tract shall prepare a document disclosing that a portion of the property has been used as a disposal area for land clearing and inert debris or has been used to meet applicable minimum buffer requirements. The disclosure shall include a legal description of the property that would be sufficient in an instrument of conveyance and shall be filed in the register of deeds office prior to any lease or conveyance.

(d) No public, commercial, or residential building shall be located or constructed on the property, or any portion of the property on which the landfill for the on-site disposal of land clearing and inert debris is located, 50 feet or less from the landfill. Construction of such buildings, with the exception of site preparation and foundation work, shall not commence until after closure of the on-site land clearing and inert debris landfill.

(e) Source reduction methods including, but not limited to, chipping and mulching of land clearing and inert debris shall be utilized to the maximum degree technically and economically feasible.

(f) The Department of Transportation is exempt from subsections (b) and (c) of this section for the on-site disposal of land clearing and inert debris on highway rights-of-way. (1993 (Reg. Sess., 1994), c. 580, s. 2.)

§ 130A-301.2: Expired September 30, 2003, pursuant to Session Laws 1995, c. 502, s. 4, as amended by Session Laws 2001-357, s. 2.

§ 130A-302. Sludge deposits at sanitary landfills.

Sludges generated by the treatment of wastewater discharges which are point sources subject to permits granted under Section 402 of the Federal Water Pollution Control Act, as amended (P.L. 92-500), or permits generated under G.S. 143-215.1 by the Environmental Management Commission shall not be deposited in or on a sanitary landfill permitted under this Article unless in a compliance with the rules concerning solid waste adopted under this Article. (1977, 2nd Sess., c. 1216; 1983, c. 891, s. 2.)

§ 130A-303. Imminent hazard.

(a) The judgement of the Secretary that an imminent hazard exists concerning solid waste shall be supported by findings of fact made by the Secretary.

(b) In order to eliminate an imminent hazard, the Secretary may, without notice or hearing, issue an order requiring that immediate action be taken to protect the public health or the environment. This order may be directed to a generator or transporter of solid waste or to the owner or operator of a solid waste management facility. Where the imminent hazard is caused by an inactive hazardous substance or waste disposal site, the Secretary shall follow the procedures set forth in G.S. 130A-310.5. (1977, 2nd Sess., c. 1216; 1981, c. 704, s. 7; 1983, c. 891, s. 2; 1987, c. 574, s. 3.)

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering State waters or being deposited on the State shores and the extent State law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 130A-304. Confidential information protected.

(a) The following information received or prepared by the Department in the course of carrying out its duties and responsibilities under this Article is confidential information and shall not be subject to disclosure under G.S. 132-6:

(1) Information which the Secretary determines is entitled to confidential treatment pursuant to G.S. 132-1.2. If the Secretary determines that information received by the Department is not entitled to confidential

treatment, the Secretary shall inform the person who provided the information of that determination at the time such determination is made. The Secretary may refuse to accept or may return any information that is claimed to be confidential that the Secretary determines is not entitled to confidential treatment.

(2) Information that is confidential under any provision of federal or state law.

(3) Information compiled in anticipation of enforcement or criminal proceedings, but only to the extent disclosure could reasonably be expected to interfere with the institution of such proceedings.

(b) Confidential information may be disclosed to officers, employees, or authorized representatives of federal or state agencies if such disclosure is necessary to carry out a proper function of the Department or the requesting agency or when relevant in any proceeding under this Article.

(c) Except as provided in subsection (b) of this section or as otherwise provided by law, any officer or employee of the State who knowingly discloses information designated as confidential under this section shall be guilty of a Class 1 misdemeanor and shall be removed from office or discharged from employment. (1977, 2nd Sess., c. 1216; 1983, c. 891, s. 2; 1985, c. 738, s. 5; 1987, c. 282, s. 20; 1991, c. 745, s. 2; 1993, c. 539, s. 951; 1994, Ex. Sess., c. 24, s. 14(c).)

OPINIONS OF ATTORNEY GENERAL

Determination of Confidentiality of Information. — Department of Environment and Natural Resources staff should review requests for information by determining whether any of the exemptions from disclosure authorized by the North Carolina Public Records Act apply to the information received or prepared by the department in the course of carrying out its duties and responsibilities under Article 9 of Chapter 130A, G.S. 130A-290 et seq. Department staff must also determine whether such information is subject to any of the exemptions from disclosure pursuant to the Freedom of Information Act (FOIA), either by identifying whether such information was received by a federal agency with the stipulation that it be kept confidential pursuant to a specific FOIA provision or by examining the relevant memorandum of agreement or similar document which should identify the types of documents that the federal agency expects to be treated as confidential pursuant to FOIA. Information at issue must acquire its confidential status pursuant to federal law. See opinion of Attorney General to Mr. Daniel McLawhorn, Office of General Counsel, Department of Environment and Natural Resources, 2001 N.C. AG LEXIS 1 (1/4/2001).

§ 130A-305. Construction.

This Article shall be interpreted as enabling the State to obtain federal financial assistance in carrying out its solid waste management program and to obtain the authority needed to assume primary enforcement responsibility for that portion of the solid waste management program concerning the management of hazardous waste. (1983, c. 891, s. 2.)

§ 130A-306. Emergency Response Fund.

There is established under the control and direction of the Department, an Emergency Response Fund which shall be a nonreverting fund consisting of any money appropriated for such purpose by the General Assembly or available to it from grants, fees, charges, and other money paid to or recovered by or on behalf of the Department pursuant to this Article, except fees and penalties specifically designated by this Article for some other use or purpose. The Emergency Response Fund shall be treated as a special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3. The Fund shall be used to defray expenses incurred by the Department in developing and implementing an emergency hazardous waste remedial plan and to reimburse any federal, State or local agency and any agent or contractor for expenses incurred in developing and implementing such a plan that has been approved by the Department. These funds shall be used upon a determination that sufficient funds or corrective action cannot be obtained from other sources without incurring a delay that would significantly increase the threat to life or risk of damage to the environment. This Fund may not exceed five hundred thousand dollars ($500,000); money in excess of five hundred thousand dollars ($500,000) shall be deposited in the Inactive Hazardous Sites Cleanup Fund. The Secretary is authorized to take the necessary action to recover all costs incurred by the State for site investigation and the development and implementation of an emergency hazardous waste remedial plan, including attorney's fees and other expenses of bringing the cost recovery action from the responsible party or parties. The provisions of G.S. 130A-310.7 shall apply to actions to recover costs under this section except that: (i) reimbursement shall be to the Emergency Response Fund and (ii) the State need not show that it has complied with the provisions of Part 3 of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 74; 1989, c. 286, s. 1; 1998-215, s. 54(b).)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ **130A-307:** Reserved for future codification purposes.

§ 130A-308. Continuing releases at permitted facilities; notification of completed corrective action.

(a) Standards adopted under G.S. 130A-294(c) and a permit issued under G.S. 130A-294(c) shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under G.S. 130A-294(c), regardless of the time at which waste was placed in such unit. Permits issued under G.S. 130A-294(c) which implement Section 3005 of RCRA (42 U.S.C. § 6925) shall contain schedules of compliance for corrective action if corrective action cannot be completed prior to issuance of the permit and establishment of financial assurance for completing corrective action. Notwithstanding any other provision of this section, this section shall apply only to units, facilities, and permits that are covered by Section 3004(u) of RCRA (42 U.S.C. § 6924(u)). Notwithstanding the foregoing, corrective action authorized elsewhere in this Chapter shall not be limited by this section.

(b) The definitions set out in G.S. 130A-310.31(b) apply to this subsection. Any person may submit a written request to the Department for a determination that a corrective action for a release of a hazardous waste or constituents from a solid waste management unit that is a treatment, storage, or disposal facility permitted under G.S 130A-294(c) has been completed to unrestricted use standards. A request for a determination that a corrective action at a facility has been completed to unrestricted use standards shall be accompanied by the fee required by G.S. 130A-310.39(a)(2). If the Department determines that the corrective action at a facility has been completed to unrestricted use standards, the Department shall issue a written notification that no further corrective action will be required at the facility. The notification shall state that no further corrective action will be required at the facility unless the Department later determines, based on new information or information not previously provided to the Department, that the corrective action at the facility has not been completed to unrestricted use standards or that the Department was provided with false or incomplete information. Under any of those circumstances, the Department may withdraw the notification and require responsible parties to take corrective action at a facility to bring the facility into compliance with unrestricted use standards. (1985, c. 738, s. 4; 1989, c. 168, s. 27; 1997-357, s. 4; 2001-384, s. 11; 2007-107, s. 1.1(f).)

Editor's Note. — Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources (now the Department of Environment and Natural Resources) shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

Session Laws 2001-384, s. 13, provides: "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

Session Laws 2007-107, s. 6.2, contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, s. 1.1(f), effective October 1, 2007, rewrote the second sentence of subsection (a).

§ 130A-309. Corrective actions beyond facility boundary.

Standards adopted under G.S. 130A-294(c) shall require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Department that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such standards shall take effect upon adoption and shall apply to:

(1) All facilities operating under permits issued under G.S. 130A-294(c); and

(2) All disposal facilities, surface impoundments, and waste pile units (including any new units, replacements of existing units or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending adoption of such rules, the Department shall issue corrective action orders for facilities referred to in (1) and (2), on a case-by-case basis, consistent with the purposes of this section. Notwithstanding any other provision of this section, this section shall apply only to units, facilities, and permits that are covered by Section 3004(v) of RCRA (42 U.S.C. § 6924(v)). Notwithstanding the foregoing, corrective action authorized elsewhere in this Chapter shall not be limited by this section. (1985, c. 738, s. 4; 1989, c. 168, s. 28.)

Part 2A. Nonhazardous Solid Waste Management.

§ 130A-309.01. Title.

This Part may be cited as the Solid Waste Management Act of 1989. (1989, c. 784, s. 2.)

Cross References. — As to provisions for regional solid waste management authorities, see Article 22 of Chapter 153A, G.S. 153A-421 et seq.

Editor's Note. — Session Laws 2007-550, s. 15, provides: "(a) The Commission for Health Services shall review rules governing the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of solid waste management facilities to determine whether changes are required to protect public health, safety, welfare, and the environment; to improve the performance of solid waste management facilities; to take advantage of technological advances in landfill design, construction, operation, maintenance, and closure; and to provide additional protection to environmentally sensitive areas of the State. The Commission shall adopt rules necessary to minimize impacts from solid waste management facilities on public health, safety, welfare, and the environment. These rules shall:

"(1) Establish standards for the collection, control, and utilization or destruction of landfill gases at municipal solid waste landfills.

"(2) Establish standards for the design, construction, operation, maintenance, closure, and post-closure monitoring and maintenance of bioreactor landfills.

"(3) Establish criteria for development of bird and wildlife management plans.

"(4) Incorporate measures necessary to minimize impacts to natural, historic, and cultural resources, including, but not limited to, wetlands, critical fisheries habitats, parks, recreation areas, cultural and historic sites, and potential water supplies.

"(b) This section is effective when it becomes law [August 31, 2007]."

§ 130A-309.02. Applicability.

This Part shall apply to solid waste other than hazardous waste and sludges. (1989, c. 784, s. 2.)

§ 130A-309.03. Findings, purposes.

(a) The General Assembly finds that:
- (1) Inefficient and improper methods of managing solid waste create hazards to public health, cause pollution of air and water resources, constitute a waste of natural resources, have an adverse effect on land values, and create public nuisances.
- (2) Problems of solid waste management have become a matter statewide in scope and necessitate State action to assist local governments in improving methods and processes to promote more efficient methods of solid waste collection and disposal.
- (3) The continuing technological progress and improvements in methods of manufacture, packaging, and marketing of consumer products have resulted in an ever-mounting increase of the mass of material discarded by the purchasers of the products, thereby necessitating a statewide approach to assisting local governments around the State with their solid waste management programs.
- (4) The economic growth and population growth of our State have required increased industrial production together with related commercial and agricultural operations to meet our needs, which have resulted in a rising tide of unwanted and discarded materials.
- (5) The failure or inability to economically recover material and energy resources from solid waste results in the unnecessary waste and depletion of our natural resources; such that, maximum resource recovery from solid waste and maximum recycling and reuse of the resources must be considered goals of the State.
- (6) Certain solid waste, due to its quantity; concentration; or physical, chemical, biological, or infectious characteristics; is exceptionally hazardous to human health, safety, and to the environment; such that exceptional attention to the transportation, disposal, storage, and treatment of the waste is necessary to protect human health, safety, and welfare; and to protect the environment.
- (7) This Part should be integrated with other State laws and rules and applicable federal law.

(b) It is the purpose of this Part to:
- (1) Regulate in the most economically feasible, cost-effective, and environmentally safe manner the storage, collection, transport, separa-

tion, processing, recycling, and disposal of solid waste in order to protect the public health, safety, and welfare; enhance the environment for the people of this State; and recover resources which have the potential for further usefulness.

(2) Establish and maintain a cooperative State program of planning, technical assistance, and financial assistance for solid waste management.

(3) Require counties and municipalities to adequately plan and provide efficient, environmentally acceptable solid waste management programs; and require counties to plan for proper hazardous waste management.

(4) Require review of the design, and issue permits for the construction, operation, and closure of solid waste management facilities.

(5) Promote the application of resource recovery systems that preserve and enhance the quality of air, water, and land resources.

(6) Ensure that exceptionally hazardous solid waste is transported, disposed of, stored, and treated in a manner adequate to protect human health, safety, and welfare; and the environment.

(7) Promote the reduction, recycling, reuse, or treatment of solid waste, specifically including hazardous waste, in lieu of disposal of the waste.

(8) Promote methods and technology for the treatment, disposal, and transportation of hazardous waste which are practical, cost-effective, and economically feasible.

(9) Encourage counties and municipalities to utilize all means reasonably available to promote efficient and proper methods of managing solid waste and to promote the economical recovery of material and energy resources from solid waste, including contracting with persons to provide or operate resource recovery services or facilities on behalf of the county or municipality.

(10) Promote the education of the general public and the training of solid waste professionals to reduce the production of solid waste, to ensure proper disposal of solid waste, and to encourage recycling.

(11) Encourage the development of waste reduction and recycling as a means of managing solid waste, conserving resources, and supplying energy through planning, grants, technical assistance, and other incentives.

(12) Encourage the development of the State's recycling industry by promoting the successful development of markets for recycled items and by promoting the acceleration and advancement of the technology used in manufacturing processes that use recycled items.

(13) Give the State a leadership role in recycling efforts by granting a preference in State purchasing to products with recycled content.

(14) Require counties to develop and implement recycling programs so that valuable materials may be returned to productive use, energy and natural resources conserved, and the useful life of solid waste management facilities extended.

(15) Ensure that medical waste is transported, stored, treated, and disposed of in a manner sufficient to protect human health, safety, and welfare; and the environment.

(16) Require counties, municipalities, and State agencies to determine the full cost of providing storage, collection, transport, separation, processing, recycling, and disposal of solid waste in an environmentally safe manner; and encourage counties, municipalities, and State agencies to contract with private persons for any or all the services in order to assure that the services are provided in the most cost-effective manner. (1989, c. 784, s. 2.)

CASE NOTES

Cited in County of Wake v. N.C. Dep't of Env't & Natural Res., 155 N.C. App. 225, 573 S.E.2d 572, 2002 N.C. App. LEXIS 1632 (2002), cert. dismissed, 357 N.C. 62, 579 S.E.2d 387 (2003).

§ 130A-309.04. State solid waste management policy and goals.

(a) It is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills and to assist units of local government with solid waste management. In furtherance of this State policy, there is established a hierarchy of methods of managing solid waste, in descending order of preference:

(1) Waste reduction at the source;
(2) Recycling and reuse;
(3) Composting;
(4) Incineration with energy recovery;
(5) Incineration without energy recovery;
(6) Disposal in landfills.

(b) It is the policy of the State to encourage research into innovative solid waste management methods and products and to encourage regional solid waste management projects.

(c) It is the goal of this State to reduce the municipal solid waste stream, primarily through source reduction, reuse, recycling, and composting, by forty percent (40%) on a per capita basis by 30 June 2001.

(1), (2) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 8.

(c1) To measure progress toward the municipal solid waste reduction goal in a given year, comparison shall be made between the amount by weight of the municipal solid waste that, during the baseline year and the given year, is received at municipal solid waste management facilities and is:

(1) Disposed of in a landfill;
(2) Incinerated;
(3) Converted to tire-derived fuel; or
(4) Converted to refuse-derived fuel.

(c2) Comparison shall be between baseline and given years beginning on 1 July and ending on 30 June of the following year. The baseline year shall be the year beginning 1 July 1991 and ending 30 June 1992. However, a unit of local government may use an earlier baseline year if it demonstrates to the satisfaction of the Department that it has sufficient data to support the use of the earlier baseline year.

(c3) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 8.

(d) In furtherance of the State's solid waste management policy, each State agency shall develop a solid waste management plan that is consistent with the solid waste management policy of the State.

(d1) It is the policy of the State to obtain, to the extent practicable, economic benefits from the recovery from solid waste and reuse of material and energy resources. In furtherance of this policy, it is the goal of the State to foster partnerships between the public and private sectors that strengthen the supply of, and demand for, recyclable and reusable materials and that foster opportunities for economic development from the recovery and reuse of materials.

(e), (f) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 8. (1989, c. 784, s. 2; 1991, c. 621, s. 2; 1991 (Reg. Sess., 1992), c. 1013, s. 6; 1995 (Reg. Sess., 1996), c. 594, s. 8.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1013, which amended this section, in s. 8 provides: "Any contract for solid waste collection or disposal entered into by any county, city, or town that would have been lawful if this act had been in effect at the time the contract was entered into is validated. The provisions of this act that limit a contract or franchise for the collection and disposal of solid waste to a period of not more than 30 years shall not be construed to invalidate any contract or franchise for a longer period up to 60 years that was entered into by any county, city, or town prior to the date this act is effective." The act became effective July 22, 1992.

§ 130A-309.05. Regulated wastes; certain exclusions.

(a) Notwithstanding other provisions of this Article, the following waste shall be regulated pursuant to this Part:

(1) Medical waste; and

(2) Ash generated by a solid waste management facility from the burning of solid waste.

(b) Ash generated by a solid waste management facility from the burning of solid waste shall be disposed of in a properly designed solid waste disposal area that complies with standards developed by the Department for the disposal of the ash. The Department shall work with solid waste management facilities that burn solid waste to identify and develop methods for recycling and reusing incinerator ash or treated ash.

(c) Recovered material is not subject to regulation as solid waste under this Article. In order for a material that would otherwise be regulated as solid waste to qualify as a recovered material, the Department may require any person who owns or has control over the material to demonstrate that the material meets the requirements of this subsection. In order to protect public health and the environment, the Commission may adopt rules to implement this subsection. In order to qualify as a recovered material:

(1) A majority of the recovered material at a facility shall be sold, used, or reused within one year;

(2) The recovered material or the products or by-products of operations that process recovered material shall not be discharged, deposited, injected, dumped, spilled, leaked, or placed into or upon any land or water so that the products or by-products or any constituent thereof may enter other lands or be emitted into the air or discharged into any waters including groundwaters, or otherwise enter the environment or pose a threat to public health and safety; and

(3) The recovered material shall not be a hazardous waste or have been recovered from a hazardous waste. (1989, c. 784, s. 2; 1995 (Reg. Sess., 1996), c. 594, s. 9.)

§ 130A-309.06. Additional powers and duties of the Department.

(a) In addition to other powers and duties set forth in this Part, the Department shall:

(1) Develop a comprehensive solid waste management plan consistent with this Part. The plan shall be developed in consultation with units of local government and shall be updated at least every three years. In developing the State solid waste management plan, the Department shall hold public hearings around the State and shall give notice of these public hearings to all units of local government and regional planning agencies.

(2) Provide guidance for the orderly collection, transportation, storage, separation, processing, recovery, recycling, and disposal of solid waste throughout the State.

(3) Encourage coordinated local activity for solid waste management within a common geographical area.

(4) Provide planning, technical, and financial assistance to units of local government and State agencies for reduction, recycling, reuse, and processing of solid waste and for safe and environmentally sound solid waste management and disposal.

(5) Cooperate with appropriate federal agencies, local governments, and private organizations in carrying out the provisions of this Part.

(6) Promote and assist the development of solid waste reduction, recycling, and resource recovery programs that preserve and enhance the quality of the air, water, and other natural resources of the State.

(7) Maintain a directory of recycling and resource recovery systems in the State and provide assistance with matching recovered materials with markets.

(8) Manage a program of grants for programs for recycling and special waste management, and for programs that provide for the safe and proper management of solid waste.

(9) Provide for the education of the general public and the training of solid waste management professionals to reduce the production of solid waste, to ensure proper processing and disposal of solid waste, and to encourage recycling and solid waste reduction.

(10) Develop descriptive literature to inform units of local government of their solid waste management responsibilities and opportunities.

(11) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 10.

(12) Provide and maintain recycling bins for the collection and recycling of newspaper, aluminum cans, glass containers, and recyclable plastic beverage containers at the North Carolina Zoological Park.

(13) Identify, based on reports required under G.S. 130A-309.14 and any other relevant information, those materials in the municipal solid waste stream that are marketable in the State or any portion thereof and that should be recovered from the waste stream prior to treatment or disposal.

(14) Identify and analyze, with assistance from the Department of Commerce pursuant to G.S. 130A-309.14, components of the State's recycling industry and present and potential markets for recyclable materials in this State, other states, and foreign countries.

(b) Repealed by Session Laws 2007-550, s. 6(b), effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date.

(c) The Department shall report to the Environmental Review Commission on or before 15 January of each year on the status of solid waste management efforts in the State. The report shall include:

(1) A comprehensive analysis, to be updated in each report, of solid waste generation and disposal in the State projected for the 20-year period beginning on 1 July 1991.

(2) The total amounts of solid waste recycled and disposed of and the methods of solid waste recycling and disposal used during the calendar year prior to the year in which the report is published.

(3) An evaluation of the development and implementation of local solid waste management programs and county and municipal recycling programs.

(4) An evaluation of the success of each county or group of counties in meeting the municipal solid waste reduction goal established in G.S. 130A-309.04.

(5) Recommendations concerning existing and potential programs for solid waste reduction and recycling that would be appropriate for

units of local government and State agencies to implement to meet the requirements of this Part.

(6) An evaluation of the recycling industry, the markets for recycled materials, the recycling of polystyrene, and the success of State, local, and private industry efforts to enhance the markets for these materials.

(7) Recommendations to the Governor and the Environmental Review Commission to improve the management and recycling of solid waste in the State, including any proposed legislation to implement the recommendations.

(8) A description of the condition of the Solid Waste Management Trust Fund and the use of all funds allocated from the Solid Waste Management Trust Fund, as required by G.S. 130A-309.12(c).

(9) A description of the review and revision of bid procedures and the purchase and use of reusable, refillable, repairable, more durable, and less toxic supplies and products by both the Department of Administration and the Department of Transportation, as required by G.S. 130A-309.14(a1)(3).

(10) A description of the implementation of the North Carolina Scrap Tire Disposal Act that includes the beginning and ending balances in the Scrap Tire Disposal Account for the reporting period, the amount credited to the Scrap Tire Disposal Account during the reporting period, and the amount of revenue used for grants and to clean up nuisance tire collection sites, as required by G.S. 130A-309.63(e).

(11) A description of the management of white goods in the State, as required by G.S. 130A-309.85.

(12) A summary of the report by the Department of Transportation on the amounts and types of recycled materials that were specified or used in contracts that were entered into by the Department of Transportation during the previous fiscal year, as required by G.S. 136-28.8(g).

(13) A summary of the reports by each State department, institution, agency, community college, and local school administrative unit authorized to purchase materials and supplies detailing the amounts and types of materials and supplies with recycled content that were purchased during the previous fiscal year and the progress toward reaching the goals under G.S. 143-58.3, as required by G.S. 143-58.2(f).

(d) Repealed by Session Laws 2001-452, s. 3.1, effective October 28, 2001. (1989, c. 784, s. 2; 1991, c. 336, s. 4; c. 621, ss. 3, 4; 1993, c. 250, s. 3; 1995 (Reg. Sess., 1996), c. 594, s. 10; 2001-452, s. 3.1; 2007-550, s. 6(b).)

Editor's Note. — Session Laws 1991, c. 336, s. 5, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each department and agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that department or agency."

Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, s. 6(b), effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date, deleted subsection (b) regarding issuance of permits to those found to have violated solid waste management statues, rules, orders, or permit terms.

§ 130A-309.07. State solid waste management plan.

The State solid waste management plan shall include, at a minimum:

(1) Procedures to encourage cooperative efforts in solid waste management by counties and municipalities and groups of counties and

municipalities where appropriate, including the establishment of joint agencies pursuant to G.S. 160A-462.

(2) Provisions for the continuation of existing effective regional resource recovery, recycling, and solid waste management facilities and programs.

(3) Planning guidance and technical assistance to counties and municipalities to aid in meeting the municipal solid waste reduction goals established in G.S. 130A-309.04.

(4) Planning guidance and technical assistance to counties and municipalities to assist the development and implementation of solid waste reduction programs.

(5) Technical assistance to counties and municipalities in determining the full cost for solid waste management as required in G.S. 130A-309.08.

(6) Planning guidance and technical assistance to counties and municipalities to assist the development and implementation of programs for alternative disposal, processing, or recycling of the solid wastes prohibited from disposal in landfills pursuant to G.S. 130A-309.10 and for special wastes.

(7) A public education program, to be developed in cooperation with the Department of Public Instruction, units of local government, other State agencies, and business and industry organizations, to inform the public of the need for and the benefits of recycling solid waste and reducing the amounts of solid and hazardous waste generated and disposed of in the State. The public education program shall be implemented through public workshops and through the use of brochures, reports, public service announcements, and other materials.

(8) Provisions to encourage partnerships between the public and private sectors that strengthen the supply of, and demand for, recyclable materials and that foster opportunities for economic development from the recovery and reuse of materials. (1989, c. 784, s. 2; 1991, c. 621, s. 5; 1995 (Reg. Sess., 1996), c. 594, s. 11.)

§ 130A-309.08. Determination of cost for solid waste management; local solid waste management fees.

(a) Each county and each municipality shall annually determine the full cost for solid waste management within the service area of the county or municipality for the preceding year. The Commission shall establish by rule the method for units of local government to use in calculating full cost.

(b) Each municipality shall establish a system to inform, no less than once a year, residential and nonresidential users of solid waste management services within the municipality's service area of the user's share, on an average or individual basis, of the full cost for solid waste management as determined pursuant to subsection (a) of this section. Counties shall provide the information required of municipalities only to residential and nonresidential users of solid waste management services within the county's service area that are not served by a municipality. Municipalities shall include costs charged to them or to persons contracting with them for disposal of solid waste in the full cost information provided to residential and nonresidential users of solid waste management services. Counties and municipalities are encouraged to operate their solid waste management systems through use of an enterprise fund.

(c) For purposes of this section, "service area" means the area in which the county or municipality provides, directly or by contract, solid waste management services. The provisions of this section shall not be construed to require a person operating under a franchise contract or other agreement to collect or dispose of solid waste within the service area of a county or municipality to make the calculations or to establish a system to provide the information required under this section, unless such person agrees to do so as part of such franchise contract or other agreement.

(d) A county may charge fees for the collection, processing, or disposal of solid waste as provided in Article 15 of Chapter 153A of the General Statutes. A city may charge fees for the collection, processing, or disposal of solid waste as provided in Article 16 of Chapter 160A of the General Statutes.

(e), (f) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 12. (1989, c. 784, s. 2; 1991, c. 621, s. 6; 1995 (Reg. Sess., 1996), c. 594, s. 12.)

§ **130A-309.09:** Recodified as G.S. 130A-309.09A to 130A.09C by Session Laws 1991, c. 621, ss. 7 through 10.

§ 130A-309.09A. Local government solid waste responsibilities.

(a) The governing board of each unit of local government shall assess local solid waste collection services and disposal capacity and shall determine the adequacy of collection services and disposal capacity to meet local needs and to protect human health and the environment. Each unit of local government shall implement programs and take other actions that it determines are necessary to address deficiencies in service or capacity required to meet local needs and to protect human health and the environment. A unit of local government may adopt ordinances governing the disposal, in facilities that it operates, of solid waste generated outside of the area designated to be served by the facility. Such ordinances shall not be construed to apply to privately operated disposal facilities located within the boundaries of the unit of local government.

(b) Each unit of local government, either individually or in cooperation with other units of local government, shall develop a 10-year comprehensive solid waste management plan. Units of local government shall make a good-faith effort to achieve the State's forty percent (40%) municipal solid waste reduction goal and to comply with the State's comprehensive solid waste management plan. Each unit of local government shall develop its solid waste management plan with public participation, including, at a minimum, one advertised public meeting. The Department shall assist units of local government in the preparation of the plan required by this subsection if the unit of local government requests assistance. Each plan shall be updated at least every three years. In order to assure compliance with this subsection, each unit of local government shall provide the Department with a copy of its current plan upon request by the Department. Each plan shall:

(1) Evaluate the solid waste stream in the geographic area covered by the plan.

(2) Include a goal for the reduction of municipal solid waste on a per capita basis by 30 June 2001 and a goal for the further reduction of municipal solid waste by 30 June 2006. The solid waste reduction goals shall be determined by the unit or units of local government that prepare the plan, and shall be determined so as to assist the State, to the maximum extent practical, to achieve the State's forty percent (40%) municipal solid waste reduction goal as set out in G.S. 130A-309.04(c).

(3) Be designed to achieve the solid waste reduction goals established by the plan.

(4) Include a description of the process by which the plan was developed, including provisions for public participation in the development of the plan.

(5) Include an assessment of current programs and a description of intended actions with respect to the following solid waste management methods:
  a. Reduction at the source.
  b. Collection.
  c. Recycling and reuse.
  d. Composting and mulching.
  e. Incineration with energy recovery.
  f. Incineration without energy recovery.
  g. Transfer outside the geographic area covered by the plan.
  h. Disposal.

(6) Include an assessment of current programs and a description of intended actions with respect to:
  a. Education with the community and through the schools.
  b. Management of special wastes.
  c. Prevention of illegal disposal and management of litter.
  d. Purchase of recycled materials and products manufactured with recycled materials.
  e. **(Effective January 1, 2009)** For each county and each municipality with a population in excess of 25,000, collection of discarded computer equipment, as defined in G.S. 130A-309.91.

(7) Include a description and assessment of the full cost of solid waste management, including the costs of collection, disposal, waste reduction, and other programs, and of the methods of financing those costs.

(8) Consider the use of facilities and other resources for management of solid waste that may be available through private enterprise.

(c) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 12.

(d) In order to assess the progress in meeting the goal set out in G.S. 130A-309.04, each unit of local government shall report to the Department on the solid waste management programs and waste reduction activities within the unit of local government by 1 September of each year. At a minimum, the report shall include:

(1) A description of public education programs on recycling.

(2) The amount of solid waste received at municipal solid waste management facilities, by type of solid waste.

(3) The amount and type of materials from the solid waste stream that were recycled.

(4) The percentage of the population participating in various types of recycling activities instituted.

(5) The annual reduction in municipal solid waste, measured as provided in G.S. 130A-309.04.

(6) Information regarding programs and other actions implemented as part of the local comprehensive solid waste management plan.

(7) A statement of the costs of solid waste management programs implemented by the unit of local government and the methods of financing those costs.

(e) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 13.

(f) Each operator of a municipal solid waste management facility shall weigh all solid waste when it is received.

(g) A unit of local government that is a collector of municipal solid waste shall not knowingly collect for disposal, and the owner or operator of a municipal solid waste management facility that is owned or operated by a unit of local government shall not knowingly dispose of, any type or form of municipal solid waste that is generated within the boundaries of a unit of local government that by ordinance:

(1) Prohibits generators or collectors of municipal solid waste from disposing of that type or form of municipal solid waste.
(2) Requires generators or collectors of municipal solid waste to recycle that type or form of municipal solid waste. (1989, c. 784, s. 2; 1989 (Reg. Sess., 1990), c. 1009, s. 4; 1991, c. 621, s. 7; 1995 (Reg. Sess., 1996), c. 594, s. 13; 2007-550, s. 16.2.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 594, s. 30(a), effective October 1, 1996, provides: "Each unit of local government shall adopt a resolution approving the comprehensive solid waste management plan required by G.S. 130A-309.09A, as amended by Section 13 of this act, and shall begin implementation of the plan by 1 July 1997. Units of local government that prepared a solid waste management plan pursuant to G.S. 130A-309.09A(b) prior to the date this act becomes effective may, in lieu of developing a new plan, update their existing plan to meet the requirements of G.S. 130A-309.09A(b), as amended by Section 13 of this act."

Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, s. 16.2, effective January 1, 2009, added subdivision (b)(6)e.

CASE NOTES

County was liable to landowner for temporary taking of easement across county's landfill where regulations were promulgated under G.S. 130A-294 requiring that the facility be secured by means of gates, chains, berms, fences, and other security measures to prevent unauthorized entry. Tolbert v. County of Caldwell, 121 N.C. App. 653, 468 S.E.2d 504 (1996).

§ 130A-309.09B. Local government waste reduction programs.

(a) Each unit of local government shall establish and maintain a solid waste reduction program that will enable the unit of local government to meet the local solid waste reduction goals established pursuant to G.S. 130A-309.09A(b)(2). The following requirements shall apply:

(1) Demolition debris consisting of used asphalt or used asphalt mixed with dirt, sand, gravel, rock, concrete, or similar nonhazardous material may be used as fill and need not be disposed of in a permitted landfill or solid waste disposal facility, provided that demolition debris may not be placed in the waters of the State or at or below the seasonal high water table.
(2) Repealed by Session Laws 1991, c. 621, s. 8.
(3) Units of local government are encouraged to separate marketable plastics, glass, metal, and all grades of paper for recycling prior to final disposal and are further encouraged to recycle yard trash and other organic solid waste into compost available for agricultural and other acceptable uses.

(b) To the maximum extent practicable, units of local government should participate in the preparation and implementation of joint waste reduction and solid waste management programs, whether through joint agencies established pursuant to G.S. 153A-421, G.S. 160A-462, or any other means provided by law. Nothing in a county's solid waste management or waste reduction program shall affect the authority of a municipality to franchise or otherwise provide for the collection of solid waste generated within the boundaries of the municipality.

(c) through (e) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 14.

(f) A county or counties and its or their municipalities may jointly determine, through a joint agency established pursuant to G.S. 153A-421 or G.S.

160A-462, which local governmental agency shall administer a solid waste management or waste reduction program.

(g) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 14. (1989, c. 784, s. 2; 1989 (Reg. Sess., 1990), c. 1009, s. 4; 1991, c. 537, s. 2; c. 621, s. 8; 1993, c. 86, s. 1; 1995 (Reg. Sess., 1996), c. 594, s. 14.)

§ 130A-309.09C. Additional powers of local governments; construction of this Part; effect of noncompliance.

(a) To effect the purposes of this Part, counties and municipalities are authorized, in addition to other powers granted pursuant to this Part:

(1) To contract with persons to provide resource recovery services or operate resource recovery facilities on behalf of the county or municipality.

(2) To indemnify persons providing resource recovery services or operating resource recovery facilities for liabilities or claims arising out of the provision or operation of such services or facilities that are not the result of the sole negligence of the persons providing the services or operating the facilities.

(3) To contract with persons to provide solid waste disposal services or operate solid waste disposal facilities on behalf of the county or municipality.

(b) A county or municipality may enter into a written agreement with other persons, including persons transporting solid waste, to undertake to fulfill some or all of the county's or municipality's responsibilities under this Part.

(c) Nothing in this Part shall be construed to prevent the governing board of any county or municipality from providing by ordinance or regulation for solid waste management standards which are stricter or more extensive than those imposed by the State solid waste management program and rules and orders issued to implement the State program.

(d) Nothing in this Part or in any rule adopted by any agency shall be construed to require any county or municipality to participate in any regional solid waste management until the governing board of the county or municipality has determined that participation in such a program is economically feasible for that county or municipality. Nothing in this Part or in any special or local act or in any rule adopted by any agency shall be construed to limit the authority of a municipality to regulate the disposal of solid waste located within its boundaries or generated within its boundaries so long as a facility for any such disposal has been approved by the Department, unless the municipality is included within a solid waste management program created under a joint agency or special or local act. If bonds had been issued to finance a solid waste management program in reliance on State law granting to a unit of local government, a region, or a special district the responsibility for the solid waste management program, nothing herein shall permit any governmental agency to withdraw from the program if the agency's participation is necessary for the financial feasibility of the project, so long as the bonds are outstanding.

(e) Nothing in this Part or in any rule adopted by any State agency pursuant to this Part shall require any person to subscribe to any private solid waste collection service.

(f) In the event a region, special district, or other entity by special act or joint agency, has been established to manage solid waste, any duty or responsibility or penalty imposed under this Part on a unit of local government shall apply to such region, special district, or other entity to the extent of the grant of the duty or responsibility or imposition of such penalty. To the same extent, such region, special district, or other entity shall be eligible for grants or other benefits provided pursuant to this Part.

(g) In addition to any other penalties provided by law, a unit of local government that does not comply with the requirements of G.S. 130A-309.09A(b) and G.S. 130A-309.09B(a) shall not be eligible for grants from the Solid Waste Management Trust Fund, the Scrap Tire Disposal Account, or the White Goods Management Account and shall not receive the proceeds of the scrap tire disposal tax imposed by Article 5B of Chapter 105 of the General Statutes or the proceeds of the white goods disposal tax imposed by Article 5C of Chapter 105 of the General Statutes to which the unit of local government would otherwise be entitled. The Secretary shall notify the Secretary of Revenue to withhold payment of these funds to any unit of local government that fails to comply with the requirements of G.S. 130A-309.09A(b) and G.S. 130A-309.09B(a). Proceeds of the scrap tire disposal tax that are withheld pursuant to this subsection shall be credited to the Scrap Tire Disposal Account and may be used as provided in G.S. 130A-309.63. Proceeds of the white goods disposal tax that are withheld pursuant to this subsection shall be credited to the White Goods Management Account and may be used as provided in G.S. 130A-309.83. (1989, c. 784, s. 2; 1989 (Reg. Sess., 1990), c. 1009, s. 4; 1991, c. 621, s. 9; 1995 (Reg. Sess., 1996), c. 594, s. 15.)

§ 130A-309.09D. Responsibilities of generators of municipal solid waste owners and operators of privately owned solid waste management facilities and collectors of municipal solid waste.

(a) A generator of municipal solid waste shall not knowingly dispose of, a collector of municipal solid waste shall not knowingly collect for disposal, and the owner or operator of a privately owned or operated municipal solid waste management facility shall not knowingly dispose of, any type or form of municipal solid waste that is generated within the boundaries of a unit of local government that by ordinance:

(1) Prohibits generators or collectors of municipal solid waste from disposing of that type or form of municipal solid waste.

(2) Requires generators or collectors of municipal solid waste to recycle that type or form of municipal solid waste.

(b) On or before 1 August, the owner or operator of a privately owned solid waste management facility shall report to the Department, for the previous year beginning 1 July and ending 30 June, the amount by weight of the solid waste that was received at the facility and disposed of in a landfill, incinerated, or converted to fuel. To the maximum extent practicable, the reports shall indicate by weight the county of origin of all solid waste. The owner or operator shall transmit a copy of the report to the county in which the facility is located and to each county from which solid waste originated.

(c) A generator of industrial solid waste that owns and operates an industrial solid waste facility for the management of industrial solid waste generated by that generator shall develop a 10-year waste management plan. The plan shall be updated at least every three years. In order to assure compliance with this subsection, each generator to which this subsection applies shall provide the Department with a copy of its current plan upon request by the Department. Each generator to which this subsection applies shall file a report on its implementation of the plan required by this subsection with the Department by 1 August of each year. A generator to which this subsection applies may provide the Department with a copy of a current plan prepared pursuant to an ordinance adopted by a unit of local government or prepared for any other purpose if the plan meets the requirements of this subsection. The plan shall have the following components:

(1) A waste reduction goal established by the generator.

(2) Options for the management and reduction of wastes evaluated by the generator.

(3) A waste management strategy, including plans for waste reduction and waste disposal, for the 10-year period covered by the plan. (1991, c. 621, s. 11; 1995 (Reg. Sess., 1996), c. 594, s. 16.)

§ 130A-309.10. Prohibited acts relating to packaging; coded labeling of plastic containers required; disposal of certain solid wastes in landfills or by incineration prohibited.

(a) No beverage shall be sold or offered for sale within the State in a beverage container designed and constructed so that the container is opened by detaching a metal ring or tab.

(b) No person shall distribute, sell, or offer for sale in this State, any product packaged in a container or packing material manufactured with fully halogenated chlorofluorocarbons (CFC). Producers of containers or packing material manufactured with chlorofluorocarbons (CFC) are urged to introduce alternative packaging materials that are environmentally compatible.

(c)(1) No plastic bag shall be provided at any retail outlet to any retail customer to use for the purpose of carrying items purchased by that customer unless the bag is composed of material that is recyclable.

(2) It is the goal of the State that at least twenty-five percent (25%) of the plastic bags provided at retail outlets in the State to retail customers for carrying items purchased by the customer be recycled.

(d)(1) No person shall distribute, sell, or offer for sale in this State any polystyrene foam product that is to be used in conjunction with food for human consumption unless the product is composed of material that is recyclable.

(2) Repealed by Session Laws 1995, c. 321, s. 1.

(e) No person shall distribute, sell, or offer for sale in this State any rigid plastic container, including a plastic beverage container unless the container has a molded label indicating the plastic resin used to produce the container. The code shall consist of a number placed within three triangulated arrows and letters placed below the triangulated arrows. The three arrows shall form an equilateral triangle with the common point of each line forming each angle of the triangle at the midpoint of each arrow and rounded with a short radius. The arrowhead of each arrow shall be at the midpoint of each side of the triangle with a short gap separating the arrowhead from the base of the adjacent arrow. The triangle formed by the three arrows curved at their midpoints shall depict a clockwise path around the code number. The label shall appear on or near the bottom of the container and be clearly visible. A container having a capacity of less than eight fluid ounces or more than five gallons is exempt from the requirements of this subsection. The numbers and letters shall be as follows:

(1) For polyethylene terephthalate, the letters “PETE” and the number 1.
(2) For high density polyethylene, the letters “HDPE” and the number 2.
(3) For vinyl, the letter “V” and the number 3.
(4) For low density polyethylene, the letters “LDPE” and the number 4.
(5) For polypropylene, the letters “PP” and the number 5.
(6) For polystyrene, the letters “PS” and the number 6.
(7) For any other, the letters “OTHER” and the number 7.

(f) No person shall knowingly dispose of the following solid wastes in landfills:

(1) Repealed by Session Laws 1991, c. 375, s. 1.
(2) Used oil.
(3) Yard trash, except in landfills approved for the disposal of yard trash under rules adopted by the Commission. Yard trash that is source separated from solid waste may be accepted at a solid waste disposal area where the area provides and maintains separate yard trash composting facilities.
(4) White goods.
(5) Antifreeze (ethylene glycol).
(6) Aluminum cans.
(7) **(Effective until October 1, 2009)** Whole scrap tires, as provided in G.S. 130A-309.58(b). The prohibition of the disposal of whole scrap tires in landfills applies to all whole pneumatic rubber coverings, but does not apply to whole solid rubber coverings.
(7) **(Effective October 1, 2009)** Whole scrap tires, as provided in G.S. 130A-309.58(b). The prohibition on disposal of whole scrap tires in landfills applies to all whole pneumatic rubber coverings, but does not apply to whole solid rubber coverings.
(8) Lead-acid batteries, as provided in G.S. 130A-309.70.
(9) Beverage containers that are required to be recycled under G.S. 18B-1006.1.
(10) **(Effective October 1, 2009)** Motor vehicle oil filters.
(11) **(Effective October 1, 2009)** Recyclable rigid plastic containers that are required to be labeled as provided in subsection (e) of this section, that have a neck smaller than the body of the container, and that accept a screw top, snap cap, or other closure. The prohibition on disposal of recyclable rigid plastic containers in landfills does not apply to rigid plastic containers that are intended for use in the sale or distribution of motor oil.
(12) **(Effective October 1, 2009)** Wooden pallets, except that wooden pallets may be disposed of in a landfill that is permitted to only accept construction and demolition debris.
(13) Oyster shells.
(14) **(Effective January 1, 2012)** Discarded computer equipment, as defined in G.S. 130A-309.91.

(f1) No person shall knowingly dispose of the following solid wastes by incineration in an incinerator for which a permit is required under this Article:

(1) Antifreeze (ethylene glycol) used solely in motor vehicles.
(2) Aluminum cans.
(3) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 17.
(4) White goods.
(5) Lead-acid batteries, as provided in G.S. 130A-309.70.
(6) Beverage containers that are required to be recycled under G.S. 18B-1006.1.
(7) **(Effective January 1, 2012)** Discarded computer equipment, as defined in G.S. 130A-309.91.

(f2) Subsection (f1) of this section shall not apply to solid waste incinerated in an incinerator solely owned and operated by the generator of the solid waste. Subsection (f1) of this section shall not apply to antifreeze (ethylene glycol) that cannot be recycled or reclaimed to make it usable as antifreeze in a motor vehicle.

(g) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 17.

(h) The accidental or occasional disposal of small amounts of prohibited solid waste by landfill shall not be construed as a violation of subsection (f) of this section.

(i) The accidental or occasional disposal of small amounts of prohibited solid waste by incineration shall not be construed as a violation of subsection (f1) of this section if the Department has approved a plan for the incinerator as provided in subsection (j) of this section or if the incinerator is exempt from subsection (j) of this section.

(j) The Department may issue a permit pursuant to this Article for an incinerator that is subject to subsection (f1) of this section only if the applicant for the permit has a plan approved by the Department pursuant to this subsection. The applicant shall file the plan at the time of the application for the permit. The Department shall approve a plan only if it complies with the requirements of this subsection. The plan shall provide for the implementation of a program to prevent the incineration of the solid waste listed in subsection (f1) of this section. The program shall include the random visual inspection prior to incineration of at least ten percent (10%) of the solid waste to be incinerated. The program shall also provide for the retention of the records of the random visual inspections and the training of personnel to recognize the solid waste listed in subsection (f1) of this section. If a random visual inspection discovers solid waste that may not be incinerated pursuant to subsection (f1) of this section, the program shall provide that the operator of the incinerator shall dispose of the solid waste in accordance with applicable federal and State laws, regulations, and rules. This subsection does not apply to an incinerator that disposes only of medical waste.

(k) **(Effective October 1, 2009)** A county or city may petition the Department for a waiver from the prohibition on disposal of a material described in subdivisions (9), (10), (11) and (12) of subsection (f) of this section in a landfill based on a showing that prohibiting the disposal of the material would constitute an economic hardship.

(*l*) Oyster shells that are delivered to a landfill shall be stored at the landfill for at least 90 days or until they are removed for recycling. If oyster shells that are stored at a landfill are not removed for recycling within 90 days of delivery to the landfill, then, notwithstanding subdivision (12) of subsection (f) of this section, the oyster shells may be disposed of in the landfill. (1989, c. 784, s. 2; 1991, c. 23, s. 1; c. 375, s. 1; 1991 (Reg. Sess., 1992), c. 932, ss. 1, 2; 1993, c. 290, s. 1; 1995, c. 321, s. 1; c. 504, s. 9; 1995 (Reg. Sess., 1996), c. 594, s. 17; 2001-440, ss. 3.1, 3.2; 2005-348, s. 3; 2005-362, ss. 2, 3; 2006-226, s. 24(a); 2006-264, ss. 98.5(a), (c); 2007-550, ss. 16.3, 16.4.)

Subdivision (f)(7) Set Out Twice. — The first version of subdivision (f)(7) set out above is effective until October 1, 2009. The second version of subdivision (f)(7) set out above is effective October 1, 2009.

Editor's Note. — This section was amended by Session Laws 2005-362, s. 2 in the coded bill drafting format provided by G.S. 120-20.1. The act failed to incorporate the changes in subdivision (f)(7) made by Session Laws 2005-348, s. 3. The version of subdivision (f)(7) effective October 1, 2009 is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2001-440, s. 3.3, provides: "If an incinerator that is subject to the new G.S. 130A-309.10(j) as enacted by Section 3.2 of this act [s. 3.2 of Session Laws 2001-440, which added subsections (i) and (j) of G.S. 130A-309.10] has received a permit pursuant to this Article prior to the effective date of Section 3.2 of this act [October 15, 2001], then a plan that complies with the requirements of G.S. 130A-309.10(j) shall be submitted to the Department for approval within 90 days after Section 3.2 of this act becomes effective. The Department shall review and either approve or disapprove a plan submitted pursuant to this section [s. 3.3 of Session Laws 2001-440] within 90 days of the day the plan is submitted. Upon approval by the Department, a plan submitted pursuant to this section [s. 3.3 of Session Laws 2001-440] shall be implemented within 60 days of the date of its approval."

Session Laws 2001-440, s. 3.4, provides: "The Environmental Management Commission shall adopt temporary rules in accordance with 65 Federal Register No. 235 pp. 76,378 through 76,405 (6 December 2000) by 1 March 2002. These rules shall include a compliance schedule that requires existing small municipal waste combustion units to achieve final compliance with the rules no later than 1 March 2003." For extension of the date by which certain small municipal waste combustion units must achieve compliance with the rules adopted pursuant to this provision, see Session Laws 2002-24, s. 2.

Session Laws 2001-440, s. 3.5, provides: "The Lower Cape Fear River Research and Education Program, located at and administered by the Center for Marine Science at the University of North Carolina at Wilmington, shall pursue and apply for funding to conduct water quality and sediment sampling for heavy metals and other contaminants in the Lower Cape Fear River."

Session Laws 2002-24, s. 2, provides: "Notwithstanding the provisions of Section 3.4 of S.L. 2001-440 to the contrary, rules adopted by the Environmental Management Commission pursuant to Section 3.4 of S.L. 2001-440 shall include a compliance schedule that requires existing small municipal waste combustion units to achieve final compliance with the rules on and after 1 December 2004. The Environmental Management Commission shall amend rules adopted pursuant to Section 3.4 of S.L. 2001-440 to conform to the requirements of this section."

Session Laws 2005-348, s. 3, added subdivision (f)(9). Session Laws 2005-362, s. 2, added subdivisions (f)(9) through (12), which were redesignated subdivisions (f)(10) through (13) at the direction of the Revisor of Statutes.

Session Laws 2005-362, s. 4, as amended by Session Laws 2006-264, s. 98.5(c), provides: "Sections 1, 2, and 3 of this act become effective 1 October 2009 except that G.S. 130A-309.10(f)(12) [now G.S. 130A-309.10(f)(13)], as enacted by Section 2 of this act, becomes effective 1 January 2007. Section 4 of this act becomes effective 1 January 2007."

Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2005-348, s. 3, effective January 1, 2008, in subsection (f), rewrote the second sentence of subdivision (7), which read: "The prohibition against landfilling whole tires applies to all whole pneumatic rubber coverings, but does not apply to whole solid rubber coverings." and added subdivision (9); and in subsection (f1), added subdivision (6).

Session Laws 2005-362, ss. 2 and 3, substituted "prohibition on disposal of whole tires in landfills" for "prohibition against landfilling whole tires" in subdivision (f)(7), and added subdivisions (f)(10) through (f)(13) and subsection (k). For effective date, see editor's note.

Session Laws 2006-226, s. 24(a), effective October 1, 2009, deleted "of the disposal of" following "The prohibition" in the second sentence of subdivision (f)(7).

Session Laws 2006-264, s. 98.5(a), effective January 1, 2007, added (*l*).

Session Laws 2007-550, ss. 16.3, 16.4, effective January 1, 2012, added subdivisions (f)(14) and (f1)(7).

§ 130A-309.11. Compost standards and applications.

(a) In order to protect the State's land and water resources, compost produced, utilized, or disposed of by the composting process at solid waste management facilities in the State must meet criteria established by the Department.

(b) The Commission shall adopt rules to establish standards for the production of compost. Rules shall be adopted not later than 24 months after the initiation of rule making. Such rules shall include:

(1) Requirements necessary to produce hygienically safe compost products for varying applications.

(2) A classification scheme for compost based on:

a. The types of waste composted, including at least one type containing only yard trash;

b. The maturity of the compost, including at least three degrees of decomposition for fresh, semi-mature, and mature; and

c. The levels of organic and inorganic constituents in the compost.

(c) The compost classification scheme shall address:

(1) Methods for measurement of the compost maturity.

(2) Particle sizes.

(3) Moisture content.

(4) Average levels of organic and inorganic constituents, including heavy metals, for such classes of compost as the Department establishes, and the analytical methods to determine those levels.

(d) The Commission shall adopt rules to prescribe the allowable uses and application rates of compost. Rules shall be adopted not later than 24 months after the initiation of rule making. Such rules shall be based on the following criteria:

(1) The total quantity of organic and inorganic constituents, including heavy metals, allowed to be applied through the addition of compost to the soil per acre per year.

(2) The allowable uses of compost based on maturity and type of compost.

(e) If compost is produced which does not meet the criteria prescribed by the Department for agricultural and other use, the compost must be reprocessed or disposed of in a manner approved by the Department, unless a different application is specifically permitted by the Department. (1989, c. 784, s. 2; 1995 (Reg. Sess., 1996), c. 594, s. 18.)

§ 130A-309.12. Solid Waste Management Trust Fund.

(a) The Solid Waste Management Trust Fund is created and is to be administered by the Department for the purposes of:

(1) Funding activities of the Department to promote waste reduction and recycling including but not limited to public education programs and technical assistance to units of local government;

(2) Funding research on the solid waste stream in North Carolina;

(3) Funding activities related to the development of secondary materials markets;

(4) Providing funding for demonstration projects as provided by this Part; and

(5) Providing funding for research by The University of North Carolina and independent nonprofit colleges and universities within the State which are accredited by the Southern Association of Colleges and Schools as provided by this Part.

(b) The Solid Waste Management Trust Fund shall consist of the following:

(1) Funds appropriated by the General Assembly.

(2) Contributions and grants from public or private sources.

(3) Five percent (5%) of the proceeds of the scrap tire disposal tax imposed under Article 5B of Chapter 105 of the General Statutes.

(4) Eight percent (8%) of the proceeds of the white goods disposal tax imposed under Article 5C of Chapter 105 of the General Statutes.

(c) The Department shall include in the report required by G.S. 130A-309.06(c) a description of the condition of the Solid Waste Management Trust Fund and the use of all funds allocated from the Solid Waste Management Trust Fund. (1989, c. 784, s. 2; 1991, c. 690, s. 10; 1991 (Reg. Sess., 1992), c. 990, s. 7; 1993, c. 471, ss. 5, 8; c. 513, s. 1; c. 548, s. 3; 1997-209, s. 1; 1998-24, ss. 3, 7; 2000-109, s. 9(a); 2001-265, s. 5; 2001-452, s. 3.2.)

Editor's Note. — Session Laws 1993, c. 471, s. 8 provided that subdivision (b)(4) of this section would be repealed. Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1998-24, s. 7, had provided that the repeal of subdivision (b)(4) would be effective July 1, 2002. Session Laws 2000-109, s. 9(a), effective July 13, 2000, amended Session Laws 1993, c. 471, s. 11, to delete the postponed date for this amendment. Subsequently, Session Laws 2001-265, s. 5, effective retroactively to July 13, 2000, repealed Session Laws 1993, c. 471, s. 8. Subdivision (b)(4) is therefore not repealed.

§ 130A-309.13: Reserved for future codification purposes.

§ 130A-309.14. Duties of State agencies.

(a) Each State agency, including the General Assembly, the General Court of Justice, and The University of North Carolina shall:

(1) Establish a program in cooperation with the Department and the Department of Administration for the collection of all recyclable materials generated in State offices throughout the State. The program shall provide that recycling containers are readily accessible on each floor where State employees are located in a building occupied by a State agency. Recycling containers required pursuant to this subdivision shall be clearly labeled to identify the types of recyclable materials to be deposited in each container and, to the extent practicable, recycling containers for glass, plastic, and aluminum shall be located near trash receptacles. The program shall provide for the collection of all of the following recyclable materials.

a. Aluminum.
b. Newspaper.
c. Sorted office paper.
d. Recyclable glass.
e. Plastic bottles.

As used in this subdivision, the term "sorted office paper" means paper used in offices that is of a high quality for purposes of recycling and includes copier paper, computer paper, letterhead, ledger, white envelopes, and bond paper.

(2) Provide procedures for collecting and storing recyclable materials, containers for storing materials, and contractual or other arrangements with buyers of the recyclable materials.

(3) The Department of Administration and the Department of Transportation shall each provide by 1 October of each year to the Department of Environment and Natural Resources a detailed description of the respective Agency's review and revision of bid procedures and purchase and use of reusable, refillable, repairable, more durable, and less toxic supplies and products. The information provided by the Department of Administration and the Department of Transportation to the Department of Environment and Natural Resources shall also be included in the report required by G.S. 130A-309.06(c).

(4) Establish and implement, in cooperation with the Department and the Department of Administration, a solid waste reduction program for materials used in the course of agency operations. The program shall be designed and implemented to achieve maximum feasible reduction of solid waste generated as a result of agency operations.

(5) Prepare any written report in compliance with the model report under subsection (j) of this section. The State agency shall, in lieu of distributing the report in mass:

a. Notify persons to whom each agency is required to report, and any other persons it deems appropriate, that a report has been published, its subject and title, and the locations, including State libraries, at which the report is available;
b. Deliver any report to only those State libraries that each agency determines is likely to receive requests for a particular report; and
c. Distribute a report to only those who request the report.

A State library that has received a report shall distribute a report only upon request. Any State agency required by law to report to an entity shall be in compliance with that law by notifying that entity under sub-subdivision a. of this subdivision.

(a1) The Department of Administration shall review and revise its bid procedures and specifications set forth in Article 3 of Chapter 143 of the General Statutes and the Department of Transportation shall review and revise its bid procedures and specifications set forth in Article 2 of Chapter 136 of the General Statutes to encourage the purchase or use of reusable, refillable, repairable, more durable, and less toxic supplies and products.

(1) The Department of Administration shall require the procurement of such supplies and products to the extent that the purchase or use is practicable and cost-effective. The Department of Administration shall require the purchase or use of remanufactured toner cartridges for laser printers to the extent practicable.

(2) The Department of Transportation shall require the purchase or use of such supplies and products in the construction and maintenance of highways and bridges to the extent that the purchase or use is practicable and cost-effective.

(3) The Department of Administration and the Department of Transportation shall each provide by 1 October of each year to the Department of Environment and Natural Resources a detailed description of the respective Agency's review and revision of bid procedures and purchase and use of reusable, refillable, repairable, more durable, and less toxic supplies and products. The information provided by the Department of Administration and the Department of Transportation to the Department of Environment and Natural Resources shall also be included in the report required by G.S. 130A-309.06(c).

(b) The Department of Commerce shall assist and encourage the recycling industry in the State. Assistance and encouragement of the recycling industry shall include:

(1) Assisting the Department in the identification and analysis, by the Department pursuant to G.S. 130A-309.06, of components of the State's recycling industry and present and potential markets for recyclable materials in this State, other states, and foreign countries

(2) Providing information on the availability and benefits of using recycled materials to businesses and industries in the State; and

(3) Distributing any material prepared in implementing this section to the public, businesses, industries, units of local government, or other organizations upon request.

(c) Repealed by Session Laws 1993, c. 250, s. 2.

(d) The Department of Commerce shall investigate the potential markets for composted materials and shall submit its findings to the Department for the waste registry informational program administered by the Department in order to stimulate absorption of available composted materials into such markets.

(e) On or before 1 March 1991, the Department of Commerce shall report to the General Assembly its findings relative to:

(1) Potential markets for composted materials, including private and public sector markets;

(2) The types of materials which may legally and effectively be used in a successful composting operation; and

(3) The manner in which the composted materials should be marketed for optimum use.

(f)(1) All State agencies, including the Department of Transportation and the Department of Administration, and units of local government are required to procure compost products when they can be substituted for, and cost no more than, regular soil amendment products, provided the compost products meet all applicable engineering and environmental quality standards, specifications, and rules. This product preference shall apply to, but not be limited to, highway construction and maintenance projects, highway planting and beautification projects, recultivation and erosion control programs, and other projects.

(2) The Department of Transportation shall, consistent with economic feasibility and applicable engineering and environmental quality standards, use scrap tires, demolition debris, and untreated, stabilized, or encapsulated ash from boilers and incinerators in highway construction and maintenance projects.

(g) The Department of Public Instruction, with the assistance of the Department and The University of North Carolina, shall develop, distribute, and encourage the use of guidelines for the collection of recyclable materials and for solid waste reduction in the State system of education. At a minimum, the guidelines shall address solid waste generated in administrative offices, classrooms, dormitories, and cafeterias. The guidelines shall be developed by 1 January 1991.

(h) In order to orient students and their families to the recycling of waste and to encourage the participation of schools, communities, and families in recycling programs, the school board of each school district in the State shall make available an awareness program in the recycling of waste materials. The program shall be provided at both the elementary and secondary levels of education.

(i) The Department of Public Instruction is directed to develop, from funds appropriated for environmental education, curriculum materials and resource guides for a recycling awareness program for instruction at the elementary, middle, and high school levels.

(j) The Department of Administration shall develop a model report for reports published by any State agency, the General Assembly, the General Court of Justice, or The University of North Carolina. This model report shall satisfy the following:

(1) The paper in the report shall, to the extent economically practicable, be made from recycled paper and shall be capable of being recycled.
(2) The other constituent elements of the report shall, to the extent economically practicable, be made from recycled products and shall be capable of being recycled or reused.
(3) The report shall be printed on both sides of the paper if no additional time, staff, equipment, or expense would be required to fulfill this requirement.
(4) State publications that are of historical and enduring value and importance to the citizens of North Carolina shall be printed on alkaline (acid-free) paper according to G.S. 125-11.13.

(k) The Department of Transportation shall provide and maintain recycling containers at each rest area located in this State on a highway in the Interstate Highway System or in the State highway system for the collection of each of the following recyclable materials for which recycling is feasible:

(1) Aluminum.
(2) Newspaper.
(3) Recyclable glass.
(4) Plastic bottles.

For each rest area that has recycling containers, the Department of Transportation shall install signs, or modify existing signs, that are proximately located to the rest area to notify motorists that the rest area has recycling containers.

(*l*) Any State agency or agency of a political subdivision of the State that is using State funds, or any person contracting with any agency with respect to work performed under contract, shall procure products of recycled steel if all of the following conditions are satisfied:

(1) The product must be acquired competitively within a reasonable time frame.
(2) The product must meet appropriate performance standards.
(3) The product must be acquired at a reasonable price.

(m) **(Effective January 1, 2008)** The Alcoholic Beverage Control Commission, with the assistance of the Department, shall develop a model recycling program for holders of on-premises malt beverage permits, on-premises unfortified wine permits, on-premises fortified wine permits, and mixed beverages permits under G.S. 18B-1001 that are required to recycle beverage containers under G.S. 18B-1006.1. The model program shall provide for the separation, storage, and collection for recycling of all beverage containers that are required to be recycled under G.S. 18B-1006.1 and shall provide alternatives that reflect variations in local circumstances across the State. The Alcoholic Beverage Control Commission may adopt rules to comply with this section. (1989, c. 784, s. 2; 1991, c. 522, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 32; 1993, c. 197, s. 1; c. 250, ss. 1, 2; c. 448, ss. 1, 2; c. 553, s. 74; 2001-144, s. 1; 2001-452, s. 3.3; 2001-512, ss. 13, 14; 2003-284, s. 6.10(a); 2003-340, s. 1.6; 2005-348, s. 2.)

Editor's Note. — The second sentence of subdivision (a1)(3) was apparently intended to be added by Session Laws 2001-452, s. 3.3; however, Session Laws 2001-452 was in the coded bill drafting format, but did not underline that sentence. The sentence was subsequently added by Session Laws 2003-340, s. 1.6, effective July 27, 2003.

Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 6.10(b), provides: "The Department of Administration shall report to the Joint Legislative Commission on Governmental Operations on agencies' compliance with this section."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2003-340, s. 8, is a severability clause.

Effect of Amendments. — Session Laws 2005-348, s. 2, effective January 1, 2008, added subsection (m).

§ 130A-309.14A. Reports by certain State-assisted entities.

Any community college, as defined in G.S. 115D-2(2), and any nonprofit corporation that receives State funds are encouraged to prepare any written reports in compliance with G.S. 130A-309.14(j). (1993, c. 448, s. 3.)

§ 130A-309.15. Prohibited acts regarding used oil.

(a) No person may knowingly:

(1) Collect, transport, store, recycle, use, or dispose of used oil in any manner which endangers the public health or welfare.

(2) Discharge used oil into sewers, drainage systems, septic tanks, surface waters, groundwaters, watercourses, or marine waters.

(3) Dispose of used oil in landfills in the State unless such disposal has been approved by the Department.

(4) Mix used oil with solid waste that is to be disposed of in landfills.

(5) Mix used oil with hazardous substances that make it unsuitable for recycling or beneficial use.

(b) A person who violates subsection (a) of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided by G.S. 130A-25(a) and G.S. 14-3.

(c) A person who disposes of used oil in a landfill where such used oil has been mixed with other solid waste which may be lawfully disposed of in such landfill, and who is without knowledge that such solid waste has been mixed with used oil, is not guilty of a violation under this section.

(d) Used oil shall not be used for road oiling, dust control, weed abatement, or other similar purposes that have the potential to release used oil into the environment. (1989, c. 784, s. 2.)

§ 130A-309.16. Public education program regarding used oil collection and recycling.

The Department shall conduct a public education program to inform the public of the needs for and benefits of collecting and recycling used oil and shall:

(1) Encourage persons who annually sell at retail, in containers for use off the premises, more than 500 gallons of oil to provide the purchasers with information on the locations of collection facilities and information on proper disposal practices.

(2) Establish, maintain, and publicize a used oil information center that disperses materials or information explaining local, State, and federal laws and rules governing used oil and informing the public of places and methods for proper disposal of used oil.

(3) Encourage the voluntary establishment of used oil collection and recycling programs and provide technical assistance to persons who organize such programs.

(4) Encourage the procurement of recycled automotive, industrial, and fuel oils and oils blended with recycled oils for all State and local government uses. Recycled oils procured under this section shall meet equipment manufacturer's specifications. (1989, c. 784, s. 2.)

§ 130A-309.17. Registration of persons transporting, collecting, or recycling used oil; fees; reports and records.

(a) The following persons shall register annually with the Department pursuant to rules of the Department on forms prescribed by it:

(1) Any person who transports over public highways more than 500 gallons of used oil per week.

(2) Any person who maintains a collection facility that receives more than 6,000 gallons of used oil annually. For purposes of registration, the amount received does not include used oil delivered to collection centers by individuals that change their own personal motor oil.

(3) Any facility that recycles more than 10,000 gallons of used oil annually.

(b) An electric utility which generates during its operation used oil that is then reclaimed, recycled, or rerefined by the electric utility for use in its operations is not required to register or report pursuant to this section.

(c) An on-site burner which only burns a specification used oil generated by the burner is not required to register or report pursuant to this section, provided that the burning is done in compliance with any air permits issued by the Department.

(d) The Department may prescribe a fee for the registration required by this section in an amount which is sufficient to cover the cost of processing applications but which does not exceed twenty-five dollars ($25.00).

(e) The Department shall require each registered person to submit, no later than 1 July of each year, a report which specifies the type and quantity of used oil transported, collected, and recycled during the preceding calendar year.

(f) Each registered person who transports or recycles used oil shall maintain records which identify:
- (1) The source of the materials transported or recycled;
- (2) The quantity of materials received;
- (3) The date of receipt; and
- (4) The destination or end use of the materials.

(g) The Department shall perform technical studies to sample used oil at facilities of representative used oil transporters and at representative recycling facilities to determine the incidence of contamination of used oil with hazardous, toxic, or other harmful substances.

(h) Any person who fails to register with the Department as required by this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided by G.S. 130A-25(a) and G.S. 14-3.

(i) The proceeds from the registration fees imposed by this section shall be deposited into the Solid Waste Management Trust Fund. (1989, c. 784, s. 2.)

§ 130A-309.18. Regulation of used oil as hazardous waste.

Nothing in this Part shall prohibit the Department from regulating used oil as a hazardous waste in a manner consistent with applicable federal law and this Article. (1989, c. 784, s. 2.)

§ 130A-309.19. Coordination with other State agencies.

The Department of Transportation shall study the feasibility of using recycled oil products in road construction activities and shall report to the President Pro Tempore of the Senate and the Speaker of the House of Representatives annually, beginning 1 January 1991, on the results of its study. (1989, c. 784, s. 2.)

§ 130A-309.20. Public used oil collection centers.

(a) The Department shall encourage the voluntary establishment of public used oil collection centers and recycling programs and provide technical assistance to persons who organize such programs.

(b) All State agencies and businesses that change motor oil for the public are encouraged to serve as public used oil collection centers.

(c) A public used oil collection center must:
- (1) Notify the Department annually that it is accepting used oil from the public; and
- (2) Annually report quantities of used oil collected from the public.

(d) No person may recover from the owner or operator of a used oil collection center any costs of response actions resulting from a release of either used oil or a hazardous substance against the owner or operator of a used oil collection center if such used oil is:
- (1) Not mixed with any hazardous substance by the owner or operator of the used oil collection center;
- (2) Not knowingly accepted with any hazardous substances contained therein;
- (3) Transported from the used oil collection center by a certified transporter pursuant to G.S. 130A-309.23; and
- (4) Stored in a used oil collection center that is in compliance with this section.

(e) Subsection (d) of this section applies only to that portion of the public used oil collection center used for the collection of used oil and does not apply if the owner or operator is grossly negligent in the operation of the public used oil collection center. Nothing in this section shall affect or modify in any way the obligations or liability of any person under any other provisions of State or federal law, including common law, for injury or damage resulting from a release of used oil or hazardous substances. For purposes of this section, the owner or operator of a used oil collection center may presume that a quantity of no more than five gallons of used oil accepted from any member of the public is not mixed with a hazardous substance, provided that the owner or operator acts in good faith. (1989, c. 784, s. 2.)

§ 130A-309.21. Incentives program.

(a) The Department is authorized to establish an incentives program for individuals who change their own oil to encourage them to return their used oil to a used oil collection center.

(b) The incentives used by the Department may involve the use of discount or prize coupons, prize drawings, promotional giveaways, or other activities the Department determines will promote collection, reuse, or proper disposal of used oil.

(c) The Department may contract with a promotion company to administer the incentives program. (1989, c. 784, s. 2.)

§ 130A-309.22. Grants to local governments.

(a) The Department shall develop a grants program for units of local government to encourage the collection, reuse, and proper disposal of used oil. No grant may be made for any project unless the project is approved by the Department.

(b) The Department shall consider for grant assistance any unit of local government project that uses one or more of the following programs or any activity that the Department feels will reduce the improper disposal and reuse of used oil:

(1) Curbside pickup of used oil containers by a unit of local government or its designee.

(2) Retrofitting of solid waste equipment to promote curbside pickup or disposal of used oil at used oil collection centers designated by the unit of local government.

(3) Establishment of publicly operated used oil collection centers at landfills or other public places.

(4) Providing containers and other materials and supplies that the public can utilize in an environmentally sound manner to store used oil for pickup or return to a used oil collection center.

(5) Providing incentives for the establishment of privately operated public used oil collection centers.

(c) Eligible projects shall be funded according to provisions established by the Department; however, no grant may exceed twenty-five thousand dollars ($25,000).

(d) The Department shall initiate rule making on or before 1 January 1991, necessary to carry out the purposes of this section. (1989, c. 784, s. 2.)

§ 130A-309.23. Certification of used oil transporters.

(a) Any person who transports over public highways after 1 January 1992, more than 500 gallons of used oil in any week must be a certified transporter or must be employed by a person who is a certified transporter.

(b) The Department of Transportation shall develop a certification program for transporters of used oil, and shall issue, deny, or revoke certifications authorizing the holder to transport used oil. Certification requirements shall help assure that a used oil transporter is familiar with appropriate rules and used oil management procedures.

(c) The Department of Transportation shall adopt rules governing certification, which shall include requirements for the following:

(1) Registration and annual reporting pursuant to G.S. 130A-309.17.
(2) Evidence of familiarity with applicable State laws and rules governing used oil transportation.
(3) Proof of liability insurance or other means of financial responsibility for any liability which may be incurred in the transport of used oil.
(4) Marking, by the certified transporter of used oil, of all vehicles which transport used oil or all containers of used oil when it is not feasible to mark the vehicle. The mark must clearly identify the certified used oil transporter and clearly indicate that the vehicle is used to transport used oil. The marking must be visible to others travelling on the highway. (1989, c. 784, s. 2; 1991, c. 488, s. 1.)

§ 130A-309.24. Permits for used oil recycling facilities.

(a) Each person who intends to operate, modify, or close a used oil recycling facility shall obtain an operation or closure permit from the Department prior to operating, modifying, or closing the facility.

(b) By 1 January 1992, the Department shall develop a permitting system for used or recycling facilities after reviewing and considering the applicability of the permit system for hazardous waste treatment, storage, or disposal facilities.

(c) Permits shall not be required under this section for the burning of used oil as a fuel, provided:

(1) A valid air permit issued by the Department is in effect for the facility; and
(2) The facility burns used oil in accordance with applicable United States Environmental Protection Agency regulations, local government regulations, and the requirements and conditions of its air permit.

(d) No permit is required under this section for the use of used oil for the beneficiation or flotation of phosphate rock. (1989, c. 784, s. 2.)

§ 130A-309.25. Training of operators of solid waste management facilities.

(a) The Department shall establish qualifications for, and encourage the development of training programs for, operators of incinerators, operators of landfills, coordinators of local recycling programs, and other solid waste management facilities.

(b) The Department shall work with accredited community colleges, vocational technical centers, State universities, and private institutions in developing educational materials, courses of study, and other such information to be made available for persons seeking to be trained as operators of solid waste management facilities.

(c) A person may not perform the duties of an operator of a solid waste management facility after 1 January 1998, unless he has completed an operator training course approved by the Department. An owner of a solid waste management facility may not employ any person to perform the duties of an operator unless the person has completed an approved solid waste management facility operator training course.

(d) The Commission may adopt rules and minimum standards to effectuate the provisions of this section and to ensure the safe, healthy, and lawful operation of solid waste management facilities. The Commission may establish, by rule, various classifications for operators to address the need for differing levels of training required to operate various types of solid waste management facilities due to different operating requirements at the facilities.

(e) In developing training programs for incinerator operators under this section, the Department shall establish and consult with ad hoc advisory groups to help coordinate the requirements under this section with other training programs for incinerator operators.

(f) This section does not apply to any operator of a solid waste management facility who has five years continuous experience as an operator of a solid waste management facility immediately preceding January 1, 1998, provided that the operator attends a course and completes the continuing education requirements approved by the Department. (1989, c. 784, s. 2; 1993, c. 29, s. 1; 1995 (Reg. Sess., 1996), c. 594, s. 19; 1997-443, s. 15.49(a).)

§ 130A-309.26. Regulation of medical waste.

(a) As used in this section:

(1) "Sharps" means needles, syringes, and scalpel blades.

(2) "Treatment" means any process, including steam sterilization, chemical treatment, incineration, and other methods approved by the Commission which changes the character or composition of medical waste so as to render it noninfectious.

(b) It is the intent of the General Assembly to protect the public health by establishing standards for the safe packaging, storage, treatment, and disposal of medical waste. The Commission shall adopt and the Department shall enforce rules for the packaging, storage, treatment, and disposal of:

(1) Medical waste at facilities where medical waste is generated;

(2) Medical waste from the point at which the waste is transported from the facility where it was generated;

(3) On-site and off-site treatment of medical waste; and

(4) The off-site transport, storage, treatment or disposal of medical waste.

(c) No later than 1 August 1990, the Commission shall adopt rules necessary to protect the health, safety, and welfare of the public and to carry out the purpose of this section. Such rules shall address, but need not be limited to, the packaging of medical waste, including specific requirements for the safe packaging of sharps and the segregation, storage, treatment, and disposal of medical wastes at the facilities in which such waste is generated. (1989, c. 784, s. 2; 1995 (Reg. Sess., 1996), c. 594, s. 20.)

§ 130A-309.27. Joint and several liability.

(a) As used in this section:

(1) "Owner or operator" means, in addition to the usual meanings of the term, any owner of record of any interest in land on which a landfill is or has been sited, any person or business entity that owns a majority interest in any other business entity which is the owner or operator of a landfill, and any person designated as a joint permittee pursuant to G.S. 130A-295.2(e).

(2) "Proceeds" means all funds collected and received by the Department, including interest and penalties on delinquent fees.

(b) Every owner or operator of a landfill is jointly and severally liable for the improper operation and closure of the landfill, as provided by law.

(c) through (f) Repealed by Session Laws 2007-550, s. 5(b), effective August 1, 2007. (1989, c. 784, s. 2; 2007-550, s. 5(b).)

Editor's Note. — Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, s. 5(b), effective August 1, 2007, and applicable to any application for a permit for a solid waste management facility that is pending on that date, in the section heading, substituted "Joint and several liability" for "Landfill escrow account" in the section heading; in subdivision (a)(1), made a stylistic change, substituted "business entity" for "corporation" both times it appears, and added "and any person designated as a joint permittee pursuant to G.S. 130A-295.2(e)"; and deleted subsections (c) through (f).

§ 130A-309.28. University research.

Research, training, and service activities related to solid and hazardous waste management conducted by The University of North Carolina shall be coordinated by the Board of Governors of The University of North Carolina through the Office of the President. Proposals for research contracts and grants; public service assignments; and responses to requests for information and technical assistance by the State and units of local government, business, and industry shall be addressed by a formal process involving an advisory board of university personnel appointed by the President and chaired and directed by an individual appointed by the President. The Board of Governors of The University of North Carolina shall consult with the Department in developing the research programs and provide the Department with a copy of the proposed research program for review and comment before the research is undertaken. Research contracts shall be awarded to independent nonprofit colleges and universities within the State which are accredited by the Southern Association of Colleges and Schools on the same basis as those research contracts awarded to The University of North Carolina. Research activities shall include the following areas:

(1) Methods and processes for recycling solid and hazardous waste;
(2) Methods of treatment for detoxifying hazardous waste; and
(3) Technologies for disposing of solid and hazardous waste. (1989, c. 784, s. 2.)

§ 130A-309.29. Adoption of rules.

The Commission may adopt rules to implement the provisions of this Part pursuant to Article 2A of Chapter 150B of the General Statutes. (1991, c. 621, s. 12; 2000-189, s. 12.)

Editor's Note. — Session Laws 1997-374, s. 1, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt a rule regarding design criteria for municipal solid wasted landfills that complies with 40 C.F.R. Part 258.40 (1 July 1996 Edition) and that provides for alternate landfills liners that are at least as protective as the liner currently authorized under the rules of the Commission for Health Services [now the Commission for Public Health]."

Session Laws 1997-374, s. 2, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Commission for Health Services [now the Commission for Public Health] shall adopt the rule required by Section 1 of this act as a temporary rule no later than 1 July 1998."

§§ 130A-309.30 through 130A-309.50: Reserved for future codification purposes.

Part 2B. Scrap Tire Disposal Act.

§ 130A-309.51. Title.

This Part may be cited as the "North Carolina Scrap Tire Disposal Act." (1989, c. 784, s. 3.)

§ 130A-309.52. Findings; purpose.

(a) The General Assembly finds that:

(1) Scrap tire disposal poses a unique and troublesome solid waste management problem.

(2) Scrap tires are a usable resource that may be recycled for energy value.

(3) Uncontrolled disposal of scrap tires may create a public health and safety problem because tire piles act as breeding sites for mosquitoes and other disease-transmitting vectors, pose substantial fire hazards, and present a difficult disposal problem for landfills.

(4) A significant number of scrap tires are illegally dumped in North Carolina.

(5) It is in the State's best interest to encourage efforts to recycle or recover resources from scrap tires.

(6) It is desirable to allow units of local government to control tire disposal for themselves and to encourage multicounty, regional approaches to scrap tire disposal and collection.

(7) It is desirable to encourage reduction in the volume of scrap tires being disposed of at public sanitary landfills.

(b) The purpose of this Part is to provide statewide guidelines and structure for the environmentally safe disposal of scrap tires to be administered through units of local government. (1989, c. 784, s. 3.)

§ 130A-309.53. Definitions.

Unless a different meaning is required by the context, the following definitions shall apply throughout this Part:

(1) "Collection site" means a site used for the storage of scrap tires.

(2) "Disposal fee" is any amount charged by a tire collector, tire processor, or unit of local government in exchange for accepting scrap tires.

(3) "In-county scrap tire" means any scrap tire brought for disposal from inside the county in which the collection or processing site is located.

(4) "Out-of-county scrap tire" means any scrap tire brought for disposal from outside the county in which the collection or processing site is located.

(5) "Processing site" means a site actively used to produce or manufacture usable materials, including fuel, from scrap tires. Commercial enterprises processing scrap tires shall not be considered solid waste management facilities insofar as the provisions of G.S. 130A-294(a)(4) and G.S. 130A-294(b) are concerned.

(6) "Scrap tire" means a tire that is no longer suitable for its original, intended purpose because of wear, damage, or defect.

(7) "Tire" means a continuous solid or pneumatic rubber covering that encircles the wheel of a vehicle. Bicycle tires and other tires for vehicles propelled by human power are not subject to the provisions of this Part.

(8) "Tire collector" means a person who owns or operates a site used for the storage, collection, or deposit of more than 50 scrap tires.

(9) "Tire hauler" means a person engaged in the picking up or transporting of scrap tires for the purpose of storage, processing, or disposal.

(10) "Tire processor" means a person who engages in the processing of scrap tires or one who owns or operates a tire processing site.

(11) "Tire retailer" means a person who engages in the retail sale of a tire in any quantity for any use or purpose by the purchaser other than for resale. (1989, c. 784, s. 3; 1991, c. 221, s. 2; 1995 (Reg. Sess., 1996), c. 594, s. 21.)

§ 130A-309.54. Use of scrap tire tax proceeds.

Article 5B of Chapter 105 imposes a tax on new tires to provide funds for the disposal of scrap tires. A county may use proceeds of the tax distributed to it under that Article only for the disposal of scrap tires pursuant to the provisions of this Part or for the abatement of a nuisance pursuant to G.S. 130A-309.60. (1989, c. 784, s. 3; 1991, c. 221, s. 3; 1993, c. 364, s. 1(a).)

§§ 130A-309.55, 130A-309.56: Repealed by Session Laws 1991, c. 221, s. 4.

Cross References. — As to privilege taxes imposed upon new tire sales, see G.S. 105-187.16. As to use of such tax proceeds, see G.S. 105-187.19.

§ 130A-309.57. Scrap tire disposal program.

(a) The owner or operator of any scrap tire collection site shall, within six months after October 1, 1989, provide the Department with information concerning the site's location, size, and the approximate number of scrap tires that are accumulated at the site and shall initiate steps to comply with subsection (b) of this section.

(b) On or after July 1, 1990:

- (1) A person may not maintain a scrap tire collection site or a scrap tire disposal site unless the site is permitted.
- (2) It is unlawful for any person to dispose of scrap tires in the State unless the scrap tires are disposed of at a scrap tire collection site or at a tire disposal site, or disposed of for processing at a scrap tire processing facility.

(c) By January 1, 1990, the Commission shall adopt rules to carry out the provisions of this section. Such rules shall:

- (1) Provide for the administration of scrap tire collector and collection center permits and scrap tire disposal site permits, which may not exceed two hundred fifty dollars ($250.00) annually;
- (2) Set standards for scrap tire processing facilities and associated scrap tire sites, scrap tire collection centers, and scrap tire collectors; and
- (3) Authorize the final disposal of scrap tires at a permitted solid waste disposal facility provided the tires have been cut into sufficiently small parts to assure their proper disposal.

(d) A permit is not required for:

- (1) A tire retreading business where fewer than 1,000 scrap tires are kept on the business premises;
- (2) A business that, in the ordinary course of business, removes tires from motor vehicles if fewer than 1,000 of these tires are kept on the business premises; or
- (3) A retail tire-selling business which is serving as a scrap tire collection center if fewer than 1,000 scrap tires are kept on the business premises.

(e) The Department shall encourage the voluntary establishment of scrap tire collection centers at retail tire-selling businesses, scrap tire processing facilities, and solid waste disposal facilities, to be open to the public for the deposit of used and scrap tires. The Department may establish an incentives program for individuals to encourage them to return their used or scrap tires to a scrap tire collection center. (1989, c. 784, s. 3.)

§ 130A-309.58. Disposal of scrap tires.

(a) Each county is responsible for providing for the disposal of scrap tires located within its boundaries in accordance with the provisions of this Part and any rules issued pursuant to this Part. The following are permissible methods of scrap tire disposal:

(1) Incinerating;
(2) Retreading;
(3) Constructing crash barriers;
(4) Controlling soil erosion when whole tires are not used;
(5) Chopping or shredding;
(6) Grinding into crumbs for use in road asphalt, tire derived fuel, and as raw material for other products;
(7) Slicing vertically, resulting in each scrap tire being divided into at least two pieces;
(8) Sludge composting;
(9) Using for agriculture-related purposes;
(10) Chipping for use as an oyster cultch as approved by rules adopted by the Marine Fisheries Commission;
(11) Cutting, stamping, or dyeing tires;
(12) Pyrolizing and other physico-chemical processing;
(13) Hauling to out-of-State collection or processing sites; and
(14) Monofilling split, ground, chopped, sliced, or shredded scrap tires.

(b) The Commission may adopt rules approving other permissible methods of scrap tire disposal. Landfilling of whole scrap tires is prohibited. The prohibition against landfilling whole tires applies to all whole pneumatic rubber coverings, but does not apply to whole solid rubber coverings.

(c) Units of local government may enter into joint ventures or other cooperative efforts with other units of local government for the purpose of disposing of scrap tires. Units of local government may enter into leases or other contractual arrangements with units of local government or private entities in order to dispose of scrap tires.

(d) Each county is responsible for developing a description of scrap tire disposal procedures. These procedures shall be included in any solid waste management plan required by the Department under this Article. Further, any revisions to the initial description of the scrap tire disposal procedures shall be forwarded to the Department.

(e) A county shall provide, directly or by contract with another unit of local government or private entity, at least one site for scrap tire disposal for that county. The unit of local government or contracting party may not charge a disposal fee for the disposal of scrap tires except as provided in this subsection. A unit of local government or contracting party may charge a disposal fee that does not exceed the cost of disposing of the scrap tires only if:

(1) The scrap tires are new tires that are being disposed of by their manufacturer because they do not meet the manufacturer's standards for salable tires; or
(2) The scrap tires are delivered to a local government scrap tire disposal site without an accompanying certificate required by G.S. 130A-309.58(f) that indicates that the tires originated in a county within North Carolina.

(f) Every tire retailer or other person disposing of scrap tires shall complete and sign a certification form prescribed by the Department and distributed to each county, certifying that the tires were collected in the normal course of business for disposal, the county in which the tires were collected, and the number of tires to be disposed of. This form also shall be completed and signed by the tire hauler, certifying that the load contains the same tires that were received from the tire retailer or other person disposing of scrap tires. The tire hauler shall present this certification form to the tire processor or tire collector at the time of delivery of the scrap tires for disposal, collection, or processing. Copies of these certification forms shall be retained for a minimum of three years after the date of delivery of the scrap tires.

(g) The provisions of subsection (f) of this section do not apply to tires that are brought for disposal in quantities of five or less by someone other than a tire collector, tire processor, or tire hauler. (1989, c. 784, s. 3; 1991, c. 221, s. 5; 1993, c. 548, s. 4; 1995 (Reg. Sess., 1996), c. 594, s. 22; 1997-209, s. 1.)

§ 130A-309.59. Registration of tire haulers.

(a) Before engaging in the hauling of scrap tires in this State, any tire hauler must register with the Department whereupon the Department shall issue to the tire hauler a scrap tire hauling identification number. A tire retailer licensed under G.S. 105-164.29 and solely engaged in the hauling of scrap tires received by it in connection with the retail sale of replacement tires is not required to register under this section.

(b) Each tire hauler shall furnish its hauling identification number on all certification forms required under G.S. 130A-309.58(f). Any tire retailer engaged in the hauling of scrap tires and not required by subsection (a) of this section to be registered shall supply its merchant identification number on all certification forms required by G.S. 130A-309.58(f). (1989, c. 784, s. 3.)

§ 130A-309.60. Nuisance tire collection sites.

(a) On or after July 1, 1990, if the Department determines that a tire collection site is a nuisance, it shall notify the person responsible for the nuisance and request that the tires be processed or removed within 90 days. If the person fails to take the requested action within 90 days, the Department shall order the person to abate the nuisance within 90 days. If the person responsible for the nuisance is not the owner of the property on which the tire collection site is located, the Department may order the property owner to permit abatement of the nuisance. If the person responsible for the nuisance fails to comply with the order, the Department shall take any action necessary to abate the nuisance, including entering the property where the tire collection site is located and confiscating the scrap tires, or arranging to have the scrap tires processed or removed.

(b) When the Department abates the nuisance pursuant to subsection (a) of this section, the person responsible for the nuisance shall be liable for the actual costs incurred by the Department for its nuisance abatement activities and its administrative and legal expenses related to the abatement. The Department may ask the Attorney General to initiate a civil action to recover these costs from the person responsible for the nuisance. Nonpayment of the actual costs incurred by the Department shall result in the imposition of a lien on the owner's real property on which the tire collection site is located.

(c) This section does not apply to any of the following:

(1) A retail business premises where tires are sold if no more than 500 scrap tires are kept on the premises at one time;

(2) The premises of a tire retreading business if no more than 3,000 scrap tires are kept on the premises at one time;

(3) A premises where tires are removed from motor vehicles in the ordinary course of business if no more than 500 scrap tires are kept on the premises at one time;

(4) A solid waste disposal facility where no more than 60,000 scrap tires are stored above ground at one time if all tires received for storage are

processed, buried, or removed from the facility within one year after receipt;

(5) A site where no more than 250 scrap tires are stored for agricultural uses; and

(6) A construction site where scrap tires are stored for use or used in road surfacing and construction of embankments.

(d) The descending order of priority for the Department's abatement activities under subsection (a) of this section is as follows:

(1) Tire collection sites determined by the Department to contain more than 1,000,000 tires;

(2) Tire collection sites which constitute a fire hazard or threat to public health;

(3) Tire collection sites in densely populated areas; and

(4) Any other tire collection sites that are determined to be a nuisance.

(e) This section does not change the existing authority of the Department to enforce any existing laws or of any person to abate a nuisance.

(f) As used in this section, "nuisance" means an unreasonable danger to public health, safety, or welfare or to the environment. (1989, c. 784, s. 3.)

CASE NOTES

When Owner Not Liable. — An owner who is not the "person responsible for the nuisance" under this section is not liable in a civil action by the Attorney General. D.G. Matthews & Son v. State ex rel. McDevitt, 131 N.C. App. 520, 508 S.E.2d 331 (1998).

§ 130A-309.61. Effect on local ordinances.

This Part preempts any local ordinance regarding the disposal of scrap tires to the extent the local ordinance is inconsistent with this Part or the rules adopted pursuant to this Part. (1989, c. 784, s. 3; 1993, c. 548, s. 5; 1997-209, s. 1.)

§ 130A-309.62. Fines and penalties.

Any person who knowingly hauls or disposes of a tire in violation of this Part or the rules adopted pursuant to this Part shall be assessed a civil penalty of fifty dollars ($50.00) per violation. Each tire hauled or disposed of in violation of this Part or rules adopted pursuant to this Part constitutes a separate violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 784, s. 3; 1998-215, s. 55.)

§ 130A-309.63. Scrap Tire Disposal Account.

(a) Creation. — The Scrap Tire Disposal Account is established as a nonreverting account within the Department. The Account consists of revenue credited to the Account from the proceeds of the scrap tire disposal tax imposed by Article 5B of Chapter 105 of the General Statutes.

(b) Use. — The Department may use revenue in the Account only as authorized by this section.

(1) The Department may use up to fifty percent (50%) of the revenue in the Account to make grants to units of local government to assist them in disposing of scrap tires. To administer the grants, the Department shall establish procedures for applying for a grant and the criteria for selecting among grant applicants. The criteria shall include the

financial ability of a unit of local government to provide for scrap tire disposal, the severity of a unit of local government's scrap tire disposal problem, the effort made by a unit of local government to ensure that only tires generated in the normal course of business in this State are provided free disposal, and the effort made by a unit of local government to provide for scrap tire disposal within the resources available to it.

(2) The Department may use up to forty percent (40%) of the revenue in the Account to make grants to encourage the use of processed scrap tire materials. These grants may be made to encourage the use of tire-derived fuel, crumb rubber, carbon black, or other components of tires for use in products such as fuel, tires, mats, auto parts, gaskets, flooring material, or other applications of processed tire materials. These grants shall be made in consultation with the Department of Commerce, the Division of Pollution Prevention and Environmental Assistance of the Department, and, where appropriate, the Department of Transportation. Grants to encourage the use of processed scrap tire materials shall not be used to process tires.

(3) The Department may use revenue in the Account to support a position to provide local governments with assistance in developing and implementing scrap tire management programs designed to complete the cleanup of nuisance tire collection sites and prevent scrap tires generated from outside of the State from being presented for free disposal in the State.

(4) The Department may use the remaining revenue in the Account only to clean up scrap tire collection sites that the Department has determined are a nuisance. The Department may use funds in the Account to clean up a nuisance tire collection site only if no other funds are available for that purpose.

(c) Eligibility. — A unit of local government is not eligible for a grant for scrap tire disposal unless its costs for disposing of scrap tires for the six-month period preceding the date the unit of local government files an application for a grant exceeded the amount the unit of local government received during that period from the proceeds of the scrap tire tax under G.S. 105-187.19. A grant to a unit of local government for scrap tire disposal may not exceed the unit of local government's unreimbursed cost for the six-month period.

(d) Repealed by Session Laws 2002-126, s. 12.5(b), effective July 1, 2002.

(e) Reporting. — The Department shall include in the report to be delivered to the Environmental Review Commission on or before 15 January of each year pursuant to G.S. 130A-309.06(c) a description of the implementation of the North Carolina Scrap Tire Disposal Act for the fiscal year ending the preceding 30 June. The description of the implementation of the North Carolina Scrap Tire Disposal Act shall include the beginning and ending balances in the Account for the reporting period, the amount credited to the Account during the reporting period, and the amount of revenue used for grants and to clean up nuisance tire collection sites. (1993, c. 548, s. 6; 1995 (Reg. Sess., 1996), c. 594, s. 23; 1997-209, ss. 1, 2; 2001-452, s. 3.4; 2002-126, s. 12.5(b).)

§§ 130A-309.64 through 130A-309.69: Reserved for future codification purposes.

Part 2C. Lead-Acid Batteries.

§ 130A-309.70. Landfilling and incineration of lead-acid batteries prohibited; delivery for recycling.

(a) No person shall knowingly place or dispose of a used lead-acid battery in a landfill, incinerator, or in any waste-to-energy facility. Any person may deliver a lead-acid battery to a battery retailer or wholesaler, or to a secondary lead smelter, or to a collection or recycling facility authorized under this Chapter or by the United States Environmental Protection Agency.

(b) No battery retailer shall knowingly place or dispose of a used lead-acid battery in a landfill, incinerator, or waste-to-energy facility. Any battery retailer may deliver a used lead-acid battery to the agent of a battery wholesaler or a secondary lead smelter, to a battery manufacturer for delivery to a secondary lead smelter, or to a collection or recycling facility authorized under this Chapter or by the United States Environmental Protection Agency.

(c) Any person who knowingly places or disposes of a lead-acid battery in violation of this section shall be assessed a civil penalty of not more than fifty dollars ($50.00) per violation. Each battery improperly disposed of shall constitute a separate violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 375, s. 2; 1998-215, s. 56.)

Editor's Note. — Session Laws 1991, c. 375, s. 3, provides: "This Act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this Act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise appropriated or available to the Department."

§ 130A-309.71. Retailers required to accept lead-acid batteries for recycling; posting of notice required.

(a) A person who sells or offers for sale lead-acid batteries at retail in this State shall accept from customers, at the point of transfer or sale, used lead-acid batteries of the type and in a quantity at least equal to the number of new batteries purchased, if offered by customers.

(b) A person who sells or offers for sale lead-acid batteries at retail in this State shall post written notice which must be at least 81/2 inches by 11 inches in size and must contain the universal recycling symbol and the following language:

(1) "It is illegal to improperly dispose of a motor vehicle battery or other lead-acid battery."
(2) "Recycle your used batteries."
(3) "State law requires us to accept used motor vehicle batteries or other lead-acid batteries for recycling in exchange for new batteries purchased."

(c) Any person who fails to post the notice required by subsection (b) of this section after receiving a written warning from the Department to do so shall be assessed a civil penalty of not more than fifty dollars ($50.00) per day for each day the person fails to post the required notice.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 375, s. 2; 1998-215, s. 57.)

§ 130A-309.72. Wholesalers required to accept lead-acid batteries.

(a) No person selling new lead-acid batteries at wholesale shall refuse to accept from customers at the point of transfer, used lead-acid batteries of the type and in a quantity at least equal to the number of new batteries purchased, if offered by customers. A person accepting batteries in transfer from a battery retailer shall be allowed a period not to exceed 90 days to remove batteries from the retail point of collection.

(b) Any person who violates this section shall be assessed a civil penalty of fifty dollars ($50.00) per violation. Each battery refused by a wholesaler or not removed from the retail point of collection within 90 days shall constitute a separate violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 375, s. 2; 1998-215, s. 58.)

§ 130A-309.73. Inspections of battery retailers authorized; construction of this Part.

(a) The Department may inspect any place, building, or premise subject to the provisions of G.S. 130A-309.71. The Department may issue warnings to persons who fail to comply with the provisions of this Part.

(b) The provisions of this Part shall not be construed to prohibit any person who does not sell lead-acid batteries from collecting and recycling such batteries. (1991, c. 375, s. 2.)

§§ 130A-309.74 through 130A-309.79: Reserved for future codification purposes.

Part 2D. Management of Discarded White Goods.

§ 130A-309.80. Findings and purpose.

The General Assembly finds that white goods are difficult to dispose of, that white goods that contain chlorofluorocarbon refrigerants pose a danger to the environment, and that it is in the best interest of the State to require that chlorofluorocarbon refrigerants be removed from discarded white goods. This Part therefore provides for the management of discarded white goods. (1993, c. 471, s. 4.)

§ 130A-309.81. Management of discarded white goods; disposal fee prohibited.

(a) Duty. — Each county is responsible for providing at least one site for the collection of discarded white goods. It must also provide for the disposal of discarded white goods and for the removal of chlorofluorocarbon refrigerants from white goods. A county may contract with another unit of local government or a private entity in accordance with Article 15 of Chapter 153A of the General Statutes to provide for the management of discarded white goods or for the removal of chlorofluorocarbon refrigerants from white goods.

(b) Restrictions. — A unit of local government or a contracting party may not charge a disposal fee for the disposal of white goods. A white good may not be disposed of in a landfill, an incinerator, or a waste-to-energy facility.

(c) Plan. — Each county shall establish written procedures for the management of white goods. The county shall include the procedures in any solid waste management plan required by the Department under this Article. (1993, c. 471, ss. 4, 6; 1993 (Reg. Sess., 1994), c. 745, ss. 36, 37; 2001-265, s. 6.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 745, s. 37, repealed Session Laws 1993, c. 471, s. 6, which would have deleted "not" following "a contracting party may" in subsection (b). However, Session Laws 1993 (Reg. Sess., 1994), c. 745, s. 38, effective

July 1, 1998, itself made the same change. Subsequently, Session Laws 2001-265, s. 6, effective retroactively to July 1, 1998, repealed s. 38 of Session Laws 1993 (Reg. Sess., 1994), c. 745.

Session Laws 1993, c. 471, s. 11, as originally enacted, had provided that the version of this section as amended by Session Laws 1993, c. 471, s. 6 (but subsequently repealed) would be effective July 1, 1998. Session Laws 1998-24, s. 11, had extended this date to July 1, 2002, and Session Laws 2000-109, s. 9(a), effective July 13, 2000, had deleted the postponed date for this amendment.

The section is set out above as it read prior to amendment by Session Laws 1993, c. 471, s. 6 and by Session Laws 1993 (Reg. Sess., 1994), c. 745, s. 38.

§ 130A-309.82. Use of disposal tax proceeds by counties.

Article 5C of Chapter 105 of the General Statutes imposes a tax on new white goods to provide funds for the management of discarded white goods. A county must use the proceeds of the tax distributed to it under that Article for the management of discarded white goods. The purposes for which a county may use the tax proceeds include, but are not limited to, the following:

(1) Capital improvements for infrastructure to manage discarded white goods, such as concrete pads for loading, equipment essential for moving white goods, storage sheds for equipment essential to white goods disposal management, and freon extraction equipment.

(2) Operating costs associated with managing discarded white goods, such as labor, transportation, and freon extraction.

(3) The cleanup of illegal white goods disposal sites, the cleanup of illegal disposal sites consisting of more than fifty percent (50%) discarded white goods, and, as to those illegal disposal sites consisting of fifty percent (50%) or less discarded white goods, the cleanup of the discarded white goods portion of the illegal disposal sites.

Except as provided in subdivision (3) of this section, a county may not use the tax proceeds for a capital improvement or operating expense that does not directly relate to the management of discarded white goods. Except as provided in subdivision (3) of this section, if a capital improvement or operating expense is partially related to the management of discarded white goods, a county may use the tax proceeds to finance a percentage of the costs equal to the percentage of the use of the improvement or expense directly related to the management of discarded white goods. (1993, c. 471, s. 4; 1998-24, ss. 4, 7; 2000-109, s. 9(a); 2001-265, s. 5.)

Editor's Note. — Session Laws 1993, c. 471, s. 4 enacted this section and s. 7 provided for its postponed repeal; subsequently, Session Laws 2001-265, s. 5, effective retroactively to July 13, 2000, repealed s. 7 of Session Laws 1993, c. 471. Session Laws 1993, c. 471, s. 11 made the section effective January 1, 1994, to repeal on July 1, 1999. Session Laws 1998-24, s. 7 amended Session Laws 1993, c. 471, s. 11 to extend the postponed repeal date to July 1, 2002. Session Laws 2000-109, s. 9(a), effective July 13, 2000, amended s. 11 to delete the postponed date for repeal of this section.

§ 130A-309.83. White Goods Management Account.

(a) The White Goods Management Account is established within the Department. The Account consists of revenue credited to the Account from the proceeds of the white goods disposal tax imposed by Article 5C of Chapter 105 of the General Statutes.

(b) The Department shall use revenue in the Account to make grants to units of local government to assist them in managing discarded white goods. To administer the grants, the Department shall establish procedures for applying for a grant and the criteria for selecting among grant applicants. The criteria shall include the financial ability of a unit to manage white goods, the severity of a unit's white goods management problem, and the effort made by a unit to manage white goods within the resources available to it.

(c) A unit of local government is not eligible for a grant unless its costs of managing white goods for a six-month period preceding the date the unit files an application for a grant exceeded the amount the unit received during that period from the proceeds of the white goods disposal tax under G.S. 105-187.24. The Department shall determine the six-month period to be used in determining who is eligible for a grant. A grant to a unit may not exceed the unit's unreimbursed cost for the six-month period.

(d) If a unit of local government anticipates that its costs of managing white goods during a six-month period will exceed the amount the unit will receive during that period because the unit will make a capital expenditure for the management of white goods or because the unit will incur other costs resulting from improvements to that unit's white goods management program, the unit may request that the Department make an advance determination that the costs are eligible to be paid by a grant from the White Goods Management Account and that there will be sufficient funds available in the Account to cover those costs. If the Department determines that the costs are eligible for reimbursement and that funds will be available, the Department shall reserve funds for that unit of local government in the amount necessary to reimburse allowable costs. The Department shall notify the unit of its determination and fund availability within 60 days of the request from the unit of local government. This subsection applies only to capital expenditures for the management of white goods and to costs resulting from improvements to a unit's white goods management program. (1993, c. 471, s. 4; 1995 (Reg. Sess., 1996), c. 594, s. 24; 1998-24, s. 7; 2000-109, s. 9(a); 2001-265, s. 5.)

Editor's Note. — Session Laws 1993-471, s. 4 enacted this section and s. 7 provided for its postponed repeal; subsequently, Session Laws 2001-265, s. 5, effective retroactively to July 13, 2000, repealed s. 7 of Session Laws 1993, c. 471. Session Laws 1993-471, s. 11 made the section effective January 1, 1994, to repeal on July 1, 1999. Session Laws 1998-24, s. 7 amended Session Laws 1993-471, s. 11 to extend the postponed repeal date to July 1, 2002. Session Laws 2000-109, s. 9(a), effective July 13, 2000, amended s. 11 to delete the postponed date for repeal of this section.

§ 130A-309.84. Civil penalties for improper disposal.

The Department may assess a civil penalty of not more than one hundred dollars ($100.00) against a person who, knowing it is unlawful, places or otherwise disposes of a discarded white good in a landfill, an incinerator, or a waste-to-energy facility. The Department may assess this penalty for the day the unlawful disposal occurs and each following day until the white good is disposed of properly.

The Department may assess a penalty of up to one hundred dollars ($100.00) against a person who, knowing it is required, fails to remove chlorofluorocarbon refrigerants from a discarded white good. The Department may assess this penalty for the day the failure occurs and each following day until the chlorofluorocarbon refrigerants are removed.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1993, c. 471, s. 4; 1998-215, s. 59.)

§ 130A-309.85. Reporting on the management of white goods.

The Department shall include in the report to be delivered to the Environmental Review Commission on or before 15 January of each year pursuant to

G.S. 130A-309.06(c) a description of the management of white goods in the State for the fiscal year ending the preceding 30 June. The description of the management of white goods shall include the following information:

(1) The amount of taxes collected and distributed under G.S. 105-187.24 during the period covered by the report.

(2) The cost to each county of managing white goods during the period covered by the report.

(3) The beginning and ending balances of the White Goods Management Account for the period covered by the report and a list of grants made from the Account for the period.

(4) Any other information the Department considers helpful in understanding the problem of managing white goods.

(5) A summary of the information concerning the counties' white goods management programs contained in the counties' Annual Financial Information Report. (1993, c. 471, s. 4; 1995 (Reg. Sess., 1996), c. 594, s. 25; 1998-24, ss. 5, 7; 2000-109, s. 9(a); 2001-265, s. 5; 2001-452, s. 3.5.)

Editor's Note. — Session Laws 1993, c. 471, s. 9 was a postponed amendment to this section. Session Laws 1998-24, s. 7, amended Session Laws 1993-471, s. 11, to change the effective date of the amendment by Session Laws 1993-471, s. 9 to July 1, 2002. Session Laws 2000-109, s. 9(a), effective July 13, 2000, amended s. 11 to delete the postponed date for this amendment. Subsequently, Session Laws 2001-265, s. 5, effective retroactively to July 13, 2000, repealed Session Laws 1993, c. 471, s. 9. This section is therefore set out without the changes from the 1993 amendment.

Session Laws 1996, Second Extra Session, c. 18, s. 27.10, provides: "Beginning in 1997, the Department of Environment, Health and Natural Resources shall report on the generation, storage, treatment, and disposal of hazardous waste in North Carolina no more often than it is required to report under a federal law or federal regulation."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

§ 130A-309.86. Effect on local ordinances.

This Part preempts any local ordinance regarding the management of white goods that is inconsistent with this Part or the rules adopted pursuant to this Part. It does not preempt any local ordinance regarding the management of white goods that is consistent with this Part or rules adopted pursuant to this Part. (1993, c. 471, s. 4.)

§ 130A-309.87. Eligibility for disposal tax proceeds.

(a) Receipt of Funds. — A county may not receive a quarterly distribution of the white goods disposal tax proceeds under G.S. 105-187.24 unless the undesignated balance in the county's white goods account at the end of its fiscal year is less than the threshold amount. Based upon the information in a county's Annual Financial Information Report, the Department must notify the Department of Revenue by March 1 of each year which counties may not receive a distribution of the white goods disposal tax for the current calendar year. The Department of Revenue will credit the undistributed tax proceeds to the White Goods Management Account.

If the undesignated balance in a county's white goods account subsequently falls below the threshold amount, the county may submit a statement to the Department, certified by the county finance officer, that the undesignated balance in its white goods account is less than the threshold amount. Upon receipt of the statement, the Department will notify the Department of Revenue to distribute to the county its quarterly distribution of the white goods disposal tax proceeds. The Department must notify the Department of Revenue of the county's change of status at least 30 days prior to the next quarterly distribution.

For the purposes of this subsection, the term "threshold amount" means twenty-five percent (25%) of the amount of white goods disposal tax proceeds a county received, or would have received if it had been eligible to receive them under G.S. 130A-309.87, during the preceding fiscal year.

(b) Annual Financial Information Report. — On or before November 1 of each year, a county must submit a copy of its Annual Financial Information Report, prepared in accordance with G.S. 159-33.1, to the Department. The Secretary of the Local Government Commission must require the following information in that report:

(1) The tonnage of white goods scrap metal collected.
(2) The amount of revenue credited to its white goods account. This revenue should include all receipts derived from the white goods disposal tax, the sale of white goods scrap metals and freon, and a grant from the White Goods Management Account.
(3) The expenditures from its white goods account. The expenditures should include operating expenses and capital improvement costs associated with its white goods management program.
(4) The designated and undesignated balance of its white goods account.
(5) A comparison of the undesignated balance of its white goods account at the end of the fiscal year and the amount of white goods disposal tax proceeds it received, or would have received if it had been eligible to receive it under G.S. 130A-309.87, during the fiscal year. (1998-24, s. 6.)

§§ 130A-309.88, 130A-309.89: Reserved for future codification purposes.

Part 2E. Discarded Computer Equipment Management.

§ 130A-309.90. (Effective January 1, 2009) Findings.

The General Assembly makes the following findings:

(1) The computer equipment waste stream is growing rapidly in volume and complexity and can introduce toxic materials into solid waste landfills.
(2) It is in the best interests of the citizens of this State to have convenient, simple, and free access to recycling services for discarded computer equipment.
(3) Collection programs operated by local government and nonprofit agencies are an efficient way to divert discarded computer equipment from disposal and to provide recycling services to all citizens of this State.
(4) The development of local and nonprofit collection programs is hindered by the high costs of recycling and transporting discarded computer equipment.
(5) No other system currently exists, either provided by electronics manufacturers, retailers, or others, to adequately serve all citizens of the State and to divert large quantities of discarded computer equipment from disposal.

(6) Manufacturer responsibility is an effective way to ensure that manufacturers of computer equipment take part in a solution to the electronic waste problem.

(7) The recycling of discarded computer equipment recovers valuable materials for reuse and will create jobs and expand the tax base of the State. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550, s. 16.6(a), provides: 'Part 2E of Article 9 of Chapter 130A of the General Statutes, as enacted by Section 16.1(a) of [Session Laws 2007-550], becomes effective as follows:

"(1) G.S. 130A-309.90 becomes effective 1 January 2009.

"(2) G.S. 130A-309.91 becomes effective 1 January 2009.

"(3) G.S. 130A-309.92 becomes effective 1 January 2009.

"(4) G.S. 130A-309.93(a) becomes effective 1 January 2009.

"(5) G.S. 130A-309.93(b) becomes effective 1 January 2009.

"(6) G.S. 130A-309.93(c) becomes effective 1 October 2009.

"(7) G.S. 130A-309.93(d) becomes effective 1 October 2009.

"(8) G.S. 130A-309.93(e) becomes effective 1 January 2009.

"(9) G.S. 130A-309.93(f) becomes effective 1 January 2009.

"(10) G.S. 130A-309.93(g) becomes effective 1 February 2011.

"(11) G.S. 130A-309.94 becomes effective 1 January 2010.

"(12) G.S. 130A-309.95(1) becomes effective 1 January 2009.

"(13) G.S. 130A-309.95(2) becomes effective 1 January 2009.

"(14) G.S. 130A-309.95(3) becomes effective 1 January 2009.

"(15) G.S. 130A-309.96 becomes effective 1 January 2009.

"(16) G.S. 130A-309.97 becomes effective 1 January 2009.

"(17) G.S. 130A-309.98 becomes effective 1 April 2011."

Session Laws 2007-550, s. 19, is a severability clause.

§ 130A-309.91. (Effective January 1, 2009) Definitions.

As used in this Part, the following definitions apply:

(1) Business entity. — Defined in G.S. 55-1-40(2a).

(2) Computer equipment. — Any desktop central processing unit, any laptop computer, the monitor or video display unit for a computer system, and the keyboard, mice, and other peripheral equipment. Computer equipment does not include a printing device such as a printer, a scanner, a combination print-scanner-fax machine, or other device designed to produce hard paper copies from a computer; an automobile; a television; a household appliance; a large piece of commercial or industrial equipment, such as commercial medical equipment, that contains a cathode ray tube, a cathode ray tube device, a flat panel display, or similar video display device that is contained within, and is not separate from, the larger piece of equipment, or other medical devices as that term is defined under the federal Food, Drug, and Cosmetic Act.

(3) Discarded computer equipment. — Computer equipment that is solid waste.

(4) Discarded computer equipment collector. — A municipal or county government, nonprofit agency, or retailer that accepts discarded computer equipment from the public.

(5) Manufacturer. — A person who manufactures computer equipment sold under its own brand or label; sells under its own brand or label computer equipment produced by other suppliers; imports into the United States computer equipment that was manufactured outside of the United States; or owns a brand that it licenses to another person for use on computer equipment. Manufacturer includes a business entity that acquires another business entity that manufactures or has manufactured computer equipment.

(6) Orphan discarded computer equipment. — Any discarded computer equipment for which a manufacturer cannot be identified or for which the manufacturer is no longer in business and has no successor in interest.

(7) Retailer. — A person who sells computer equipment in the State to a consumer. Retailer includes a manufacturer of computer equipment that sells directly to a consumer through any means, including transactions conducted through sales outlets, catalogs, the Internet, or any similar electronic means, but does not include a person who sells computer equipment to a distributor or retailer through a wholesale transaction. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2009.

Session Laws 2007-550, s. 16.1(b), provides: "The Department shall include in the annual report for 1 April 2011, as required by G.S. 130A-309.98, as enacted by Section 16.1(a) of this act, an analysis of the feasibility and advisability of deleting the exclusion of printing devices from the definition of computer equipment as set out in G.S. 130A-309.91, as enacted by Section 16.1(a) of this act."

§ 130A-309.92. (Effective January 1, 2009) Responsibility for recycling discarded computer equipment.

In addition to the specific requirements of this Part, discarded computer equipment collectors and manufacturers share responsibility for the recycling of discarded computer equipment and the education of citizens of the State as to recycling opportunities for discarded computer equipment. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2009.

§ 130A-309.93. (For effective dates, see note) Requirements for manufacturers.

(a) Registration and Fee Required. — Each manufacturer of computer equipment, before selling or offering for sale computer equipment in North Carolina, shall register with the Department and, at the time of registration, shall pay an initial registration fee of ten thousand dollars ($10,000) to the Department. A computer equipment manufacturer that has registered shall pay an annual renewal registration fee of one thousand dollars ($1,000) to the Department. The annual renewal registration fee shall be paid each year no later than the first day of the month in which the initial registration fee was paid. The proceeds of these fees shall be credited to the Computer Equipment Management Account. A manufacturer of computer equipment that sells 1,000 items of computer equipment or less per year is exempt from the requirement to pay the registration fee and the annual renewal fee imposed by this subsection.

(b) Manufacturer Label Required. — A manufacturer shall not sell or offer to sell computer equipment in this State unless a visible, permanent label clearly identifying the manufacturer of that device is affixed to the equipment.

(c) Computer Equipment Recycling Plan. — Each manufacturer of computer equipment shall develop and submit to the Department a plan for reuse or recycling of discarded computer equipment in the State produced by the manufacturer. The manufacturer shall submit a proposed plan to the Department within 120 days of registration as required by subsection (a) of this section. The plan shall:

(1) Describe any direct take-back program to be implemented by the manufacturer, including mail-back programs and collection events.
(2) Provide that the manufacturer will take responsibility for discarded computer equipment it manufactured.
(3) Include a detailed description as to how the manufacturer will implement and finance the plan.
(4) Provide for environmentally sound management practices to transport and recycle discarded computer equipment.
(5) Describe the performance measures that will be used by the manufacturer to document recovery and recycling rates for discarded computer equipment. The calculation of recycling rates shall include the amount of discarded computer equipment managed under the manufacturer's program divided by the amount of computer equipment sold by the manufacturer in North Carolina.
(6) Describe in detail how the manufacturer will provide for transportation of discarded computer equipment at no cost from discarded computer equipment collectors.
(7) Describe in detail how the manufacturer will fully cover the costs of processing discarded computer equipment received from discarded computer equipment collectors.
(8) Include a public education plan on the laws governing the recycling and reuse of discarded computer equipment under this Part and on the methods available to consumers to comply with those requirements.

(d) Computer Equipment Recycling Plan Revision. — A manufacturer may prepare a revised plan and submit it to the Department at any time as the manufacturer considers appropriate in response to changed circumstances or needs. The Department may require a manufacturer to revise or update a plan if the Department finds that the plan is inadequate or out-of-date.

(e) Payment of Costs for Plan Implementation. — Each manufacturer is responsible for all costs associated with the development and implementation of its plan. A manufacturer shall not collect a charge for the management of discarded computer equipment at the time the equipment is discarded.

(f) Joint Computer Equipment Recycling Plans. — A manufacturer may fulfill the requirements of this section by participation in a joint recycling plan with other manufacturers. A joint plan shall meet the requirements of subsection (c) of this section.

(g) Annual Report. — Each manufacturer shall submit a report to the Department by 1 February of each year that includes all of the following for the previous calendar year:

(1) A description of the collection and recycling services used to recover the manufacturer's products.
(2) The quantity and type of computer equipment sold by the manufacturer to retail consumers in this State.
(3) The quantity and type of discarded computer equipment collected by the manufacturer for recovery in this State for the preceding calendar year.
(4) Any other information requested by the Department. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes subsections (a), (b), (e) and (f) effective January 1, 2009, subsections (c) and (d) effective October 1, 2009, and subsection (g) effective February 1, 2011.

§ 130A-309.94. (Effective January 1, 2010) Requirements for discarded computer equipment collectors.

Each discarded computer equipment collector shall ensure that discarded computer equipment received by the collector is consolidated at central locations, properly stored, and either held for pickup by a manufacturer or delivered to a facility designated by a manufacturer. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2010.

§ 130A-309.95. (Effective January 1, 2009) Responsibilities of the Department.

In addition to its other responsibilities under this Part, the Department shall:

(1) Develop and maintain a current list of manufacturers that are in compliance with the requirements of G.S. 130A-309.93 and provide the current list to the Office of Information Technology Services each time that the list is updated.

(2) Develop and implement a public education program on the laws governing the recycling and reuse of discarded computer equipment under this Part and on the methods available to consumers to comply with those requirements. The Department shall make this information available on the Internet and shall provide technical assistance to manufacturers to meet the requirements of G.S. 130A-309.93(c)(8). The Department shall also provide technical assistance to units of local government on the establishment and operation of discarded computer equipment collection centers and in the development and implementation of local public education programs.

(3) Maintain the confidentiality of any information that is required to be submitted by a manufacturer under this Part that is designated as a trade secret, as defined in G.S. 66-152(3) and that is designated as confidential or as a trade secret under G.S. 132-1.2. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2009.

§ 130A-309.96. (Effective January 1, 2009) Computer Equipment Management Account.

The Computer Equipment Management Account is created as a nonreverting account within the Department. Funds in the Account shall be used by the Department to implement the provisions of this Part. (2007-550, s. 16.1(a).)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2009.

§ 130A-309.97. (Effective January 1, 2009) Enforcement.

This Part may be enforced as provided by Part 2 of Article 1 of this Chapter. (2007-550, s. 16.1.)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective January 1, 2009.

§ 130A-309.98. (Effective April 1, 2011) Annual report.

No later than 1 April of each year, the Department shall submit a report on the recycling of discarded computer equipment in the State under this Part to the Environmental Review Commission. The report must include an evaluation of the recycling rates in the State for discarded computer equipment, a discussion of compliance and enforcement related to the requirements of this Part, and any recommendations for any changes to the system of collection and recycling of discarded computer equipment or other electronic devices. (2007-550, s. 16.1.)

Editor's Note. — Session Laws 2007-550. s. 16.6(a), makes this section effective April 1, 2011.

Session Laws 2007-550, s. 16.1(b), provides: "The Department shall include in the annual report for 1 April 2011, as required by G.S. 130A-309.98, as enacted by Section 16.1(a) of this act, an analysis of the feasibility and advisability of deleting the exclusion of printing devices from the definition of computer equipment as set out in G.S. 130A-309.91, as enacted by Section 16.1(a) of this act."

Part 3. Inactive Hazardous Sites.

§ 130A-310. Definitions.

Unless a different meaning is required by the context, the following definitions shall apply throughout this Part:

(1) "CERCLA/SARA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96-510, 94 Stat. 2767, 42 U.S.C. 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613, as amended.
(2) "Hazardous substance" means hazardous substance as defined in CERCLA/SARA.
(3) "Inactive hazardous substance or waste disposal site" or "site" means any facility, as defined in CERCLA/SARA. These sites do not include hazardous waste facilities permitted or in interim status under this Article.
(4) "Operator" means the person responsible for the overall operation of an inactive hazardous substance or waste disposal site.
(5) "Owner" means any person who owns an inactive hazardous substance or waste disposal site, or any part thereof.
(6) "Release" means release as defined in the CERCLA/SARA.
(7) "Remedy" or "Remedial Action" means remedy or remedial action as defined in CERCLA/SARA.
(8) "Remove" or "Removal" means remove or removal as defined in CERCLA/SARA.
(9) "Responsible party" means any person who is liable pursuant to G.S. 130A-310.7. (1987, c. 574, s. 2; 1989, c. 286, s. 2; 1999-83, s. 1.)

Editor's Note. — Section 4 of Session Laws 1987, c. 574, provided: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act; nor shall it be construed to obligate the Secretary to implement any monitoring program, testing program, or inactive hazardous substance or waste disposal site remedial action program for which no funding is available, from appropriations or otherwise."

Legal Periodicals. — For note on the Brownfields Property Reuse Act of 1997, see 78 N.C.L. Rev. 1015 (1998).

§ 130A-310.1. Identification, inventory, and monitoring of inactive hazardous substance or waste disposal sites; duty of owners, operators, and responsible parties to provide information and access; remedies.

(a) The Department shall develop and implement a program for locating, cataloguing, and monitoring all inactive hazardous substance or waste disposal sites in North Carolina. The Secretary shall compile and maintain an inventory of all inactive hazardous substance or waste disposal sites based on information submitted by owners, operators, and responsible parties, and on data obtained directly by the Secretary. The Secretary shall maintain records of any evidence of contamination to the air, surface water, groundwater, surface or subsurface soils, or waste streams for inventoried sites. The records shall include all available information on the extent of any actual damage or potential danger to public health or to the environment resulting from the contamination.

(b) The Commission shall develop and make available a format and checklist for submission of data relevant to inactive hazardous substance or waste disposal sites. Within 90 days of the date on which an owner, operator, or responsible party knows or should know of the existence of an inactive hazardous substance or waste disposal site, the owner, operator, or responsible party shall submit to the Secretary all site data that is known or readily available to the owner, operator, or responsible party. The owner, operator, or responsible party shall certify under oath that, to the best of his knowledge and belief, the data is complete and accurate.

(c) Whenever the Secretary determines that there is a release, or substantial threat of a release, into the environment of a hazardous substance from an inactive hazardous substance or waste disposal site, the Secretary may, in addition to any other powers he may have, order any responsible party to conduct any monitoring, testing, analysis, and reporting that the Secretary deems reasonable and necessary to ascertain the nature and extent of any hazard posed by the site. Written notice of any order issued pursuant to this section shall be given to all persons subject to the order as set out in G.S. 130A-310.3(c). The Secretary, prior to the entry of any order, shall solicit the cooperation of the responsible party.

(d) If a person fails to submit data as required in subsection (b) of this section or violates the requirements or schedules in an order issued pursuant to subsection (c) of this section, the Secretary may institute an action for injunctive relief, irrespective of all other remedies at law, in the superior court of the county where the violation occurred or where a defendant resides.

(e) Whenever a person ordered to take any action pursuant to this section is unable or fails to do so, or if the Secretary, after making a reasonable attempt, is unable to locate any responsible party, the Secretary may take the action. The cost of any action by the Secretary pursuant to this section may be paid from the Inactive Hazardous Sites Cleanup Fund, subject to a later action for reimbursement pursuant to G.S. 130A-310.7. The provisions of subdivisions (a)(1) to (a)(3) of G.S.130A-310.6 shall apply to any action taken by the Secretary pursuant to this section.

(f) Upon reasonable notice, the Secretary may require any person to furnish to the Secretary any information, document, or record in that person's possession or under that person's control that relates to:

(1) The identification, nature, and quantity of material that has been or is generated, treated, stored, or disposed of at an inactive hazardous substance or waste disposal site or that is transported to an inactive hazardous substance or waste disposal site.

(2) The nature and extent of a release or threatened release of a hazardous substance or hazardous waste at or from an inactive hazardous substance or waste disposal site.

(3) Information relating to the ability of a person to pay for or to perform a cleanup.

(g) A person who is required to furnish any information, document, or record under subsection (f) of this section shall either allow the Secretary to inspect and copy all information, documents, and records or shall copy and furnish to the Secretary all information, documents, and records at the expense of the person.

(h) To collect information to administer this Part, the Secretary may subpoena the attendance and testimony of witnesses and the production of documents, records, reports, answers to questions, and any other information that the Secretary deems necessary. Witnesses shall be paid the same fees and mileage that are paid to witnesses in proceedings in the General Court of Justice. In the event that a person fails to comply with a subpoena issued under this subsection, the Secretary may seek enforcement of the subpoena in the superior court in any county where the inactive hazardous substance or waste disposal site is located, in the county where the person resides, or in the county where the person has his or her principal place of business.

(i) A person who owns or has control over an inactive hazardous substance or waste disposal site shall grant the Secretary access to the site at reasonable times. If a person fails to grant the Secretary access to the site, the Secretary may obtain an administrative search and inspection warrant as provided by G.S. 15-27.2. (1987, c. 574, s. 2; 1989, c. 286, s. 3; 1997-53, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 443.

§ 130A-310.2. Inactive Hazardous Waste Sites Priority List.

No later than six months after July 1, 1987, the Commission shall develop a system for the prioritization of inactive hazardous substance or waste disposal sites based on the extent to which such sites endanger the public health and the environment. The Secretary shall apply the prioritization system to the inventory of sites to create and maintain an Inactive Hazardous Waste Site Priority List, which shall rank all inactive hazardous substance or waste disposal sites in decreasing order of danger. This list shall identify the location of each site and the type and amount of hazardous substances or waste known or believed to be located on the site. The first such list shall be published within two years after July 1, 1987, with subsequent lists to be published at intervals of not more than two years thereafter. The Secretary shall notify owners, operators, and responsible parties of sites listed on the Inactive Hazardous Waste Sites Priority List of their ranking on the list. The Inactive Hazardous Sites Priority List shall be used by the Department in determining budget requests and in allocating any State appropriation which may be made for remedial action, but shall not be used so as to impede any other action by the Department, or any remedial or other action for which funds are available. (1987, c. 574, s. 2.)

§ 130A-310.3. Remedial action programs for inactive hazardous substance or waste disposal sites.

(a) The Secretary may issue a written declaration, based upon findings of fact, that an inactive hazardous substance or waste disposal site endangers the public health or the environment. After issuing such a declaration, and at any time during which the declaration is in effect, the Secretary shall be responsible for:

(1) Monitoring the inactive hazardous substance or waste disposal site;
(2) Developing a plan for public notice and for community and local government participation in any inactive hazardous substance or waste disposal site remedial action program to be undertaken;
(3) Approving an inactive hazardous substance or waste disposal site remedial action program for the site;
(4) Coordinating the inactive hazardous substance or waste disposal site remedial action program for the site; and
(5) Ensuring that the hazardous substance or waste disposal site remedial action program is completed.

(b) Where possible, the Secretary shall work cooperatively with any owner, operator, responsible party, or any appropriate agency of the State or federal government to develop and implement the inactive hazardous substance or waste disposal site remedial action program. The Secretary shall not take action under this section to the extent that the Environmental Management Commission, the Commissioner of Agriculture, or the Pesticide Board has assumed jurisdiction pursuant to Articles 21 or 21A of Chapter 143 of the General Statutes.

(c) Whenever the Secretary has issued such a declaration, and at any time during which the declaration is in effect, the Secretary may, in addition to any other powers he may have, order any responsible party:

(1) To develop an inactive hazardous substance or waste disposal site remedial action program for the site subject to approval by the Department, and
(2) To implement the program within reasonable time limits specified in the order.

Written notice of such an order shall be provided to all persons subject to the order personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the date appearing in the return of the receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall be given as provided in G.S. 1A-1, Rule 4(j).

(d) In any inactive hazardous substance or waste disposal site remedial action program implemented hereunder, the Secretary shall ascertain the most nearly applicable cleanup standard as would be applied under CERCLA/SARA, and may seek federal approval of any such program to insure concurrent compliance with federal standards. State standards may exceed and be more comprehensive than such federal standards. The Secretary shall assure concurrent compliance with applicable standards set by the Environmental Management Commission.

(e) For any removal or remedial action conducted entirely on-site under this Part, to the extent that a permit would not be required under 42 U.S.C. § 9621(e) for a removal or remedial action conducted entirely on-site under CERCLA/SARA, the Secretary may grant a waiver from any State law or rule that requires that an environmental permit be obtained from the Department. The Secretary shall not waive any requirement that a permit be obtained unless either the removal or remedial action is being conducted pursuant to G.S. 130A-310.3(c), 130A-310.5, or 130A-310.6, or the owner, operator, or other responsible party has entered into an agreement with the Secretary to implement a voluntary remedial action plan under G.S. 130A-310.9(b). The Secretary shall invite public participation in the development of the remedial action plan in the manner set out in G.S. 130A-310.4 prior to granting a permit waiver, except for a removal or remedial action conducted pursuant to G.S. 130A-310.5.

(f) In order to reduce or eliminate the danger to public health or the environment posed by an inactive hazardous substance or waste disposal site, an owner, operator, or other responsible party may impose restrictions on the current or future use of the real property comprising any part of the site if the restrictions meet the requirements of this subsection. The restrictions must be agreed to by the owner of the real property, included in a remedial action plan for the site that has been approved by the Secretary, and implemented as a part of the remedial action program for the site. The Secretary may approve restrictions included in a remedial action plan in accordance with standards determined as provided in subsection (d) of this section or pursuant to rules adopted under Chapter 150B of the General Statutes. Restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Any approved restriction shall be enforced by any owner, operator, or other party responsible for the inactive hazardous substance or waste disposal site. Any land-use restriction may also be enforced by the Department through the remedies provided in Part 2 of Article 1 of this Chapter or by means of a civil action. The Department may enforce any land-use restriction without first having exhausted any available administrative remedies. A land-use restriction may also be enforced by any unit of local government having jurisdiction over any part of the site. A land-use restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this Part shall abide by the land-use restriction. (1987, c. 574, s. 2; 1989, c. 727, s. 145; 1991, c. 281, ss. 1, 2; 1997-394, s. 1; 2002-154, s. 2.)

§ 130A-310.4. Public participation in the development of the remedial action plan.

(a) Within 10 days after the Secretary issues a declaration pursuant to G.S. 130A-310.3, he shall notify in writing the local board of health and the local health director having jurisdiction in the county or counties in which an inactive hazardous substance or waste disposal site is located that the site may endanger the public health or environment and that a remedial action plan is being developed. The Secretary shall involve the local health director in the development of the remedial action plan.

(b) Before approving any remedial action plan, the Secretary shall make copies of the proposed plan available for inspection as follows:

(1) A copy of the plan shall be provided to the local health director.
(2) A copy of the proposed plan shall be filed with the register of deeds in the county or counties in which the site is located.
(3) A copy of the plan shall be provided to each public library located in the county or counties in which the site is located.
(4) The Secretary may place copies of the plan in other locations so as to assure the availability thereof to the public.

In addition, copies of the plan shall be available for inspection and copying at cost by the public during regular business hours in the offices of the agency within the Department with responsibility for the administration of the remedial action program.

(c) Before approving any remedial action plan, the Secretary shall give notice of the proposed plan as follows:

(1) A notice and summary of the proposed plan shall be published weekly for a period of three consecutive weeks in a newspaper having general circulation in the county or counties where the site is located.

(2) Notice that a proposed remedial action plan has been developed shall be given by first class mail to persons who have requested such notice. Such notice shall state the locations where a copy of the remedial action plan is available for inspection. The Department shall maintain a mailing list of persons who request notice pursuant to this section.

(d) The Secretary may conduct a public meeting to explain the proposed plan and alternatives to the public.

(e) At least 45 days from the latest date on which notice is provided pursuant to subsection (c)(1) of this section shall be allowed for the receipt of written comment on the proposed remedial action plan prior to its approval. If a public hearing is held pursuant to subsection (f) of this section, at least 20 days will be allowed for receipt of written comment following the hearing prior to the approval of the remedial action plan.

(f) If the Secretary determines that significant public interest exists, he shall conduct a public hearing on the proposed plan and alternatives. The Department shall give notice of the hearing at least 30 days prior to the date thereof by:

(1) Publication as provided in subdivision (c)(1) of this section, with first publication to occur not less than 30 days prior to the scheduled date of the hearing; and

(2) First class mail to persons who have requested notice as provided in subdivision (c)(2) of this section.

(g) The Commission on Health Services [Commission for Public Health] shall adopt rules prescribing the form and content of the notices required by this section. The proposed remedial action plan shall include a summary of all alternatives considered in the development of the plan. A record shall be maintained of all comment received by the Department regarding the remedial action plan. (1987, c. 574, s. 2; 1997-28, s. 2.)

Editor's Note. — Session Laws 2007-182, s. 2, effective July 5, 2007, provides: "In order to better reflect the functions and duties performed by the Commission for Health Services of the Department of Health and Human Services, the Commission for Health Services is renamed the Commission for Public Health. Wherever the name "Commission for Health Services" appears in the General Statutes, the Revisor of Statutes shall replace "Commission for Health Services" with "Commission for Public Health."

§ 130A-310.5. Authority of the Secretary with respect to sites which pose an imminent hazard.

(a) An imminent hazard exists whenever the Secretary determines, that there exists a condition caused by an inactive hazardous substance or waste disposal site, including a release or a substantial threat of a release into the environment of a hazardous substance from the site, which is causing serious harm to the public health or environment, or which is likely to cause such harm before a remedial action plan can be developed. Whenever the Secretary determines that an imminent hazard exists he may, in addition to any other powers he may have, without notice or hearing, order any known responsible party to take immediately any action necessary to eliminate or correct the condition, or the Secretary, in his discretion, may take such action without issuing an order. Written notice of any order issued pursuant to this section shall be provided to all persons subject to the order as set out in G.S. 130A-310.3(c). Unless the time required to do so would increase the harm to the public health or the environment, the Secretary shall solicit the cooperation of responsible parties prior to the entry of any such order. The provisions of subdivisions (1) to (3) of G.S. 130A-310.6(a) shall apply to any action taken by the Secretary pursuant to this section, and any such action shall be considered part of a remedial action program, the cost of which may be recovered from any responsible party.

(b) If a person violates the requirements or schedules in an order issued pursuant to this section, the Secretary may institute an action for injunctive relief, irrespective of all other remedies at law, in the superior court of the county where the violation occurred or where a defendant resides.

(c) The cost of any action by the Secretary pursuant to this section may be paid from the Inactive Hazardous Sites Cleanup Fund, or the Emergency Response Fund established pursuant to G.S. 130A-306, subject to a later action for reimbursement pursuant to G.S. 130A-310.7. (1987, c. 574, s. 2; 1989, c. 286, s. 4; 1989 (Reg. Sess., 1990), c. 1004, s. 9; c. 1024, s. 30(a); 1991, c. 342, s. 8.)

§ 130A-310.6. State action upon default of responsible parties or when no responsible party can be located.

(a) Whenever a person ordered to develop and implement an inactive hazardous substance or waste disposal site remedial action program is unable or fails to do so within the time specified in the order, the Secretary may develop and implement or cause to be developed and implemented such a program. The cost of developing and implementing a remedial action program pursuant to this section may be paid from the Inactive Hazardous Sites Cleanup Fund, subject to a later action for reimbursement pursuant to G.S. 130A-310.7.

(1) The Department is authorized and empowered to use any staff, equipment or materials under its control or provided by other cooperating federal, State or local agencies and to contract with any agent or contractor it deems appropriate to develop and implement the remedial action program. State agencies shall provide to the maximum extent feasible such staff, equipment, and materials as may be available for developing and implementing a remedial action program.

(2) Upon completion of any inactive hazardous substance or waste disposal remedial action program, any State or local agency that has provided personnel, equipment, or material shall deliver to the Department a record of expenses incurred by the agency. The amount of the incurred expenses shall be disbursed by the Secretary to each such agency. The Secretary shall keep a record of all expenses incurred for the services of State personnel and for the use of the State's equipment and material.

(3) As soon as feasible or after completion of any inactive hazardous substance or waste disposal site remedial action program, the Secretary shall prepare a statement of all expenses and costs of the program expended by the State and issue an order demanding payment from responsible parties. Written notice of such an order shall be provided to all persons subject to the order personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the date appearing on the return of the receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given as provided in G.S. 1A-1, Rule 4(j).

(b) If the Secretary, after declaring that an inactive hazardous substance or waste disposal site may endanger the public health or the environment, is unable, after making a reasonable attempt, to locate any responsible party, the Department may develop and implement a remedial action program for the site as provided in subsection (a)(1) and (2) of this section. If responsible parties are subsequently located, the Secretary may issue an order demanding payment from such persons in the manner set forth in subdivision (a)(3) of this section for the necessary expenses incurred by the Department for developing and implementing the remedial action program. If the persons subject to such an order refuse to pay the sum expended, or fail to pay such sum within the time specified in the order, the Secretary shall bring an action in the manner set forth in G.S. 130A-310.7.

(c) **(Effective July 1, 2008)** The Secretary shall use funds allocated to the Department under G.S. 130A-295.9(1) to assess pre-1983 landfills, to determine the priority for remediation of pre-1983 landfills, and to develop and implement a remedial action plan for each pre-1983 landfill that requires remediation. Environmental and human health risks posed by a pre-1983 landfill may be mitigated using a risk-based approach for assessment and remediation.

(d) **(Effective July 1, 2008)** The Secretary shall not seek cost recovery from a unit of local government for assessment and remedial action performed under subsection (c) of this section at a pre-1983 landfill. The Secretary shall not seek cost recovery for assessment and remedial action performed under subsection (c) of this section at a pre-1983 landfill from any other potentially responsible party if the Secretary develops and implements a remedial action plan for that pre-1983 landfill. If any potentially responsible party fails to cooperate with assessment of a site and implementation of control and mitigation measures at any site which the potentially responsible party owns or over which the potentially responsible party exercises control through a lease or other property interest, the Secretary may seek cost recovery for assessment and remedial action. Cooperation with assessment of a site and implementation of control and mitigation measures includes, but is not limited to, granting access to the site, allowing installation of monitoring wells, allowing installation and maintenance of improvements to the landfill cap, allowing installation of security measures, agreeing to record and implement land-use restrictions, and providing access to any records regarding the pre-1983 landfill. Nothing in this section shall alter any right, duty, obligation, or liability between a unit of local government and a third party. Nothing in this section shall alter any right, duty, obligation, or liability between any other potentially responsible party and a unit of local government, a third party, or, except as provided in this subsection, to the State.

(e) **(Effective July 1, 2008)** The Secretary shall develop and implement remedial action plans for pre-1983 landfills in the order of their priority determined as provided in subsection (c) of this section. The Secretary shall not develop or implement a remedial action plan for a pre-1983 landfill unless the Secretary determines that sufficient funds will be available from the Inactive Hazardous Sites Cleanup Fund to pay the costs of development and implementation of a remedial action plan for that pre-1983 landfill.

(f) **(Effective July 1, 2008)** A unit of local government that voluntarily undertakes assessment or remediation of a pre-1983 landfill may request that the Department reimburse the costs of assessment of the pre-1983 landfill and implementation of measures necessary to remediate the site to eliminate an imminent hazard. The Department shall provide reimbursement under this subsection if the Department finds all of the following:

(1) The unit of local government undertakes assessment and remediation under a plan approved by the Department.

(2) The unit of local government provides a certified accounting of costs incurred for assessment and remediation.

(3) Each contract for assessment and remediation complies with the requirements of Articles 3D and 8 of Chapter 143 of the General Statutes.
(4) Remedial action is limited to measures necessary to abate the imminent hazard.

(g) **(Effective July 1, 2008)** The Department may undertake any additional action necessary to remediate a pre-1983 landfill based on the priority ranking of the site under subsection (c) of this section. (1987, c. 574, s. 2; 1989, c. 286, s. 5; 2007-550, s. 14(c).)

Editor's Note. — Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, s. 14(c), effective July 1, 2008, added subsections (c) through (g).

§ 130A-310.7. Action for reimbursement; liability of responsible parties; notification of completed remedial action.

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in this subsection, any person who:
(1) Discharges or deposits; or
(2) Contracts or arranges for any discharge or deposit; or
(3) Accepts for discharge or deposit; or
(4) Transports or arranges for transport for the purpose of discharge or deposit

any hazardous substance, the result of which discharge or deposit is the existence of an inactive hazardous substance or waste disposal site, shall be considered a responsible party. Neither an innocent landowner who is a bona fide purchaser of the inactive hazardous substance or waste disposal site without knowledge or without a reasonable basis for knowing that hazardous substance or waste disposal had occurred nor a person whose interest or ownership in the inactive hazardous substance or waste disposal site is based on or derived from a security interest in the property shall be considered a responsible party. A responsible party shall be directly liable to the State for any or all of the reasonably necessary expenses of developing and implementing a remedial action program for such site. The Secretary shall bring an action for reimbursement of the Inactive Hazardous Sites Cleanup Fund in the name of the State in the superior court of the county in which the site is located to recover such sum and the cost of bringing the action. The State must show that a danger to the public health or the environment existed and that the State complied with the provisions of this Part.

(b) There shall be no liability under this section for a person who can establish by a preponderance of the evidence that the danger to the public health or the environment caused by the site was caused solely by:
(1) An act of God; or
(2) An act of war; or
(3) An intentional act or omission of a third party (but this defense shall not be available if the act or omission is that of an employee or agent of the defendant, or if the act or omission occurs in connection with a contractual relationship with the defendant); or
(4) Any combination of the above causes.

(c) The definitions set out in G.S. 130A-310.31(b) apply to this subsection. Any person may submit a written request to the Department for a determination that a site that is subject to this Part has been remediated to unrestricted use standards as provided in Part 5 of Article 9 of Chapter 130A of the General Statutes. A request for a determination that a site has been remediated to unrestricted use standards shall be accompanied by the fee required by G.S. 130A-310.39(a)(2). If the Department determines that the site has been remediated to unrestricted use standards, the Department shall issue a written notification that no further remediation will be required at the site. The notification shall state that no further remediation will be required at the site unless the Department later determines, based on new information or information not previously provided to the Department, that the site has not been remediated to unrestricted use standards or that the Department was provided with false or incomplete information. Under any of those circumstances, the Department may withdraw the notification and require responsible parties to remediate the site to unrestricted use standards. (1987, c. 574, s. 2; 1989, c. 286, s. 6; 1989 (Reg. Sess., 1990), c. 1004, s. 10; c. 1024, s. 30(b); 1997-357, s. 5; 2001-384, s. 11.)

Editor's Note. — Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

Session Laws 2001-384, s. 13, provides: "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

§ 130A-310.8. Recordation of inactive hazardous substance or waste disposal sites.

(a) After determination by the Department of the existence and location of an inactive hazardous substance or waste disposal site, the owner of the real property on which the site is located, within 180 days after official notice to the owner to do so, shall submit to the Department a survey plat of areas designated by the Department that has been prepared and certified by a professional land surveyor, and entitled "NOTICE OF INACTIVE HAZARDOUS SUBSTANCE OR WASTE DISPOSAL SITE". Where an inactive hazardous substance or waste disposal site is located on more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded. The Notice shall include a legal description of the site that would be sufficient as a description in an instrument of conveyance, shall meet the requirements of G.S. 47-30 for maps and plats, and shall identify:

(1) The location and dimensions of the disposal areas and areas of potential environmental concern with respect to permanently surveyed benchmarks.

(2) The type, location, and quantity of hazardous substances known by the owner of the site to exist on the site.

(3) Any restrictions approved by the Department on the current or future use of the site.

(b) After the Department approves and certifies the Notice, the owner of the site shall file the certified copy of the Notice in the register of deeds' office in the county or counties in which the land is located within 15 days of the date on which the owner receives approval of the Notice from the Department.

(c) The register of deeds shall record the certified copy of the Notice and index it in the grantor index under the names of the owners of the lands.

(d) In the event that the owner of the site fails to submit and file the Notice required by this section within the time specified, the Secretary may prepare and file such Notice. The costs thereof may be recovered by the Secretary from any responsible party. In the event that an owner of a site who is not a responsible party submits and files the Notice required by this section, he may recover the reasonable costs thereof from any responsible party.

(e) When an inactive hazardous substance or waste disposal site is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument, a statement that the property has been used as a hazardous substance or waste disposal site and a reference by book and page to the recordation of the Notice.

(f) A Notice of Inactive Hazardous Substance or Waste Disposal Site filed pursuant to this section may, at the request of the owner of the land, be cancelled by the Secretary after the hazards have been eliminated. If requested in writing by the owner of the land and if the Secretary concurs with the request, the Secretary shall send to the register of deeds of each county where the Notice is recorded a statement that the hazards have been eliminated and request that the Notice be cancelled of record. The Secretary's statement shall contain the names of the owners of the land as shown in the Notice and reference the plat book and page where the Notice is recorded. The register of deeds shall record the Secretary's statement in the deed books and index it on the grantor index in the names of the owners of the land as shown in the Notice and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice showing the date of cancellation and the book and page where the Secretary's statement is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record maps and plats, the register of deeds shall not be required to make a marginal entry.

(g) Recordation under this section is not required for any inactive hazardous substance or waste disposal site that is undergoing voluntary remedial action pursuant to this Part unless the Secretary determines that either:

(1) A concentration of a hazardous substance or hazardous waste that poses a danger to public health or the environment will remain following implementation of the voluntary remedial action program.

(2) The voluntary remedial action program is not being implemented in a manner satisfactory to the Secretary and in compliance with the agreement between the Secretary and the owner, operator, or other responsible party.

(h) The Secretary may waive recordation under this section with respect to any residential real property that is contaminated solely because a hazardous substance or hazardous waste migrated to the property from other property by means of groundwater flow if disclosure of the contamination is required under Chapter 47E of the General Statutes. An owner of residential real property whose recordation requirement is waived by the Secretary under this subsection and who fails to disclose contamination as required by Chapter 47E of the General Statutes is subject to both the penalties and remedies under this Chapter applicable to a person who fails to comply with the recordation requirements of this section as though those requirements had not been waived and to the remedies available under Chapter 47E of the General Statutes. (1987, c. 574, s. 2; 1989, c. 727, s. 219(34); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-394, s. 2; 1997-443, ss. 11A.119(a), (b); 1997-528, s. 1.)

§ 130A-310.9. Voluntary remedial actions; limitation of liability; agreements; implementation and oversight by private engineering and consulting firms.

(a) No one owner, operator, or other responsible party who voluntarily participates in the implementation of a remedial action program under G.S. 130A-310.3 or G.S. 130A-310.5 may be required to pay in excess of three million dollars ($3,000,000) for the cost of implementing a remedial action program at a single inactive hazardous substance or waste disposal site. The limitation of liability contained in this section applies only to the cost of implementation of the program and does not apply to the cost of the development of the remedial action plan.

(b) The Secretary may enter into an agreement with an owner, operator, or other responsible party that provides for implementation of a voluntary remedial action program in accordance with a remedial action plan approved by the Department. Investigations, evaluations, and voluntary remedial actions are subject to the provisions of G.S. 130A-310.1(c), 130A-310.1(d), 130A-310.3(d), 130A-310.3(f), 130A-310.5, 130A-310.8, and any other requirement imposed by the Department. A voluntary remedial action and all documents that relate to the voluntary remedial action shall be fully subject to inspection and audit by the Department. At least 30 days prior to entering into any agreement providing for the implementation of a voluntary remedial action program, the Secretary shall mail notice of the proposed agreement as provided in G.S. 130A-310.4(c)(2). Sites undergoing voluntary remedial actions shall be so identified as a separate category in the inventory of sites maintained pursuant to G.S. 130A-310.1 but shall not be included on the Inactive Hazardous Waste Sites Priority List required by G.S. 130A-310.2.

(c) The Department may approve a private environmental consulting and engineering firm to implement and oversee a voluntary remedial action by an owner, operator, or other responsible party. An owner, operator, or other responsible party who enters into an agreement with the Secretary to implement a voluntary remedial action may hire a private environmental consulting or engineering firm approved by the Department to implement and oversee the voluntary remedial action. A voluntary remedial action that is implemented and overseen by a private environmental consulting or engineering firm shall be implemented in accordance with all federal and State laws, regulations, and rules that apply to remedial actions generally and is subject to rules adopted pursuant to G.S. 130A-310.12(b). The Department may revoke its approval of the oversight of a voluntary remedial action by a private environmental consulting or engineering firm and assume direct oversight of the voluntary remedial action whenever it appears to the Department that the voluntary remedial action is not being properly implemented or is not being adequately overseen. The Department may require the owner, operator, other responsible party, or private environmental consulting or engineering firm to take any action necessary to bring the voluntary remedial action into compliance with applicable requirements. (1987, c. 574, s. 2; 1989, c. 286, s. 7; 1993 (Reg. Sess., 1994), c. 598, s. 1; 1995, c. 327, s. 2; 1997-394, s. 3; 2007-107, s. 1.1(g).)

Editor's Note. — Session Laws 2007-107, s. 6.2, contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, s. 1.1.(g), effective October 1, 2007, substituted "limitation of liability" for "maximum financial responsibility" in the section heading.

§ 130A-310.10. Annual reports.

(a) The Secretary shall report on inactive hazardous sites to the Environmental Review Commission on or before 1 October of each year. The report shall include at least:

(1) The Inactive Hazardous Waste Sites Priority List;

G.S. 130A-310.11 is set out twice. See notes.

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(2) A list of remedial action plans requiring State funding through the Inactive Hazardous Sites Cleanup Fund;
(3) A comprehensive budget to implement these remedial action plans and the adequacy of the Inactive Hazardous Sites Cleanup Fund to fund the cost of said plans;
(4) A prioritized list of sites that are eligible for remedial action under CERCLA/SARA together with recommended remedial action plans and a comprehensive budget to implement such plans. The budget for implementing a remedial action plan under CERCLA/SARA shall include a statement as to any appropriation that may be necessary to pay the State's share of such plan;
(5) A list of sites and remedial action plans undergoing voluntary cleanup with Departmental approval;
(6) A list of sites and remedial action plans that may require State funding, a comprehensive budget if implementation of these possible remedial action plans is required, and the adequacy of the Inactive Hazardous Sites Cleanup Fund to fund the possible costs of said plans;
(7) A list of sites that pose an imminent hazard;
(8) A comprehensive budget to develop and implement remedial action plans for sites that pose imminent hazards and that may require State funding, and the adequacy of the Inactive Hazardous Sites Cleanup Fund; and
(9) Any other information requested by the General Assembly or the Environmental Review Commission.

(b) Repealed by Session Laws 2001-452, s. 2.3, effective October 28, 2001. (1987, c. 574, s. 2; 1989, c. 286, s. 8; 1997-28, s. 1; 2001-452, s. 2.3.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 27.10, provides: "Beginning in 1997, the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall report on the generation, storage, treatment, and disposal of hazardous waste in North Carolina no more often than it is required to report under federal law or federal regulation."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

§ 130A-310.11. (Effective until July 1, 2008) Inactive Hazardous Sites Cleanup Fund created.

There is established under the control and direction of the Department the Inactive Hazardous Sites Cleanup Fund. This fund shall be a revolving fund consisting of any monies appropriated for such purpose by the General Assembly or available to it from grants, fees, and other monies paid to it or recovered by or on behalf of the Department. The Inactive Hazardous Sites Cleanup Fund shall be treated as a nonreverting special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3. (1987, c. 574, s. 2; 1989, c. 286, s. 9.)

Section Set Out Twice. — The section above is effective until July 1, 2008. For the section as amended July 1, 2008, see the following section, also numbered G.S. 130A-310.11.

G.S. 130A-310.11 is set out twice. See notes.

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§ 130A-310.11. (Effective July 1, 2008) Inactive Hazardous Sites Cleanup Fund created.

(a) There is established under the control and direction of the Department the Inactive Hazardous Sites Cleanup Fund. This fund shall be a revolving fund consisting of any monies appropriated for such purpose by the General Assembly or available to it from grants, taxes, and other monies paid to it or recovered by or on behalf of the Department. The Inactive Hazardous Sites Cleanup Fund shall be treated as a nonreverting special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3.

(b) Funds credited to the Inactive Hazardous Sites Cleanup Fund pursuant to G.S. 130A-295.9 shall be used only as provided in G.S. 130A-309.295.9(c). (1987, c. 574, s. 2; 1989, c. 286, s. 9; 2007-550, s. 14(d).)

Section Set Out Twice. — The section above is effective July 1, 2008. For the section as in effect until July 1, 2008, see the preceding section, also numbered G.S. 130A-310.11.

Editor's Note. — Session Laws 2007-550, s. 19, is a severability clause.

Effect of Amendments. — Session Laws 2007-550, s. 14(d), effective July 1, 2008, designated the existing provisions as subsection (a); and added subsection (b).

§ 130A-310.12. Administrative procedure; adoption of rules.

(a) The provisions of Chapter 150B of the General Statutes apply to this Part. The Commission shall adopt rules for the implementation of this Part.

(b) The Commission shall adopt rules governing the selection and use of private environmental consulting and engineering firms to implement and oversee voluntary remedial actions by owners, operators, or other responsible parties under G.S. 130A-310.9(c). Rules adopted under this subsection shall specify:

(1) Standards applicable to private environmental consulting and engineering firms.
(2) Criteria and procedures for approval of firms by the Department.
(3) Requirements and procedures under which the Department monitors and audits a voluntary remedial action to ensure that the voluntary remedial action complies with applicable federal and State law, regulations, and under which the owner, operator, or other responsible party reimburses the Department for the cost of monitoring and auditing the voluntary remedial action.
(4) Any financial assurances that may be required of an owner, operator, or other responsible party.
(5) Requirements for the preparation, maintenance, and public availability of work plans and records, reports of data collection including sampling, sample analysis, and other site testing, and other records and reports that are consistent with the requirements applicable to remedial actions generally. (1987, c. 574, ss. 2, 5; 1993 (Reg. Sess., 1994), c. 598, s. 2; 1995, c. 327, s. 3.)

§ 130A-310.13. Short title.

This Part shall be known and may be cited as the Inactive Hazardous Sites Response Act of 1987. (1991, c. 281, s. 3.)

§§ 130A-310.14 through 130A-310.19: Reserved for future codification purposes.

Part 4. Superfund Program.

§ 130A-310.20. Definitions.

Unless a different meaning is required by the context, the following definitions shall apply throughout this Part:

(1) "CERCLA/SARA" or "Superfund" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, as amended. (1989, c. 286, s. 10.)

Editor's Note. — As enacted, this section contained a subdivision (1) but no subdivision (2).

§ 130A-310.21. Administration of the Superfund program.

The Department shall maintain an appropriate administrative subunit within the solid waste management unit authorized by G.S. 130A-291 to carry out those activities in which the State is authorized to engage under CERCLA/SARA. (1989, c. 286, s. 10.)

§ 130A-310.22. Contracts authorized.

(a) The Department is authorized to enter into contracts and cooperative agreements with the United States and to engage in any activity otherwise authorized by law to identify, investigate, evaluate, and clean up any site or facility covered by CERCLA/SARA including but not limited to performing preliminary assessments, site investigations, remedial investigations, and feasibility studies; preparation of records of decision; conducting emergency response, remedial, and removal actions; and engaging in enforcement activities in accordance with the provisions of CERCLA/SARA.

(b) The Department may make all assurances required by federal law or regulation including but not limited to assuring that the State will assume responsibility for the operation and maintenance of any remedial action for the anticipated duration of the remedial action; assuring that the State will provide its share of the cost of any remedial action at a site or facility which was privately owned or operated; assuring that the State will provide its share of the cost of any removal, remedial planning, and remedial action at a site or facility owned or operated by the State or a political subdivision of the State; assuring the availability of off-site treatment, storage, or disposal capacity needed to effectuate a remedial action; assuring that the State will take title to, acquire an interest in, or accept transfer of any interest in real property needed to effectuate a remedial action; assuring that the State has adequate capacity to meet the assurances required by CERCLA/SARA (42 U.S.C. § 9604(c)(9)); assuring access to the facility and any adjacent property including the securing of any right-of-way or easement needed to effectuate a remedial action; and assuring that the State will satisfy all federal, State, and local requirements for permits and approvals necessary to effectuate a remedial action.

(c) Each contract entered into by the Department under this section shall stipulate that all obligations of the State are subject to the availability of funds. Neither this section nor any contract entered into under authority of this section shall be construed to obligate the General Assembly to make any appropriation to implement this Part or any contract entered into under this section. The Department shall implement this Part and any contract entered into under this section from funds otherwise available or appropriated to the Department for such purpose. (1989, c. 286, s. 10; 1989 (Reg. Sess., 1990), c. 1004, s. 11; c. 1024, s. 30(c).)

§ 130A-310.23. Filing notices of CERCLA/SARA (Superfund) liens.

Notices of liens and certificates of notices affecting liens for obligations payable to the United States under CERCLA/SARA (Superfund) (42 U.S.C. § 9607(l)) shall be filed in accordance with Article 11A of Chapter 44 of the General Statutes. (1989 (Reg. Sess., 1990), c. 1047, s. 1.1; 1991 (Reg. Sess., 1992), c. 890, s. 11.)

§§ 130A-310.24 through 130A-310.29: Reserved for further codification purposes.

Part 5. Brownfields Property Reuse Act.

§ 130A-310.30. Short title.

This Part may be cited as The Brownfields Property Reuse Act of 1997. (1997-357, s. 2.)

Editor's Note. — Session Laws 1997-357, s. 1, provides: "The General Assembly makes the following findings:

"(1) There are abandoned, idle, and underused properties in North Carolina, often referred to as 'brownfields', that may have been or were contaminated by past industrial and commercial activities, but that are attractive locations for redevelopment.

"(2) The reuse, development, redevelopment, transfer, financing, and other use of brownfields is impaired by the potential liability associated with the risk of contamination.

"(3) The safe redevelopment of brownfields would benefit the citizens of North Carolina in many ways, including improving the tax base of local government and creating job opportunities for citizens in the vicinity of brownfields.

"(4) Potential purchasers and developers of brownfields and other parties who have no connection with the contamination of the property, including redevelopment lenders, should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create, so long as the property can be and is made safe for appropriate future use.

"(5) Public and local government involvement in commenting on the safe reuse of brownfields will improve the quality and acceptability of their redevelopment."

Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

§ 130A-310.31. Definitions.

(a) Unless a different meaning is required by the context or unless a different meaning is set out in subsection (b) of this section, the definitions in G.S. 130A-2 and G.S. 130A-310 apply throughout this Part.

(b) Unless a different meaning is required by the context:

(1) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(2) "Brownfields agreement" means an agreement between the Department and a prospective developer that meets the requirements of G.S. 130A-310.32.

(3) "Brownfields property" or "brownfields site" means abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of environmental contamination and that is or may be subject to remediation under any State remedial program other than Part 2A of Article 21A of Chapter 143 of the General Statutes or that is or may be subject to remediation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601, et seq.) except for a site listed on the National Priorities List pursuant to 42 U.S.C. § 9605.

(4) "Contaminant" means a regulated substance released into the environment.

(5) "Unrestricted use standards" when used in connection with "cleanup", "remediated", or "remediation" means contaminant concentrations for each environmental medium that are considered acceptable for all uses and that comply with generally applicable standards, guidance, or established methods governing the contaminants that are established by statute or adopted, published, or implemented by the Environmental Management Commission, the Commission, or the Department instead of the site-specific contaminant levels established pursuant to this Part.

(6) "Environmental contamination" means contaminants at the property requiring remediation and that are to be remediated under the brownfields agreement including, at a minimum, hazardous waste, as defined in G.S. 130A-290; a hazardous substance, as defined in G.S. 130A-310; a hazardous substance, as defined in G.S. 143-215.77; or oil, as defined in G.S. 143-215.77.

(7) "Local government" means a town, city, or county.

(8) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(9) "Potentially responsible party" means a person who is or may be liable for remediation under a remedial program.

(10) "Prospective developer" means any person with a bona fide, demonstrable desire to either buy or sell a brownfields property for the purpose of developing or redeveloping that brownfields property and who did not cause or contribute to the contamination at the brownfields property.

(11) "Regulated substance" means a hazardous waste, as defined in G.S 130A-290; a hazardous substance, as defined in G.S. 143-215.77A; oil, as defined in G.S. 143-215.77; or other substance regulated under any remedial program implemented by the Department other than Part 2A of Article 21A of Chapter 143 of the General Statutes.

(12) "Remedial program" means a program implemented by the Department for the remediation of any contaminant, including the Inactive Hazardous Sites Response Act of 1987 under Part 3 of this Article, the Superfund Program under Part 4 of this Article, and the Oil Pollution and Hazardous Substances Control Act of 1978 under Part 2 of Article 21A of Chapter 143 of the General Statutes.

(13) "Remediation" means action to clean up, mitigate, correct, abate, minimize, eliminate, control, or prevent the spreading, migration, leaking, leaching, volatilization, spilling, transport, or further release of a contaminant into the environment in order to protect public health or the environment.

(14) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition). (1997-357, s. 2; 1997-392, ss. 4.2-4.4; 2001-384, s. 11; 2006-71, ss. 1, 2, 3.)

Editor's Note. — Session Laws 1997-392, s. 6(c), provides: "Sections 4.2 through 4.5 of this act become effective if and when 1997 House Bill 1121 becomes law." House Bill 1121 was enacted as Session Laws 1997-357, effective October 1, 1997.

Effect of Amendments. — Session Laws 2006-71, ss. 1 through 3, effective January 1, 2007, added "(42 U.S.C. § 9601, et seq.) except for a site listed on the National Priorities List pursuant to 42 U.S.C. § 9605" at the end of subdivision (b)(3); in subdivision (b)(5), substituted "contaminant concentrations for each environmental medium that are considered acceptable for all uses and that comply" for "that cleanup or remediation of contamination complies" and "site-specific contaminant levels established pursuant to this Part" for "risk-based standards established by the Commission pursuant to this Part"; and substituted "with a bona fide, demonstrable desire" for "who desires" in subdivision (b)(10).

§ 130A-310.32. Brownfields agreement.

(a) The Department may, in its discretion, enter into a brownfields agreement with a prospective developer who satisfies the requirements of this section. A prospective developer shall provide the Department with any information necessary to demonstrate that:

(1) The prospective developer, and any parent, subsidiary, or other affiliate of the prospective developer has substantially complied with:
  a. The terms of any brownfields agreement or similar agreement to which the prospective developer or any parent, subsidiary, or other affiliate of the prospective developer has been a party.
  b. The requirements applicable to any remediation in which the applicant has previously engaged.
  c. Federal and state laws, regulations, and rules for the protection of the environment.

(2) As a result of the implementation of the brownfields agreement, the brownfields property will be suitable for the uses specified in the agreement while fully protecting public health and the environment instead of being remediated to unrestricted use standards.

(3) There is a public benefit commensurate with the liability protection provided under this Part.

(4) The prospective developer has or can obtain the financial, managerial, and technical means to fully implement the brownfields agreement and assure the safe use of the brownfields property.

(5) The prospective developer has complied with or will comply with all applicable procedural requirements.

(b) In negotiating a brownfields agreement, parties may rely on land-use restrictions that will be included in a Notice of Brownfields Property required under G.S. 130A-310.35. A brownfields agreement may provide for remediation standards that are based on those land-use restrictions.

(c) A brownfields agreement shall contain a description of the brownfields property that would be sufficient as a description of the property in an instrument of conveyance and, as applicable, a statement of:

(1) Any remediation to be conducted on the property, including:
  a. A description of specific areas where remediation is to be conducted.
  b. The remediation method or methods to be employed.
  c. The resources that the prospective developer will make available.
  d. A schedule of remediation activities.
  e. Applicable remediation standards.
  f. A schedule and the method or methods for evaluating the remediation.

(2) Any land-use restrictions that will apply to the brownfields property.

(3) The desired results of any remediation or land-use restrictions with respect to the brownfields property.

(4) The guidelines, including parameters, principles, and policies within which the desired results are to be accomplished.
(5) The consequences of achieving or not achieving the desired results.

(d) Any failure of the prospective developer or the prospective developer's agents and employees to comply with the brownfields agreement constitutes a violation of this Part by the prospective developer. (1997-357, s. 2; 2001-384, s. 11.)

Cross References. — As to taxation of qualifying improvements on brownsfields, see G.S. 105-277.13.

§ 130A-310.33. Liability protection.

(a) A prospective developer who enters into a brownfields agreement with the Department and who is complying with the brownfields agreement shall not be held liable for remediation of areas of contaminants identified in the brownfields agreement except as specified in the brownfields agreement, so long as the activities conducted on the brownfields property by or under the control or direction of the prospective developer do not increase the risk of harm to public health or the environment and the prospective developer is not required to undertake additional remediation to unrestricted use standards pursuant to subsection (c) of this section. The liability protection provided under this Part applies to all of the following persons to the same extent as to a prospective developer, so long as these persons are not otherwise potentially responsible parties or parents, subsidiaries, or affiliates of potentially responsible parties and the person is not required to undertake additional remediation to unrestricted use standards pursuant to subsection (c) of this section:
(1) Any person under the direction or control of the prospective developer who directs or contracts for remediation or redevelopment of the brownfields property.
(2) Any future owner of the brownfields property.
(3) A person who develops or occupies the brownfields property.
(4) A successor or assign of any person to whom the liability protection provided under this Part applies.
(5) Any lender or fiduciary that provides financing for remediation or redevelopment of the brownfields property.

(b) A person who conducts an environmental assessment or transaction screen on a brownfields property and who is not otherwise a potentially responsible party is not a potentially responsible party as a result of conducting the environmental assessment or transaction screen unless that person increases the risk of harm to public health or the environment by failing to exercise due diligence and reasonable care in performing the environmental assessment or transaction screen.

(c) If a land-use restriction set out in the Notice of Brownfields Property required under G.S. 130A-310.35 is violated, the owner of the brownfields property at the time the land-use restriction is violated, the owner's successors and assigns, and the owner's agents who direct or contract for alteration of the brownfields property in violation of a land-use restriction shall be liable for remediation to unrestricted use standards. A prospective developer who completes the remediation or redevelopment required under a brownfields agreement or other person who receives liability protection under this Part shall not be required to undertake additional remediation at the brownfields property unless any of the following apply:
(1) The prospective developer knowingly or recklessly provides false information that forms a basis for the brownfields agreement or that

is offered to demonstrate compliance with the brownfields agreement or fails to disclose relevant information about contamination at the brownfields property.

(2) New information indicates the existence of previously unreported contaminants or an area of previously unreported contamination on or associated with the brownfields property that has not been remediated to unrestricted use standards, unless the brownfields agreement is amended to include any previously unreported contaminants and any additional areas of contamination. If the brownfields agreement sets maximum concentrations for contaminants, and new information indicates the existence of previously unreported areas of these contaminants, further remediation shall be required only if the areas of previously unreported contaminants raise the risk of the contamination to public health or the environment to a level less protective of public health and the environment than that required by the brownfields agreement.

(3) The level of risk to public health or the environment from contaminants is unacceptable at or in the vicinity of the brownfields property due to changes in exposure conditions, including (i) a change in land use that increases the probability of exposure to contaminants or in the vicinity of the brownfields property or (ii) the failure of remediation to mitigate risks to the extent required to make the brownfields property fully protective of public health and the environment as planned in the brownfields agreement.

(4) The Department obtains new information about a contaminant associated with the brownfields property or exposures at or around the brownfields property that raises the risk to public health or the environment associated with the brownfields property beyond an acceptable range and in a manner or to a degree not anticipated in the brownfields agreement. Any person whose use, including any change in use, of the brownfields property causes an unacceptable risk to public health or the environment may be required by the Department to undertake additional remediation measures under the provisions of this Part.

(5) A prospective developer fails to file a timely and proper Notice of Brownfields Development under this Part. (1997-357, s. 2; 2001-384, s. 11.)

§ 130A-310.34. Public notice and community involvement.

(a) A prospective developer who desires to enter into a brownfields agreement shall notify the public and the community in which the brownfields property is located of planned remediation and redevelopment activities. The prospective developer shall submit a Notice of Intent to Redevelop a Brownfields Property and a summary of the Notice of Intent to the Department. The Notice of Intent shall provide, to the extent known, a legal description of the location of the brownfields property, a map showing the location of the brownfields property, a description of the contaminants involved and their concentrations in the media of the brownfields property, a description of the intended future use of the brownfields property, any proposed investigation and remediation, and a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. Both the Notice of Intent and the summary of the Notice of Intent shall state the time period and means for submitting written comment and for requesting a public meeting on the proposed brownfields agreement. The summary of the Notice of Intent shall include a statement as to the public availability of the full Notice of Intent.

After approval of the Notice of Intent and summary of the Notice of Intent by the Department, the prospective developer shall provide a copy of the Notice of Intent to all local governments having jurisdiction over the brownfields property. The prospective developer shall publish the summary of the Notice of Intent in a newspaper of general circulation serving the area in which the brownfields property is located and shall file a copy of the summary of the Notice of Intent with the Codifier of Rules, who shall publish the summary of the Notice of Intent in the North Carolina Register. The prospective developer shall also conspicuously post a copy of the summary of the Notice of Intent at the brownfields site.

(b) Publication of the approved summary of the Notice of Intent in the North Carolina Register and publication in a newspaper of general circulation shall begin a public comment period of at least 30 days from the later date of publication. During the public comment period, members of the public, residents of the community in which the brownfields property is located, and local governments having jurisdiction over the brownfields property may submit comment on the proposed brownfields agreement, including methods and degree of remediation, future land uses, and impact on local employment.

(c) Any person who desires a public meeting on a proposed brownfields agreement shall submit a written request for a public meeting to the Department within 21 days after the public comment period begins. The Department shall consider all requests for a public meeting and shall hold a public meeting if the Department determines that there is significant public interest in the proposed brownfields agreement. If the Department decides to hold a public meeting, the Department shall, at least 15 days prior to the public meeting, mail written notice of the public meeting to all persons who requested the public meeting and to any other person who had previously requested notice. The Department shall also direct the prospective developer to publish, at least 15 days prior to the date of the public meeting, a notice of the public meeting at least one time in a newspaper having general circulation in such county where the brownfields property is located. In any county in which there is more than one newspaper having general circulation, the Department shall direct the prospective developer to publish a copy of the notice in as many newspapers having general circulation in the county as the Department in its discretion determines to be necessary to assure that the notice is generally available throughout the county. The Department shall prescribe the form and content of the notice to be published. The Department shall prescribe the procedures to be followed in the public meeting. The Department shall take detailed minutes of the meeting. The minutes shall include any written comments, exhibits, or documents presented at the meeting.

(d) Prior to entering into a brownfields agreement, the Department shall take into account the comment received during the comment period and at the public meeting if the Department holds a public meeting. The Department shall incorporate into the brownfields agreement provisions that reflect comment received during the comment period and at the public meeting to the extent practical. The Department shall give particular consideration to written comment that is supported by valid scientific and technical information and analysis and to written comment from the units of local government that have taxing jurisdiction over the brownfields property. (1997-357, s. 2; 2000-158, s. 2; 2006-71, ss. 4, 5.)

Effect of Amendments. — Session Laws 2006-71, ss. 4 and 5, effective January 1, 2007, substituted "30" for "60" in subsection (b); and, in subsection (c), substituted "21" for "30" in the first sentence, and "15" for "30" in the third and fourth sentences.

§ 130A-310.35. Notice of Brownfields Property; land-use restrictions in deed.

(a) In order to reduce or eliminate the danger to public health or the environment posed by a brownfields property being addressed under this Part, a prospective developer who desires to enter into a brownfields agreement with the Department shall submit to the Department a proposed Notice of Brownfields Property. A Notice of Brownfields Property shall be entitled "Notice of Brownfields Property", shall include a survey plat of areas designated by the Department that has been prepared and certified by a professional land surveyor and that meets the requirements of G.S. 47-30, shall include a legal description of the brownfields property that would be sufficient as a description of the property in an instrument of conveyance, and shall identify all of the following:

(1) The location and dimensions of the areas of potential environmental concern with respect to permanently surveyed benchmarks.

(2) The type, location, and quantity of regulated substances and contaminants known to exist on the brownfields property.

(3) Any restrictions on the current or future use of the brownfields property or, with the owner's permission, other property that are necessary or useful to maintain the level of protection appropriate for the designated current or future use of the brownfields property and that are designated in the brownfields agreement. These land-use restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Where a brownfields property encompasses more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded.

(b) After the Department approves and certifies the Notice of Brownfields Property under subsection (a) of this section, a prospective developer who enters into a brownfields agreement with the Department shall file a certified copy of the Notice of Brownfields Property in the register of deeds' office in the county or counties in which the land is located. The prospective developer shall file the Notice of Brownfields Property within 15 days of the prospective developer's receipt of the Department's approval of the notice or the prospective developer's entry into the brownfields agreement, whichever is later.

(c) The register of deeds shall record the certified copy of the notice and index it in the grantor index under the names of the owners of the land, and, if different, also under the name of the prospective developer conducting the redevelopment of the brownfields property.

(d) When a brownfields property is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument, a statement that the brownfields property has been classified and, if appropriate, cleaned up as a brownfields property under this Part.

(e) A Notice of Brownfields Property filed pursuant to this section may, at the request of the owner of the land, be cancelled by the Secretary after the hazards have been eliminated. If requested in writing by the owner of the land and if the Secretary concurs with the request, the Secretary shall send to the register of deeds of each county where the notice is recorded a statement that the hazards have been eliminated and request that the notice be cancelled of record. The Secretary's statement shall contain the names of the owners of the land as shown in the notice and reference the plat book and page where the notice is recorded. The register of deeds shall record the Secretary's statement in the deed books and index it on the grantor index in the names of the owners of the land as shown in the Notice of Brownfields Property and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice of Brownfields Property showing the date of cancellation and the book and page where the Secretary's statement is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record maps and plats, the register of deeds shall not be required to make a marginal entry.

(f) Any land-use restriction filed pursuant to this section shall be enforced by any owner of the land. Any land-use restriction may also be enforced by the Department through the remedies provided in Part 2 of Article 1 of this Chapter or by means of a civil action. The Department may enforce any land-use restriction without first having exhausted any available administrative remedies. A land-use restriction may also be enforced by any unit of local government having jurisdiction over any part of the brownfields property by means of a civil action without the unit of local government having first exhausted any available administrative remedy. A land-use restriction may also be enforced by any person eligible for liability protection under this Part who will lose liability protection if the land-use restriction is violated. A land-use restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this section shall abide by the land-use restriction.

(g) This section shall apply in lieu of the provisions of G.S. 130A-310.8 for brownfields properties remediated under this Part. (1997-357, s. 2; 1997-443, s. 11A.119(b).)

§ 130A-310.36. Appeals.

A decision by the Department as to whether or not to enter into a brownfields agreement including the terms of any brownfields agreement is reviewable under Article 3 of Chapter 150B of the General Statutes. (1997-357, s. 2.)

§ 130A-310.37. Construction of Part.

(a) This Part is not intended and shall not be construed to:

(1) Affect the ability of local governments to regulate land use under Article 19 of Chapter 160A of the General Statutes and Article 18 of Chapter 153A of the General Statutes. The use of the identified brownfields property and any land-use restrictions in the brownfields agreement shall be consistent with local land-use controls adopted under those statutes.

(2) Amend, modify, repeal, or otherwise alter any provision of any remedial program or other provision of this Chapter, Chapter 143 of the General Statutes, or any other provision of law relating to civil and criminal penalties or enforcement actions and remedies available to the Department, except as may be provided in a brownfields agreement.

(3) Prevent or impede the immediate response of the Department or responsible party to an emergency that involves an imminent or actual release of a regulated substance that threatens public health or the environment.

(4) Relieve a person receiving liability protection under this Part from any liability for contamination later caused by that person on a brownfields property.

(5) Affect the right of any person to seek any relief available against any party to the brownfields agreement who may have liability with

respect to the brownfields property, except that this Part does limit the relief available against any party to a brownfields agreement with respect to remediation of the brownfields property to the remediation required under the brownfields agreement.

(6) Affect the right of any person who may have liability with respect to the brownfields property to seek contribution from any other person who may have liability with respect to the brownfields property and who neither received nor has liability protection under this Part.

(7) Prevent the State from enforcing specific numerical remediation standards, monitoring, or compliance requirements specifically required to be enforced by the federal government as a condition to receive program authorization, delegation, primacy, or federal funds.

(8) Create a defense against the imposition of criminal and civil fines or penalties or administrative penalties otherwise authorized by law and imposed as the result of the illegal disposal of waste or for the pollution of the land, air, or waters of this State on a brownfields property.

(9) Relieve a person of any liability for failure to exercise due diligence and reasonable care in performing an environmental assessment or transaction screen.

(b) Notwithstanding the provisions of the Tort Claims Act, G.S. 143-291 through G.S. 143-300.1 or any other provision of law waiving the sovereign immunity of the State of North Carolina, the State, its agencies, officers, employees, and agents shall be absolutely immune from any liability in any proceeding for any injury or claim arising from negotiating, entering, monitoring, or enforcing a brownfields agreement or a Notice of Brownfields Property under this Part or any other action implementing this Part.

(c) The Department shall not enter into a brownfields agreement for a site listed on the National Priorities List pursuant to 42 U.S.C. § 9605. (1997-357, s. 2; 1997-392, s. 4.5; 2006-71, s. 6.)

Editor's Note. — Session Laws 1997-392, s. 6(c), provides: "Sections 4.2 through 4.5 of this act become effective if and when 1997 House Bill 1121 becomes law." House Bill 1121 was enacted as Session Laws 1997-357, effective October 1, 1997.

Effect of Amendments. — Session Laws 2006-71, s. 6, effective January 1, 2007, rewrote subsection (c).

§ 130A-310.38. Brownfields Property Reuse Act Implementation Account.

The Brownfields Property Reuse Act Implementation Account is created as a nonreverting interest-bearing account in the Office of the State Treasurer. The Account shall consist of fees and interest collected under G.S. 130A-310.39, moneys appropriated to it by the General Assembly, moneys received from the federal government, moneys contributed by private organizations, and moneys received from any other source. Funds in the Account shall be used by the Department to defray the costs of implementing this Part. The Department may contract with a private entity for any services necessary to implement this Part. (1997-357, s. 2; 1999-360, s. 17.2.)

§ 130A-310.39. Fees.

(a) The Department shall collect the following fees:

(1) A prospective developer who submits a proposed brownfields agree-

ment for review by the Department shall pay an initial fee of two thousand dollars ($2,000).

(2) A prospective developer who enters into a brownfields agreement with the Department shall pay a fee in an amount equal to the full cost to the Department and the Department of Justice of all activities related to the brownfields agreement, including but not limited to negotiation of the brownfields agreement, public notice and community involvement, and monitoring the implementation of the brownfields agreement. The procedure by which the amount of this fee is determined shall be established by agreement between the prospective developer and the Department and shall be set out as a part of the brownfields agreement. The fee imposed by this subdivision shall be paid in two installments. The first installment shall be due at the time the prospective developer and the Department enter into the brownfields agreement and shall equal all costs that have been incurred by the Department and the Department of Justice at that time less the amount of the initial fee paid pursuant to subdivision (1) of this subsection. The Department shall not enter into the brownfields agreement unless the first installment is paid in full when due. The second installment shall be due at the time the prospective developer submits a final report certifying completion of remediation under the brownfields agreement and shall include any additional costs that have been incurred by the Department and the Department of Justice, including all costs of monitoring the implementation of the brownfields agreement.

(b) Fees and interest imposed under this section shall be credited to the Brownfields Property Reuse Act Implementation Account.

(c) If a prospective developer fails to pay the full amount of any fee due under this section, interest on the unpaid portion of the fee shall accrue from the time the fee is due until paid at the rate established by the Secretary of Revenue pursuant to G.S. 105-241.21. A lien for the amount of the unpaid fee plus interest shall attach to the real and personal property of the prospective developer and to the brownfields property until the fee and interest is paid. The Department may collect unpaid fees and interest in any manner that a unit of local government may collect delinquent taxes. (1997-357, s. 2; 1999-360, s. 17.3; 2007-491, s. 44(1)(a).)

Effect of Amendments. — Session Laws 2007-491, s. 44(1)(a), effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (c).

§ 130A-310.40. Legislative reports.

The Department shall prepare and submit to the Environmental Review Commission, concurrently with the report on the Inactive Hazardous Sites Response Act of 1987 required under G.S. 130A-310.10, an evaluation of the effectiveness of this Part in facilitating the remediation and reuse of existing industrial and commercial properties. This evaluation shall include any recommendations for additional incentives or changes, if needed, to improve the effectiveness of this Part in addressing such properties. This evaluation shall also include a report on receipts by and expenditures from the Brownfields Property Reuse Act Implementation Account. (1997-357, s. 2.)

§§ 130A-310.41 through 130A-310.49: Reserved for future codification purposes.

G.S. 130A-310.50 is set out twice. See notes.

Part 6. Mercury Switch Removal.

§ 130A-310.50. (Effective until December 31, 2017) Definitions.

As used in this Part:

(1) Repealed by Session Laws 2007-142, s. 1, effective June 29, 2007.

(2) "End-of-life vehicle" means a vehicle that is sold, given, or otherwise conveyed to a vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility for the purpose of recycling.

(2a) "Inaccessible", when used in connection with mercury switch, means that, due to the condition of the vehicle, the mercury switch cannot be removed from a vehicle without a significant risk of a release of mercury into the environment.

(3), (4) Repealed by Session Laws 2007-142, s. 1, effective June 29, 2007.

(4a) "Mercury recovery performance ratio" means the ratio of the number of pounds of mercury recovered from mercury switches from the State in a calendar year to the estimated number of pounds of mercury available to be recovered from mercury switches from the State in the same calendar year.

(5) "Mercury switch" means each capsule or assembly containing mercury that is part of a convenience light switch installed in a vehicle.

(5a) Reserved for future codification purposes.

(5b) "National mercury recovery performance ratio" means the ratio of the number of pounds of mercury recovered from mercury switches from the United States in a calendar year to the estimated number of pounds of mercury available to be recovered from mercury switches from the United States in the same calendar year.

(5c) "NVMSRP" means the Memorandum of Understanding to establish the National Vehicle Mercury Switch Recovery Program dated 11 August 2006.

(6) "Scrap vehicle processing facility" means a fixed location where machinery and equipment are used to process scrap vehicles into specification grade commodities including facilities where a shredder or fragmentizer is used to process scrap vehicles into shredded scrap and facilities where end-of-life vehicles are prepared to be shredded.

(7) "Vehicle" means any passenger automobile or passenger car, station wagon, truck, van, or sport utility vehicle with a gross vehicle weight rating of less than 12,000 pounds.

(7a) "Vehicle crusher" means a person who engages in the business of flattening, crushing, or otherwise processing end-of-life vehicles for recycling. Vehicle crusher includes, but is not limited to, a person who uses fixed or mobile equipment to flatten or crush end-of-life vehicles for a vehicle recycler or a scrap vehicle processing facility.

(7b) "Vehicle dismantler" has the same meaning as "vehicle recycler."

(7c) "Vehicle manufacturer" means a person, firm, association, partnership, corporation, governmental entity, organization, combination, or joint venture that is the last person in the production or assembly process of a motor vehicle that contains one or more mercury switches, or in the case of an imported vehicle, the importer or domestic distributor of the vehicle. "Vehicle manufacturer" does not include any person engaged in the business of selling new motor vehicles at retail or any person who converts or modifies new motor vehicles after the production or assembly process.

G.S. 130A-310.50 is set out twice. See notes.

(8) "Vehicle recycler" means a person or entity engaged in the business of acquiring, dismantling, or destroying six or more end-of-life vehicles in a calendar year for the primary purpose of resale of parts of the vehicle, including scrap metal. (2005-384, s. 1; 2006-255, s. 5; 2007-142, s. 1.)

Section Set Out Twice. — The section above is effective until December 31, 2017. For this section as in effect December 31, 2017, see the following section, also numbered G.S. 130A-310.50.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Editor's Note. — Session Laws 2005-384, s. 3, provides: "The Commission for Health Services [now the Commission for Public Health] shall amend 15A NCAC 13A.0119 to adopt rules governing the management of waste mercury-containing devices, as defined in the Notice of Proposed Rulemaking published on June 12, 2002 in the Federal Register, Volume 67, Number 113, Pages 40507 through 40528, as universal waste."

Session Laws 2007-142, s. 1, enacted a new subdivision (5a), which was redesignated as subdivision (4a) at the direction of the Revisor of Statutes to maintain alphabetical order.

Effect of Amendments. — Session Laws 2007-142, s. 1, effective June 29, 2007, and expiring December 31, 2017, deleted subdivision (1) concerning "Capture rate"; in subdivision (2), inserted "vehicle crusher, vehicle dismantler" and substituted "scrap vehicle processing" for "scrap metal recycling"; added subdivision (2a); deleted former subdivision (3) concerning "Manufacturer"; deleted former subdivision (4) concerning "Mercury minimization plan"; substituted "capsule or assembly containing mercury that is part of a convenience light switch" for "mercury containing capsule, commonly known as a 'bullet', that is part of a convenience light switch assembly" in subdivision (5); added subdivisions (5a) through (5c); rewrote subdivision (6); added subdivision (7a) through (7c); and, in subdivision (8), substituted "a person" for "an individual" near the beginning and added "including scrap metal" at the end.

§ 130A-310.50. (Effective December 31, 2017) Definitions.

As used in this Part:

(1) "Capture rate" means the annual removal, collection, and recovery of mercury switches as a percentage of the total number of mercury switches available for removal from end-of-life vehicles.

(2) "End-of-life vehicle" means a vehicle that is sold, given, or otherwise conveyed to a vehicle recycler or scrap metal recycling facility for the purpose of recycling.

(3) "Manufacturer" means a person, firm, association, partnership, corporation, governmental entity, organization, combination, or joint venture that is the last person in the production or assembly process of a new vehicle that utilizes mercury switches, or in the case of an imported vehicle, the importer or domestic distributor of the vehicle.

(4) "Mercury minimization plan" means a plan for removing, collecting, and recovering mercury switches from end-of-life vehicles that is prepared as provided in G.S. 130A-310.53.

(5) "Mercury switch" means each mercury-containing capsule, commonly known as a "bullet", that is part of a convenience light switch assembly installed in a vehicle.

(6) "Scrap metal recycling facility" means a fixed location where machinery and equipment are used to process scrap metal into specific grades

of scrap metal for sale and whose primary product is scrap iron, scrap steel, or nonferrous metallic scrap.

(7) "Vehicle" means any passenger automobile or passenger car, station wagon, truck, van, or sport utility vehicle with a gross vehicle weight rating of less than 12,000 pounds.

(8) "Vehicle recycler" means an individual or entity engaged in the business of acquiring, dismantling, or destroying six or more end-of-life vehicles in a calendar year for the primary purpose of resale of parts of the vehicle. (2005-384, s. 1; 2006-255, s. 5; 2007-142, ss. 1, 9.)

Section Set Out Twice. — The section above is effective December 31, 2017. For the section as in effect until December 31, 2017, see the preceding section, also numbered G.S. 130A-310.50.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Editor's note. — Session Laws 2005-384, s. 3, provides: "The Commission for Health Services [now the Commission for Public Health] shall amend 15A NCAC 13A.0119 to adopt rules governing the management of waste mercury-containing devices, as defined in the Notice of Proposed Rulemaking published on June 12, 2002 in the Federal Register, Volume 67, Number 113, Pages 40507 through 40528, as universal waste."

§ 130A-310.51. (For expiration date — see note) Purpose.

The purpose of this Part is to reduce the quantity of mercury that is released into the environment by removing mercury switches from end-of-life vehicles and by creating a removal, collection, and recovery program for mercury switches that are removed from end-of-life vehicles in this State. (2005-384, s. 1; 2006-255, s. 5.)

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

§ 130A-310.52: Repealed by Session Laws 2007-142, s. 2, effective June 29, 2007, and expiring on December 31, 2017.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005, except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Expiration of Repeal of Section. — Session Laws 2007-142, s. 9 provides that the act, which repealed G.S. 130A-310.52, expires on December 31, 2017.

Former G.S. 130A-310.52, prior to its repeal

G.S. 130A-310.53 is set out twice. See notes.

by Session Laws 2007-142, s.2, read as follows: "**§ 130A-310.52. Mercury minimization plan.**

"(a) The Department shall develop and administer a mercury minimization plan to achieve the goal of having a capture rate of at least ninety percent (90%). In preparing the plan, the Department shall consult with manufacturers of vehicles, who shall participate in the development of the plan on an advisory basis. To the extent practicable, the mercury minimization plan shall utilize the currently available end-of-life vehicle recycling infrastructure. To the extent adequate, affordable, and environmentally sound end-of-life vehicle recycling infrastructure is unavailable, the plan shall provide for the development of this infrastructure.

"(b) A plan developed under subsection (a) of this section shall include the following:

"(1) A compilation of the make, model, and year of any vehicle that was sold or offered for sale by the vehicle manufacturer and contains one or more mercury switches and a description and the location of each mercury switch in the vehicle. A vehicle manufacturer shall report to the Department the information needed to make the compilation.

"(2) A description of all safe and environmentally sound methods for removal of mercury switches from end-of-life vehicles. A vehicle manufacturer shall report to the Department the information needed to make the description.

"(3) A presumption that if the manufacturer does not know or is uncertain as to whether or not a switch contains mercury, the switch does contain mercury.

"(4) A system to mark end-of-life vehicles that are to be shredded or crushed to indicate the presence or absence of a mercury switch.

"(5) Educational materials to assist a vehicle recycler or a scrap metal recycling facility in undertaking a safe and environmentally sound method for the removal of the mercury switches from end-of-life vehicles. The materials shall include information on hazards related to mercury and on the proper handling of mercury.

"(6) A method for storage and disposal of the mercury switches, including packaging and shipping of mercury switches to permitted recycling, storage, or disposal facilities. To the extent adequate, affordable, and environmentally sound mercury switch disposal technology is unavailable, a method for the temporary storage of mercury switches."

§ 130A-310.53. (Effective until December 31, 2017) Removal of mercury switches from end-of-life vehicles.

(a) A vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility shall not flatten, crush, bale, or shred an end-of-life vehicle that contains accessible mercury switches. Except as provided in this subsection, a vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility shall remove all accessible mercury switches from end-of-life vehicles before the vehicle is flattened, crushed, baled, or shredded, or before the vehicle is conveyed to another vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility. If a vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility conveys an end-of-life vehicle to another vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility without removing accessible mercury switches, the receiving vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility must agree to accept the end-of-life vehicle and assume responsibility for the proper removal of all accessible mercury switches. The agreement to assume responsibility for the proper removal of all accessible mercury switches shall be documented on an invoice that is provided by the vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility to the person to whom the vehicle is conveyed.

(b) A vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility that removes all accessible mercury switches from an end-of-life vehicle shall mark the vehicle to indicate that all accessible mercury switches have been removed. The vehicle crusher, vehicle dismantler, vehicle

G.S. 130A-310.53 is set out twice. See notes.

recycler, or scrap vehicle processing facility shall certify to any person to whom the vehicle is conveyed, in a form acceptable to the Department, that all accessible mercury switches have been removed from the vehicle.

(c), (d) Repealed by Session Laws 2007-142, s. 3, effective July 1, 2007.

(e) Mercury switches that are removed from end-of-life vehicles are considered "universal waste" as defined in 40 Code of Federal Regulations § 273.9 (July 1, 2006 Edition). Mercury switches that are removed from end-of-life vehicles shall be collected, transported, treated, stored, disposed of, and otherwise handled in accordance with rules adopted by the Commission governing universal waste.

(f) Vehicle manufacturers, in cooperation with the Department, shall develop, implement, and bear the costs of a mercury switch collection system in accordance with the NVMSRP. This system shall be developed and implemented so as to enhance vehicle recyclability, promote public education and outreach, and provide for the proper removal, collection, and disposal of mercury switches from end-of-life vehicles. (2005-384, s. 1; 2006-255, s. 5; 2007-142, s. 3.)

Section Set Out Twice. — The section above is effective until December 31, 2017. For this section as in effect December 31, 2017, see the following section, also numbered G.S. 130A-310.53.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Effect of Amendments. — Session Laws 2007-142, s. 3, effective July 1, 2007, and expiring December 31, 2017, rewrote subsections (a) and (b); deleted subsections (c) and (d); substituted "2006 Edition" for "2004 Edition" in the middle of subsection (e); and added subsection (f).

§ 130A-310.53. (Effective December 31, 2017) Removal of mercury switches from end-of-life vehicles.

(a) A vehicle recycler that conveys ownership of an end-of-life vehicle to a scrap metal recycling facility shall remove all mercury switches identified in the mercury minimization plan prior to delivery of the vehicle to the scrap metal recycling facility. If a mercury switch is inaccessible, the fact that the mercury switch remains in the vehicle shall be noted on the vehicle recycler's invoice.

(b) A scrap metal recycling facility that accepts an end-of-life vehicle that has not been flattened, crushed, baled, or shredded and that contains mercury switches shall remove the mercury switches before the end-of-life vehicle is flattened, crushed, baled, or shredded unless the mercury switch is inaccessible.

(c) A mercury switch is inaccessible if, due to the condition of the vehicle, the switch cannot be removed in accordance with the mercury minimization plan and removal of the switch would significantly increase the risk of a release of mercury into the environment.

(d) A vehicle recycler or scrap metal recycling facility that removes mercury switches pursuant to subsection (a) or (b) of this section shall make quarterly reports to the Department on the following:

(1) The number of vehicles that it processed for recycling.

G.S. 130A-310.53 is set out twice. See notes.

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(2) The number of vehicles from which it removed a mercury switch by make.

(3) The number of vehicles for which it could not remove the mercury switch because the switch was inaccessible.

(e) Mercury switches that are removed from end-of-life vehicles are considered 'universal waste' as defined in 40 Code of Federal Regulations § 273.9 (1 July 2004 Edition). Mercury switches that are removed from end-of-life vehicles shall be collected, transported, treated, stored, disposed of, and otherwise handled in accordance with rules adopted by the Commission governing universal waste. (2005-384, s. 1; 2006-255, s. 5; 2007-142, ss. 3, 9.)

Section Set Out Twice. — The section above is effective December 31, 2017. For this section as effective until December 31, 2017, see the preceding section, also numbered G.S. 130A-310.53.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

§ 130A-310.54. (Effective until December 31, 2017) Mercury Switch Removal Account.

(a) The Mercury Switch Removal Account is established in the Department. Revenue is credited to the Account from the certificate of title fee under G.S. 20-85.

(b) Revenue in the Mercury Switch Removal Account shall be used to reimburse the Department and others for costs incurred in implementing the mercury switch removal program. The reimbursable costs are:

(1) Five dollars ($5.00) for each mercury switch removed by a vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility pursuant to this Article and sent to destination facilities in accordance with the NVMSRP for recycling or disposal.

(2) Costs incurred by the Department in administering the program.

(c) The Department shall reimburse vehicle crushers, vehicle dismantlers, vehicle recyclers, and scrap vehicle processing facilities based on a reimbursement request that attests to the number of switches sent to destination facilities for recycling or disposal in accordance with the NVMSRP. Each reimbursement request shall be verified against information posted on the Internet site provided by the vehicle manufacturers in accordance with the NVMSRP, or against other information that verifies the reimbursement requested to the satisfaction of the Department. The vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility shall provide the Department with any information requested by the Department to verify the accuracy of a reimbursement request. Each vehicle crusher, vehicle dismantler, vehicle recycler, or scrap vehicle processing facility shall maintain accurate records that support each reimbursement request for a minimum of three years from the date the reimbursement request is approved. (2005-384, s. 1; 2006-255, s. 5; 2007-142, s. 4.)

Section Set Out Twice. — The section above is effective until December 31, 2017. For this section as in effect December 31, 2017, see the following section, also numbered G.S. 130A-310.54.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law

(September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Effect of Amendments. — Session Laws 2007-142, s. 4, effective July 1, 2007, and expiring December 31, 2017, substituted "Mercury Switch Removal Account" for "Funds to implement plan" in the section heading; substituted "Switch Removal" for "Pollution Prevention" in subsections (a) and (b); substituted "switch removal program" for "minimization plan" at the end of the first sentence of subsection (b); inserted "vehicle crusher, vehicle dismantler" and substituted "scrap vehicle processing facility pursuant to this Article and sent to destination facilities in accordance with the NVMSRP for recycling or disposal" for "scrap metal recycling facility pursuant to this Article" in subdivision (b)(1); substituted "program" for "plan" in subdivision (b)(2); and rewrote subsection (c).

§ 130A-310.54. (Effective December 31, 2017) Funds to implement plan.

(a) The Mercury Pollution Prevention Account is established in the Department. Revenue is credited to the Account from the certificate of title fee under G.S. 20-85.

(b) Revenue in the Mercury Pollution Prevention Account shall be used to reimburse the Department and others for costs incurred in implementing the mercury minimization plan. The reimbursable costs are:

(1) Five dollars ($5.00) for each mercury switch removed by a vehicle recycler or scrap metal recycling facility pursuant to this Article.

(2) Costs incurred by the Department in administering the plan.

(c) The Department shall reimburse vehicle recyclers and scrap metal recycling facilities based on the quarterly reports submitted under G.S. 130A-310.53. The Department may request any information needed to determine the accuracy of the reports. (2005-384, s. 1; 2006-255, s. 5; 2007-142, ss. 4, 9.)

Section Set Out Twice. — The section above is effective December 31, 2017. For this section as effective until December 31, 2017, see the preceding section, also numbered G.S. 130A-310.54.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

§ 130A-310.55. Violations of Article; enforcement.

(a) It is unlawful for a person to do any of the following:

(1) Knowingly flatten, crush, bale, shred, or otherwise alter the condition of a vehicle from which accessible mercury switches have not been removed, in any manner that would prevent or significantly hinder the removal of a mercury switch.

(2) Willfully fail to remove a mercury switch when the person is required to do so.

(3) Knowingly make a false report that a mercury switch has been removed from an end-of-life vehicle.

(4) Obtain a mercury switch from another source and falsely report that it was removed from a vehicle processed for recycling.

(b) **(Effective until December 31, 2017)** Any person who violates subdivision (1) or (2) of subsection (a) of this section shall be punished as provided in G.S. 14-3.

(b) **(Effective December 31, 2017)** This Part may be enforced as provided in Part 2 of Article 1 of this Chapter.

(c) **(Expires December 31, 2017)** Any person who violates subdivision (3) or (4) of subsection (a) of this section shall be guilty of a Class 2 misdemeanor and, upon conviction, shall be punished as provided in G.S. 130A-26.2.

(d) **(Expires December 31, 2017)** A violation of any provision of this Part, any rule adopted pursuant to this Part, or any rule governing universal waste may be enforced by an administrative or civil action as provided in Part 2 of Article 1 of this Chapter. (2005-384, s. 1; 2006-255, s. 5; 2007-142, ss. 5, 9.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until December 31, 2017. The second version of subsection (b) set out above is effective December 31, 2017.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Session Laws 2007-142, which rewrote this section, in s. 9, provides that the act expires on December 31, 2017.

Effect of Amendments. — Session Laws 2007-142, s. 5, effective July 1, 2007, and applicable to violations that occur on or after that date, rewrote subsection (b), and added subsections (c) and (d). See Editor's note for expiration date.

§ 130A-310.56: Repealed by Session Laws 2007-142, s. 6, effective June 29, 2007, and expiring December 31, 2017.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Expiration of Repeal of Section. — Session Laws 2007-142, s. 9, provides that the act, which repealed G.S. 130A-310.56, expires on December 31, 2017.

Former G.S. 130A-310.56, prior to its repeal by Session Laws 2007-142, s. 6, read as follows:

"§ **130A-310.56. Evaluation of vehicle design changes that affect mercury recyclability; reporting requirements.**

"(a) Each vehicle manufacturer shall, either individually or as part of a group, submit an annual report to the Department that describes in detail the status of vehicle design changes that are intended to facilitate recycling of vehicle components that contain mercury. The report is due on or before July 1. At a minimum, the report shall include all of the following:

"(a)(1) For each make and model for the upcoming model year, a list of all vehicle components that contain mercury.

"(a)(2) A description of all design changes that each manufacturer has implemented for the upcoming model year or plans to implement in future model years to reduce or eliminate vehicle components that contain mercury, the achieved or anticipated amount of each reduction.

"(a)(3) A summary of all policies that each manufacturer has implemented or will implement to ensure that the manufacturers' vehicles are designed to be recycled in a safe, cost-effective, and environmentally sound manner.

"(a)(4) A summary of any recommendations, complaints, or reports that the manufacturer has received within the previous calendar year from vehicle recyclers, scrap metal recycling facilities, government entities, or other persons, as well as any other information available to the manufacturer, regarding vehicle design features that adversely affect the recyclability of vehicle components that contain mercury.

"(b) A vehicle manufacturer or group of vehicle manufacturers that submits the report required by subsection (a) of this section may designate any information in the report that constitutes a trade secret, as defined in G.S. 66-152, as confidential information in accordance with G.S. 132-1.2. Information so designated shall be protected as provided in G.S. 130A-304.

"(c) The Department may evaluate the extent to which vehicle design promotes or impedes recycling of vehicle components that contain mercury. The Department may conduct hearings from time to time to receive public comment regarding vehicle design changes that affect recycling of vehicle components that contain mercury. The Department may develop recommendations as to changes in vehicle design that would further promote the recyclability of these components. If the Department develops recommendations pursuant to this subsection, it shall report these recommendations, together with its findings and any legislative proposals, to the Environmental Review Commission."

§ 130A-310.57. (Effective until December 31, 2017) Reports.

The Department shall submit an annual report on the mercury switch removal program under this Part to the Environmental Review Commission and the Senate and House of Representatives Appropriations Subcommittees on Natural and Economic Resources on or before 1 October of each year. The report shall include, at a minimum, all of the following:

(1) A detailed description of the mercury recovery performance ratio achieved by the mercury switch removal program.

(1a) A detailed description of the mercury switch collection system developed and implemented by vehicle manufacturers in accordance with the NVMSRP.

(2) In the event that a mercury recovery performance ratio of at least 0.90 of the national mercury recovery performance ratio as reported by the NVMSRP is not achieved, a description of additional or alternative actions that may be implemented to improve the mercury switch removal program.

(3) The number of mercury switches collected and a description of how the mercury switches were managed.

(4) A statement that details the costs required to implement the mercury switch removal program including a summary of receipts and disbursements from the Mercury Switch Removal Account. (2005-384, s. 1; 2006-255, s. 5; 2007-142, s. 7.)

Section Set Out Twice. — The section above is effective until December 31, 2017. For the section as in effect December 31, 2017, see the following section, also numbered G.S. 130A-310.57.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Session Laws 2007-142, s. 9, provides, in part, that the Department shall submit the first annual report required by G.S. 130A-310.57 on or before October 1, 2008.

Effect of Amendments. — Session Laws 2007-142, s. 7, effective June 29, 2007, and expiring December 31, 2017, rewrote the section.

§ 130A-310.57. (Effective December 31, 2017) Report on plan.

The Department shall publish an annual report on the mercury minimiza-

G.S. 130A-310.57 is set out twice. See notes.

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tion plan on or before November 1. The report shall include, at a minimum, all of the following:

(1) A detailed description and documentation of the capture rate achieved.

(2) In the event that a capture rate of at least ninety percent (90%) is not achieved, a description of additional or alternative actions that may be implemented to improve the mercury minimization plan and its implementation.

(3) The number of mercury switches collected, the number of end-of-life vehicles containing mercury switches, the number of end-of-life vehicles processed for recycling, and a description of how the mercury switches were managed.

(4) A statement that details the costs required to implement the mercury minimization plan. (2005-384, s. 1; 2006-255, s. 5; 2007-142, ss. 7, 9.)

Section Set Out Twice. — The section above is effective December 31, 2017. For the section as in effect until December 31, 2017, see the preceding section, also numbered G.S. 130A-310.57.

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

§ 130A-310.58. (For expiration date — see note) Adoption of rules; administrative procedure.

(a) The Department may adopt rules to implement this Part.

(b) Chapter 150B of the General Statutes governs implementation of this Part. (2005-384, s. 1; 2006-255, s. 5.)

Part 6 Has a Delayed Repeal Date. — Session Laws 2005-384, which enacted this Part, in s. 4, as amended by Session Laws 2006-255, s. 5, provides: "Sections 1, 3, and 4 of this act are effective when this act becomes law (September 13, 2005), except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective July 1, 2007. Section 2 of this act becomes effective October 1, 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b) [repealed], either individually or as a group of manufacturers, on or before January 1, 2007. This act expires on July 1, 2026."

Editor's note. — Session Laws 2005-384, s. 3, provides: "The Commission for Health Services [now the Commission for Public Health] shall amend 15A NCAC 13A.0119 to adopt rules governing the management of waste mercury-containing devices, as defined in the Notice of Proposed Rulemaking published on June 12, 2002 in the Federal Register, Volume 67, Number 113, Pages 40507 through 40528, as universal waste."

Article 10.

North Carolina Drinking Water Act.

§ 130A-311. Short title.

This Article shall be cited as the "North Carolina Drinking Water Act." (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 130A-312. Purpose.

The purpose of this Article is to regulate water systems within the State which supply drinking water that may affect the public health. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 130A-313. Definitions.

The following definitions shall apply throughout this Article:

(1) "Administrator" means the Administrator of the United States Environmental Protection Agency.

(2) "Certified laboratory" means a facility for performing bacteriological, chemical or other analyses on water which has received interim or final certification by either the Environmental Protection Agency or the Department.

(3) "Contaminant" means any physical, chemical, biological or radiological substance or matter in water.

(3a) "Department" means the Department of Environment and Natural Resources.

(4) "Drinking water rules" means rules adopted pursuant to this Article.

(5) "Federal act" means the Safe Drinking Water Act of 1974, P.L. 93-523, as amended.

(6) "Federal agency" means any department, agency or instrumentality of the United States.

(7) "Maximum contaminant level" means the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

(8) "National primary drinking water regulations" means primary drinking water regulations promulgated by the Administrator pursuant to the federal act.

(9) "Person" means an individual, corporation, company, association, partnership, unit of local government, State agency, federal agency or other legal entity.

(10) "Public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances if the system serves 15 or more service connections or which regularly serves 25 or more individuals. The term includes:

a. Any collection, treatment, storage or distribution facility under control of the operator of the system and used primarily in connection with the system; and

b. Any collection or pretreatment storage facility not under the control of the operator of the system that is used primarily in connection with the system.

A public water system is either a "community water system" or a "noncommunity water system" as follows:

a. "Community water system" means a public water system that serves 15 or more service connections or that regularly serves at least 25 year-round residents.
b. "Noncommunity water system" means a public water system that is not a community water system.

A connection to a system that delivers water by a constructed conveyance other than a pipe is not a connection within the meaning of this subdivision under any one of the following circumstances:

a. The water is used exclusively for purposes other than residential uses. As used in this subdivision, "residential uses" mean drinking, bathing, cooking, or other similar uses.
b. The Department determines that alternative water to achieve the equivalent level of public health protection pursuant to applicable drinking water rules is provided for residential uses.
c. The Department determines that the water provided for residential uses is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable drinking water rules.

(10a) "Secretary" means the Secretary of Environment and Natural Resources.

(11) "Supplier of water" means a person who owns, operates or controls a public water system.

(12) "Treatment technique requirement" means a requirement of the drinking water rules which specifies a specific treatment technique for a contaminant which leads to reduction in the level of the contaminant sufficient to comply with the drinking water rules. (1979, c. 788, s. 1; 1983, c. 891, s. 2; 1987, c. 704, s. 2; 1993 (Reg. Sess., 1994), c. 776, s. 14; 1997-30, s. 1; 1997-443, s. 11A.81A.)

§ 130A-314. Scope of the Article.

(a) The provisions of this Article shall apply to each public water system in the State unless the public water system meets all of the following conditions:

(1) Consists only of distribution and storage facilities and does not have any collection and treatment facilities;
(2) Obtains all of its water from, but is not owned or operated by, a public water system to which the drinking water rules apply;
(3) Does not sell water to any person; and
(4) Is not a carrier which conveys passengers in interstate commerce.

(b) A provision of any charter granted to a public water system in conflict with the provisions of this Article is repealed. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-315. Drinking water rules.

(a) The Commission shall adopt and the Secretary shall enforce drinking water rules to regulate public water systems. The rules may distinguish between community water systems and noncommunity water systems.

(b) The rules shall:

(1) Specify contaminants which may have an adverse effect on the public health;
(2) Specify for each contaminant either:
    a. A maximum contaminant level which is acceptable in water for human consumption, if it is feasible to establish the level of the contaminant in water in public water systems; or

b. One or more treatment techniques which lead to a reduction in the level of contaminants sufficient to protect the public health, if it is not feasible to establish the level of the contaminants in water in a public water system; and

(3) Establish criteria and procedures to assure a supply of drinking water which dependably complies with maximum contaminant levels and treatment techniques as determined in paragraph (2) of this subsection. These rules may provide for:

a. The minimum quality of raw water which may be taken into a public water system;
b. A program of laboratory certification;
c. Monitoring and analysis;
d. Record-keeping and reporting;
e. Notice of noncompliance, failure to perform monitoring, variances and exemptions;
f. Inspection of public water systems; inspection of records required to be kept; and the taking of samples;
g. Criteria for design and construction of new or modified public water systems;
h. Review and approval of design and construction of new or modified public water systems;
i. Siting of new public water system facilities;
j. Variances and exemptions from the drinking water rules; and
k. Additional criteria and procedures as may be required to carry out the purpose of this Article.

(b1) The rules may also establish criteria and procedures to insure an adequate supply of drinking water. The rules may:

(1) Provide for record keeping and reporting.
(2) Provide for inspection of public water systems and required records.
(3) Establish criteria for the design and construction of new public water systems and for the modification of existing public water systems.
(4) Establish procedures for review and approval of the design and construction of new public water systems and for the modification of existing public water systems.
(4a) Limit the number of service connections to a public water system based on the quantity of water available to the public water system, provided that the number of service connections shall not be limited for a public water system operating in accordance with a local water supply plan that meets the requirements of G.S. 143-355(*l*).
(5) Establish criteria and procedures for siting new public water systems.
(6) Provide for variances and exemptions from the rules.
(7) Provide for notice of noncompliance in accordance with G.S. 130A-324.

(b2) Two or more water systems that are adjacent, that are owned or operated by the same supplier of water, that individually serve less than 15 service connections or less than 25 persons but that in combination serve 15 or more service connections or 25 or more persons, and that individually are not public water systems shall meet the standards applicable to public water systems for the following contaminants: coliform bacteria, nitrates, nitrites, lead, copper, and other inorganic chemicals for which testing and monitoring is required for public water systems on 1 July 1994. The standards applicable to these contaminants shall be enforced by the Commission as though the water systems to which this subsection applies were public water systems.

(b3) The Department shall not certify or renew a certification of a laboratory under rules adopted pursuant to subdivision (3)b. of subsection (b) of this section unless the laboratory offers to perform composite testing of samples taken from a single public water supply system for those contaminants that the laboratory is seeking certification or renewal of certification to the extent allowed by regulations adopted by the United States Environmental Protection Agency.

(c) The drinking water rules may be amended as necessary in accordance with required federal regulations.

(d) When a person that receives water from a public water system is authorized by the Utilities Commission, pursuant to G.S. 62-110(g), to charge for the costs of providing water or sewer service, that person shall not be subject to regulation under this Article solely as a result of submetering and billing for water service. The supplying water system shall perform the same level of monitoring, analysis, and record keeping that the supplying system would perform if the providing water system had not been authorized to charge for the costs of providing water or sewer service pursuant to G.S. 62-110(g).

(e) When a public water system supplies water through a master meter to a water system not regulated by this Article, the supplying water system is not responsible for operation, maintenance, or repair of the providing water system. The supplying water system shall not be responsible for contamination that is confined to the providing water system if the supplying water system meets applicable requirements for water quality, treatment, and system operation for that contaminant. The supplying water system may monitor the water within the providing water system for contamination pursuant to rules adopted under this Article. The supplying water system and the Department shall have access to the providing water system to investigate water quality problems and to determine whether any contamination is confined to the providing water system and whether the quality of the water supplied by the supplying water system is contributing contamination to the providing water system.

(f) If water in the providing water system exceeds the maximum contaminant levels established pursuant to this Article and the Department determines that the supplying water system is not responsible, the supplying water system must notify the providing water system owner in writing within one day of determining that the contamination is confined solely to the providing water system for bacteria, nitrate, and nitrite, and within 30 days for all other contaminants. (1979, c. 788, s. 1; 1983, c. 891, s. 2; 1985, c. 417, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 826, s. 1; 1993 (Reg. Sess., 1994), c. 776, s. 15; 1995, c. 25, s. 1; 2000-172, s. 1.1; 2001-502, s. 6; 2004-143, s. 8.)

Legislative findings. — Session Laws 2005-190, s. 1, effective July 15, 2005, provides: "The General Assembly finds that:

"(1) Drinking water supply reservoirs are an essential source of water needed to meet municipal, industrial, and agricultural needs.

"(2) Drinking water supply reservoirs provide recreational opportunities and wildlife habitat and, if properly managed, improve water quality.

"(3) Management and protection of the quality and quantity of water in drinking water supply reservoirs are essential to the economic vitality of North Carolina.

"(4) Excessive nutrients are a major source of impairment of water quality in drinking water supply reservoirs.

"(5) It would be beneficial for the State to study the condition of drinking water supply reservoirs and to develop nutrient control criteria to prevent drinking water supply reservoirs from becoming impaired.

"(6) It would be beneficial for the State to develop calibrated nutrient response models and nutrient management strategies to ensure that drinking water supply reservoirs that are showing evidence of impairment are protected, as envisioned by Part 1 of Article 21 of Chapter 143 of the General Statutes and S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act."

Study of drinking water supply reservoirs. — Session Laws 2005-190, s. 2(a), effective July 15, 2005, provides: "The Environmental Management Commission shall study the water quality in the drinking water supply reservoirs in the State to determine whether the reservoirs meet current water quality standards. The Commission shall analyze existing data and report its findings and recommendations to the Environmental Review Commission by 1 May 2006."

Nutrient control criteria. — Session Laws 2005-190, s. 2(b), effective July 15, 2005, provides: "Based on the results of the study of drinking water supply reservoirs and an evaluation of current water quality standards, the Environmental Management Commission shall identify any nutrient control criteria necessary to prevent excess nutrient loading in each drinking water supply reservoir in order to protect public health and other designated uses by 1 January 2009. The Commission shall adopt final nutrient control criteria for each drinking water supply reservoir by 1 May 2010. If the Commission finds that the nutrient control criteria for any drinking water supply reservoir are not being achieved, the Commission shall develop and implement a plan for enhanced water quality monitoring in that drinking water supply reservoir within one year of the determination. The Commission shall report its progress in implementing this section, including its findings and recommendations, to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Applicability of section to certain reservoirs. — Session Laws 2005-190, s. 3(a), effective July 15, 2005, provides: "This section applies only to drinking water supply reservoirs that meet all of the following criteria as of 1 July 2005:

"(1) The reservoir serves a population greater than 300,000 persons.

"(2) The Environmental Management Commission has classified all or any part of the water in the reservoir as a nutrient sensitive water (NSW).

"(3) Water quality monitoring data indicates that water quality in the reservoir violates the chlorophyll A standard.

"(4) The Division of Water Quality of the Department of Environment and Natural Resources has not prepared or updated a calibrated nutrient response model for the reservoir since 1 July 2002."

Temporary limitation on increased nutrient loading. — Session Laws 2005-190, s. 3(b), effective July 15, 2005, provides: "If the Environmental Management Commission determines either that water quality in all or in any part of a drinking water supply reservoir to which this section applies does not meet current water quality standards or that it is likely that water quality will not meet water quality standards at any time prior to 1 July 2010, the Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into that reservoir. This limitation on new or increased nutrient loading allocation shall not be construed to prohibit a person who holds a permit for a wastewater discharge into a drinking water supply reservoir from purchasing a nutrient loading allocation from another person who holds a permit for a wastewater discharge into the same drinking water supply reservoir. This subsection expires with respect to a drinking water supply reservoir when permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective."

Nutrient management strategy. — Session Laws 2005-190, s. 3(c), as amended by Session Laws 2006-259, s. 31(a), effective July 15, 2005, provides: "The Environmental Management Commission shall develop a nutrient management strategy for drinking water supply reservoirs to which this section applies by 1 July 2009. The nutrient management strategy shall be based on a calibrated nutrient response model that meets the requirement of G.S. 143-215.1(c5). The nutrient management strategy shall include specific mandatory measures to achieve the reduction goals. The Commission shall consider the cost of the proposed measures in relation to the effectiveness of the measures. These measures could include, but are not limited to, buffers, erosion and sedimentation control requirements, post-construction stormwater management, agricultural nutrient reduction measures, the addition of nutrient removal treatment processes to point source permitted wastewater treatment plants, the removal of point source discharging wastewater treatments through regionalization and conversion to non-discharge treatment technologies, and any other measures that the Commission determines to be necessary to meet the nutrient reduction goals. To the extent that one or more other State programs already mandate any of these measures, the nutrient management strategy shall incorporate the mandated measures and any extension of those measures and any additional measures that may be necessary to achieve the nutrient reduction goals. In making a nutrient loading allocation to a permit holder, the Commission shall, to the extent allowed by federal and State law, give consideration to all voluntary efforts taken by the permit holder to protect water quality prior to the development of the nutrient management strategy."

Implementation; rulemaking. — Session Laws 2005-190, s. 3(e), as amended by Session Laws 2006-259, s. 31(b), effective July 15, 2005, provides: "The Environmental Management Commission shall adopt permanent rules to implement the nutrient management strategies required by this section by 1 July 2009. The rules shall require that reductions in nutrient loading from all sources begin no later than five years after the rules become effective."

Reports. — Session Laws 2005-190, s. 3(f), effective July 15, 2005, provides: "The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Other drinking water supply reservoirs. — Session Laws 2005-190, s. 4, as amended by Session Laws 2006-259, s. 31(c), effective July 15, 2005, provides: "The Environmental Management Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into any drinking water supply reservoir for which the Division of Water Quality of the Department of Environment and Natural Resources has prepared or updated a calibrated nutrient response model since 1 July 2002 until permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective. The Commission shall report its progress in developing and implementing nutrient management strategies for reservoirs to which this section applies to the Environmental Review Commission by 1 April of each year beginning 1 April 2006."

Editor's note. — Session Laws 2000-172, s. 1.2, provides: "In enacting Section 1.1 of this act, it is the intent of the General Assembly to promote water conservation while protecting public health, safety, welfare, and the environment and avoiding unduly burdensome requirements on consecutive water systems. Section 1.1 of this act shall not be construed to impose any requirement on a supplying water system other than the requirements that apply to the supplying water system on the date this act becomes effective and that would apply to the supplying water system if a consecutive water system had not been authorized."

Session Laws 2000-172, s. 8.2, contains a severability clause.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 130A-316. Department to examine waters.

The Department shall examine all waters and their sources and surroundings which are used as, or proposed to be used as, sources of public water supply to determine whether the waters and their sources are suitable for use as public water supply sources. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 130A-317. Department to provide advice; submission and approval of public water system plans.

(a) The Department shall advise all persons and units of local government locating, constructing, altering or operating or intending to locate, construct, alter or operate a public water system of the most appropriate source of water supply and the best practical method of purifying water from that source having regard to the present and prospective needs and interests of other persons and units of local government which may be affected. The Department shall also advise concerning accepted engineering practices in the location, construction, alteration and operation of public water systems.

(b) All persons and units of local government constructing or altering a public water system shall give prior notice and submit plans, specifications and other information to the Department. The Commission shall adopt rules providing for the amount of prior notice required to be given and the nature and detail of the plans, specifications and other information required to be submitted. The Commission shall take into consideration the complexity of the construction or alteration which may be involved and the resources of the Department to review the plans, specifications and other information. The

Department shall review the plans, specifications and other information, and notify the person, Utilities Commission and unit of local government of compliance or lack of compliance with applicable statutes and rules of the Commission.

(c) No person or unit of local government shall begin construction or alteration of a public water system or award a contract for construction or alteration unless all of the following conditions are met:

(1) The plans for construction or alteration have been prepared by an engineer licensed by this State.

(2) The Department has determined that the system, as constructed or altered, will be capable of compliance with the drinking water rules.

(3) The Department has determined that the system is capable of interconnection at an appropriate time with an expanding municipal, county or regional system.

(4) The Department has determined that adequate arrangements have been made for the continued operation, service and maintenance of the public water system.

(5) The Department has approved the plans and specifications.

(d) Municipalities, counties, local boards or commissions, water and sewer authorities, or groups of municipalities and counties may establish and administer within their utility service areas their own approval program in lieu of State approval of water system plans required in subsection (c) of this section for construction or alteration of the distribution system of a proposed or existing public water system, subject to the prior certification of the Department. For purposes of this subsection, the service area of a municipality shall include only that area within the corporate limits of the municipality and that area outside a municipality in its extraterritorial jurisdiction where water service is already being provided to the permit applicant by the municipality or connection to the municipal water system is immediately available to the applicant; the service areas of counties and the other entities or groups shall include only those areas where water service is already being provided to the applicant by the permitting authority or connection to the permitting authority's system is immediately available. No later than the 180th day after the receipt of an approval program and statement submitted by any local government, commission, authority, or board, the Department shall certify any local program that meets all of the following conditions:

(1) Provides by ordinance or local law for requirements compatible with those imposed by this Article, and the standards and rules adopted pursuant to this Article.

(2) Provides that the Department receives notice and a copy of each application for approval and that the Department receives copies of approved plans.

(3) Provides that plans and specifications for all construction and alterations be prepared by or under the direct supervision of an engineer licensed to practice in this State.

(4) Provides for the adequate enforcement of the program requirements by appropriate administrative and judicial process.

(5) Provides for the adequate administrative organization, engineering staff, financial and other resources necessary to effectively carry out its plan review program. A local government, commission, authority, or board may either employ an engineer licensed under Chapter 89C of the General Statutes to practice as a professional engineer in the State or contract with an engineer licensed under Chapter 89C of the General Statutes to practice as a professional engineer in the State in order to provide for adequate engineering staff under this subdivision.

(6) Provides that the system is capable of interconnection at an appropriate time with an expanding municipal, county, or regional system.

(7) Provides for the adequate arrangement for the continued operation, service, and maintenance of the public water system.

(8) Provides that an approved system, as constructed or altered, will be capable of compliance with the drinking water rules.

(9) Is approved by the Department as adequate to meet the requirements of this Article and any applicable rules adopted pursuant to this Article.

(e) The Department may deny, suspend, or revoke the certification of a local program upon a finding that a violation of the provisions in subsection (d) of this section has occurred. A local government administering an approval program shall be given notice that there has been a tentative decision to deny, suspend, or revoke certification and that an administrative hearing will be held in accordance with Chapter 150B of the General Statutes where the decision may be challenged. If a violation of the provisions in subsection (d) of this section presents an imminent hazard, certification may be suspended or revoked immediately. The Department shall give notice of the immediate suspension or revocation and notice that an administrative hearing will be held in accordance with Chapter 150B of the General Statutes where the decision may be challenged.

(f) Notwithstanding any other provisions of subsection (d) of this section, if the Department determines that a public water system is violating plan approval requirements of a local program and that the local government has not acted to enforce those approval requirements, the Department may, after written notice to the local government, take enforcement action in accordance with the provisions of this Article. (1979, c. 788, s. 1; 1983, c. 891, s. 2; 1985, c. 697, s. 1; 1987, c. 827, s. 1; 2006-238, s. 1.)

Effect of Amendments. — Session Laws 2006-238, s. 1, effective August 13, 2006, in subsection (c), added "all of the following conditions are met" at the end of the introductory paragraph and made minor punctuation changes; in subsection (d), added "meets all of the following conditions" at the end of the introductory paragraph, added the second sentence of subdivision (d)(5), and made minor punctuation and stylistic changes; added the subsection (e) and (f) designations; and substituted "subsection (d) of this section" for "this subsection" near the beginning of subsection (f).

§ 130A-318. Disinfection of public water systems.

(a) The Department is authorized to require disinfection of:

(1) Public water systems introduced on or after January 1, 1972; and

(2) All public water systems, regardless of the date introduced, whenever:

a. The maximum microbiological contaminant level is exceeded; or

b. Conditions exist which make continued use of the water potentially hazardous to public health.

(b) Public water systems shall employ disinfection methods and procedures approved by the Department. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-319. Condemnation of lands for public water systems.

All units of local government operating public water systems and all water companies operating under franchise from the State or units of local government, may acquire by condemnation lands and rights in lands and water necessary for the successful operation and protection of their systems. Condemnation proceedings under this section shall be the same as prescribed by law under Chapter 40A of the General Statutes. (1979, c. 788, s. 1; 1981, c. 919, s. 14; 1983, c. 891, s. 2.)

CASE NOTES

Power to Condemn Not Limited to Easement. — The power of a municipal corporation to condemn land for its watershed in order to protect its water supply from contamination is not limited to an easement, but it has been given power to condemn the fee for that purpose. Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960), decided under former statutory provisions.

§ 130A-320. Sanitation of watersheds; rules; inspections.

(a) The Commission shall adopt rules governing the sanitation of watersheds from which public drinking water supplies are obtained. In adopting these rules the Commission is authorized to consider the different classes of watersheds, taking into account general topography, nature of watershed development, density of population and need for frequency of sampling of raw water. The rules shall govern the keeping of livestock, operation of recreational areas, maintenance of residences and places of business, disposal of sewage, establishment of cemeteries or burying grounds, and any other factors which would endanger the public water supply.

(b) Any person operating a public water system and furnishing water from unfiltered surface supplies shall inspect the watershed area at least quarterly, and more often when the Department determines that more frequent inspections are necessary. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

Legislative findings. — Session Laws 2005-190, s. 1, effective July 15, 2005, provides: "The General Assembly finds that:

"(1) Drinking water supply reservoirs are an essential source of water needed to meet municipal, industrial, and agricultural needs.

"(2) Drinking water supply reservoirs provide recreational opportunities and wildlife habitat and, if properly managed, improve water quality.

"(3) Management and protection of the quality and quantity of water in drinking water supply reservoirs are essential to the economic vitality of North Carolina.

"(4) Excessive nutrients are a major source of impairment of water quality in drinking water supply reservoirs.

"(5) It would be beneficial for the State to study the condition of drinking water supply reservoirs and to develop nutrient control criteria to prevent drinking water supply reservoirs from becoming impaired.

"(6) It would be beneficial for the State to develop calibrated nutrient response models and nutrient management strategies to ensure that drinking water supply reservoirs that are showing evidence of impairment are protected, as envisioned by Part 1 of Article 21 of Chapter 143 of the General Statutes and S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act."

Study of drinking water supply reservoirs. — Session Laws 2005-190, s. 2(a), effective July 15, 2005, provides: "The Environmental Management Commission shall study the water quality in the drinking water supply reservoirs in the State to determine whether the reservoirs meet current water quality standards. The Commission shall analyze existing data and report its findings and recommendations to the Environmental Review Commission by 1 May 2006."

Nutrient control criteria. — Session Laws 2005-190, s. 2(b), effective July 15, 2005, provides: "Based on the results of the study of drinking water supply reservoirs and an evaluation of current water quality standards, the Environmental Management Commission shall identify any nutrient control criteria necessary to prevent excess nutrient loading in each drinking water supply reservoir in order to protect public health and other designated uses by 1 January 2009. The Commission shall adopt final nutrient control criteria for each drinking water supply reservoir by 1 May 2010. If the Commission finds that the nutrient control criteria for any drinking water supply reservoir are not being achieved, the Commission shall develop and implement a plan for enhanced water quality monitoring in that drinking water supply reservoir within one year of the determination. The Commission shall report its progress in implementing this section, including its findings and recommendations, to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Applicability of section to certain reservoirs. — Session Laws 2005-190, s. 3(a), effective July 15, 2005, provides: "This section applies only to drinking water supply reservoirs that meet all of the following criteria as of 1 July 2005:

"(1) The reservoir serves a population greater than 300,000 persons.

"(2) The Environmental Management Commission has classified all or any part of the water in the reservoir as a nutrient sensitive water (NSW).

"(3) Water quality monitoring data indicates that water quality in the reservoir violates the chlorophyll A standard.

"(4) The Division of Water Quality of the Department of Environment and Natural Resources has not prepared or updated a calibrated nutrient response model for the reservoir since 1 July 2002."

Temporary limitation on increased nutrient loading. — Session Laws 2005-190, s. 3(b), effective July 15, 2005, provides: "If the Environmental Management Commission determines either that water quality in all or in any part of a drinking water supply reservoir to which this section applies does not meet current water quality standards or that it is likely that water quality will not meet water quality standards at any time prior to 1 July 2010, the Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into that reservoir. This limitation on new or increased nutrient loading allocation shall not be construed to prohibit a person who holds a permit for a wastewater discharge into a drinking water supply reservoir from purchasing a nutrient loading allocation from another person who holds a permit for a wastewater discharge into the same drinking water supply reservoir. This subsection expires with respect to a drinking water supply reservoir when permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective."

Nutrient management strategy. — Session Laws 2005-190, s. 3(c), as amended by Session Laws 2006-259, s. 31(a), effective July 15, 2005, provides: "The Environmental Management Commission shall develop a nutrient management strategy for drinking water supply reservoirs to which this section applies by 1 July 2009. The nutrient management strategy shall be based on a calibrated nutrient response model that meets the requirement of G.S. 143-215.1(c5). The nutrient management strategy shall include specific mandatory measures to achieve the reduction goals. The Commission shall consider the cost of the proposed measures in relation to the effectiveness of the measures. These measures could include, but are not limited to, buffers, erosion and sedimentation control requirements, post-construction stormwater management, agricultural nutrient reduction measures, the addition of nutrient removal treatment processes to point source permitted wastewater treatment plants, the removal of point source discharging wastewater treatments through regionalization and conversion to non-discharge treatment technologies, and any other measures that the Commission determines to be necessary to meet the nutrient reduction goals. To the extent that one or more other State programs already mandate any of these measures, the nutrient management strategy shall incorporate the mandated measures and any extension of those measures and any additional measures that may be necessary to achieve the nutrient reduction goals. In making a nutrient loading allocation to a permit holder, the Commission shall, to the extent allowed by federal and State law, give consideration to all voluntary efforts taken by the permit holder to protect water quality prior to the development of the nutrient management strategy."

Implementation; rulemaking. — Session Laws 2005-190, s. 3(e), as amended by Session Laws 2006-259, s. 31(b), effective July 15, 2005, provides: "The Environmental Management Commission shall adopt permanent rules to implement the nutrient management strategies required by this section by 1 July 2009. The rules shall require that reductions in nutrient loading from all sources begin no later than five years after the rules become effective."

Reports. — Session Laws 2005-190, s. 3(f), effective July 15, 2005, provides: "The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Other drinking water supply reservoirs. — Session Laws 2005-190, s. 4, as amended by Session Laws 2006-259, s. 31(c), effective July 15, 2005, provides: "The Environmental Management Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into any drinking water supply reservoir for which the Division of Water Quality of the Department of Environment and Natural Resources has prepared or updated a calibrated nutrient response model since 1 July 2002 until permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective. The Commission shall report its progress in developing and implementing nutrient management strategies for reservoirs to which this section applies to the Environmental Review Commission by 1 April of each year beginning 1 April 2006."

§ 130A-321. Variances and exemptions; considerations; duration; condition; notice and hearing.

(a) The Secretary may authorize variances from the drinking water rules.

(1) The Secretary may grant one or more variances to a public water system from any requirement respecting a maximum contaminant level of an applicable drinking water rule upon a finding that:

a. Because of characteristics of the raw water sources reasonably available to the system, the system cannot meet the requirements respecting the maximum contaminant levels of the drinking water rules after application of the best technology, treatment techniques, or other means which the Secretary finds are available (taking costs into consideration); and

b. The granting of a variance will not result in an unreasonable risk to public health when considering the population exposed, the projected duration of the requested variance and the degree to which the maximum contaminant level is being or will be exceeded.

(2) The Secretary may grant one or more variances to a public water system from any requirement of a specified treatment technique of an applicable drinking water rule upon a finding that the public water system applying for the variance has demonstrated that the treatment technique is not necessary to protect the public health because of the nature of the raw water source of the system.

(3) In consideration of whether the public water system is unable to comply with a contaminant level required by the drinking water rules because of the nature of the raw water sources, the Secretary shall consider factors such as:

a. The availability and effectiveness of treatment methods for the contaminant for which the variance is requested; and

b. Costs of implementing the best treatment(s), improving the quality of the raw water by the best means or using an alternate source.

(4) In consideration of whether a public water system should be granted a variance from a required treatment technique because the treatment is unnecessary to protect the public health, the Secretary shall consider factors such as:

a. Quality of the water source including water quality data and pertinent sources of pollution; and

b. Source protection measures employed by the public water system.

(5) In order to implement sub-subdivision a. of subdivision (1) of this subsection, the Commission shall adopt by rule a list of the best available technologies, treatment techniques, or other means available, to deal with each contaminant for which a maximum contaminant level is established.

(b) The Secretary may authorize exemptions from the drinking water rules.

(1) The Secretary may exempt a public water system from any requirement respecting a maximum contaminant level or any treatment technique requirement, or from both, of an applicable drinking water rule upon a finding that:

a. Due to compelling factors, including economic factors, the public water system is unable to comply with the contaminant level or treatment technique requirement;

b. The public water system was in operation on the effective date of the contaminant level or treatment technique requirement or, for a system that was not in operation on that date, only if no reasonable alternative source of drinking water is available to the new system; and

c. The granting of the exemption will not result in an unreasonable risk to public health when considering the population exposed, the projected duration of the requested exemption and the degree to which the maximum contaminant level is being or will be exceeded.

(2) In consideration of whether the public water system is unable to comply due to compelling factors, the Secretary shall consider factors such as:

a. Construction, installation or modification of treatment equipment or systems;

b. The time needed to put into operation a new treatment facility to replace an existing system which is not in compliance; and

c. Economic feasibility of immediate compliance.

(c) As a condition of issuance of either a variance or an exemption, the Secretary shall issue a schedule of compliance for the public water system, including increments of progress for each drinking water rule for which the variance or exemption was issued. As a further condition of a variance or exemption, the Secretary shall require the public water system to implement any necessary control measures prescribed by the Secretary during the period of the variance or exemption. The compliance schedule for an exemption shall require compliance as expeditiously as practical but no later than June 19, 1987, for existing maximum contaminant levels and treatment techniques, or no later than one year from the issuance of the exemption for any newly adopted maximum contaminant level or treatment technique. The final date for compliance provided in any exemption schedule may be extended up to three years after the date of the issuance of the exemption if the water system establishes:

(1) The water system cannot meet the standard without capital improvements which cannot be completed within the period of exemption, or

(2) The system needs financial assistance for necessary improvements and has entered into an agreement to obtain such assistance, or

(3) The system has entered into an enforceable agreement to become part of a regional public water system and the system is taking all practical steps to meet the standard.

If a public water system serves 500 or fewer service connections and needs financial assistance for necessary improvements, an exemption may be renewed for one or more additional two-year periods if the system establishes it meets the requirements set forth in subdivisions (1) and (2) of this section.

(d) The Secretary shall provide notice and opportunity for public hearing on proposed variances and proposed variance and exemption schedules. (1979, c. 788, s. 1; 1981, c. 353, ss. 1, 2; 1983, c. 891, s. 2; 1987, c. 704, ss. 3-5.)

§ 130A-322. Imminent hazard; power of the Secretary.

(a) The Secretary shall judge whether an imminent hazard exists concerning a present or potential condition in a public water system.

(b) In order to eliminate an imminent hazard, the Secretary may, without notice or hearing, issue an order requiring the person or persons involved to immediately take action necessary to protect the public health. A copy of the order shall be delivered by certified mail or personal service. The order shall become effective immediately and shall remain in effect until modified or rescinded by the Secretary or by a court of competent jurisdiction. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-323. Emergency plan for drinking water; emergency circumstances defined.

(a) The Secretary shall develop and implement an adequate plan for the provision of drinking water under emergency circumstances. When the Secretary determines that emergency circumstances exist with respect to a need for drinking water, the Secretary may take action in accordance with the plan as necessary in order to provide drinking water.

(b) Emergency circumstances shall exist whenever the available supply of drinking water is inadequate. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-324. Notice of noncompliance; failure to perform monitoring; variances and exemptions.

Whenever a public water system:

(1) Is not in compliance with the drinking water rules;

(2) Fails to perform an applicable testing procedure or monitoring required by the drinking water rules;

(3) Is subject to a variance granted for inability to meet a maximum contaminant level requirement;

(4) Is subject to an exemption; or

(5) Fails to comply with the requirements prescribed by a variance or exemption,

the supplier shall as soon as possible, but not later than 48 hours after discovery, notify the Department and give public notification as prescribed by the drinking water rules. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-325. Prohibited acts.

The following acts are prohibited:

(1) Failure by a supplier of water to comply with this Article, an order issued under this Article, or the drinking water rules;

(2) Failure by a supplier of water to comply with the requirements of G.S. 130A-324 or the dissemination by a supplier of any false or misleading information with respect to remedial actions being undertaken to achieve compliance with the drinking water rules;

(3) Refusal by a supplier of water to allow the Department or local health department to inspect a public water system as provided for in G.S. 130A-17;

(4) The willful defiling by any person of any water supply of a public water system or the willful damaging of any pipe or other part of a public water system;

(5) The discharge by any person of sewage or other waste above the intake of a public water system, unless the sewage or waste has been passed through a system of purification approved by the Department; and

(6) The failure by a person to maintain a system approved by the Department for collecting and disposing of all accumulations of human excrement located on the watershed of a public water system. (1979, c. 788, s. 1; 1983, c. 891, s. 2; 1985, c. 462, s. 2; 1989, c. 727, s. 146.)

§ 130A-326. Powers of the Secretary.

To carry out the provisions of this Article, the Secretary is authorized to:

(1) Administer and enforce the provisions of this Article, the drinking water rules and orders issued under this Article;

(2) Enter into agreements or cooperative arrangements with, or participate in related programs of other states, other state agencies, federal or interstate agencies, units of local government, educational institutions, local health departments or other organizations or individuals;
(3) Receive financial and technical assistance from the federal government and other public or private agencies;
(4) Require public water systems to take actions or make modifications as necessary to comply with the requirements of this Article or the drinking water rules;
(5) Prescribe policies and procedures necessary or appropriate to carry out the Secretary's function under this Article;
(6) Establish and collect fees to recover the costs of laboratory analyses performed for compliance with this Article. The fees shall not exceed two hundred dollars ($200.00) for each analysis; and
(7) Establish and collect fees for certification and certification renewal of laboratories to perform analyses for compliance under this Article. The fees shall not exceed twenty dollars ($20.00) per analyte certified. The minimum fee for certification or certification renewal shall be two hundred fifty dollars ($250.00) per analyte category. The maximum fee for certification or certification renewal shall be six hundred dollars ($600.00) per analyte category. The fees collected under this subdivision shall be used to administer blind performance evaluation samples to certified laboratories to determine compliance with certification requirements. (1979, c. 788, s. 1; 1981, c. 562, s. 9; 1983, c. 891, s. 2; 1987, c. 471; 1991 (Reg. Sess., 1992), c. 1039, s. 10.)

§ 130A-327. Construction.

This Article shall be interpreted as giving the State the authority needed to assume primary enforcement responsibility under the federal act. (1979, c. 788, s. 1; 1983, c. 891, s. 2.)

§ 130A-328. Public water system operating permit and permit fee.

(a) No person shall operate a community or non transient non-community water system who has not been issued an operating permit by the Department. A community or non transient non-community water system operating permit shall be valid from January 1 through December 31 of each year unless suspended or revoked by the Department for cause. The Commission shall adopt rules concerning permit issuance and renewal and permit suspension and revocation. The annual fees in subsection (b) shall be prorated on a monthly basis for permits obtained after January 1 of each year.

(b) The following fees are imposed for the issuance or renewal of a permit to operate a community or non transient non-community water system; the fees are based on the number of persons served by the system:

	Fee
Non Community Water Systems:	
Base fee:	
Non transient non-community	$150
Community Water Systems:	
Number of Persons Served	
50 or fewer	$255

	Fee
More than 50 but no more than 100	$270
More than 100 but no more than 200	$330
More than 200 but no more than 300	$350
More than 300 but no more than 400	$385
More than 400 but no more than 500	$420
More than 500 but no more than 750	$780
More than 750 but no more than 1000	$810
More than 1000 but no more than 2000	$840
More than 2000 but no more than 3000	$870
More than 3000 but no more than 4000	$1350
More than 4000 but no more than 5000	$1460
More than 5000 but no more than 7500	$1925
More than 7500 but no more than 10,000	$2065
More than 10,000 but no more than 25,000	$2600
More than 25,000 but no more than 50,000	$2925
More than 50,000 but no more than 75,000	$4250
More than 75,000 but no more than 100,000	$4675
More than 100,000 but no more than 250,000	$5100
More than 250,000 but no more than 500,000	$5525
More than 500,000	$5950

(c) The following fees are imposed for the review of plans, specifications, and other information submitted to the Department for approval of construction or alteration of a public water system. The fees are based on the type of constructions or alteration proposed:

Distribution system:	Fee
Construction of water lines, less than 5000 linear feet	$150
Construction of water lines, 5000 linear feet or more	$200
Other construction or alteration to a distribution system	$75
Ground water system:	
Construction of a new ground water system or adding a new well	$200
Alteration to an existing ground water system	$100
Surface Water system:	
Construction of a new surface water treatment facility	$250
Alteration to an existing surface water treatment facility	$150
Water System Management Plan review	$75
Miscellaneous changes or maintenance not covered above	$50

(d) The Department may charge an administrative fee of up to one hundred fifty dollars ($150.00) for failure to pay the permit fee by January 31 of each year.

(e) All fees collected under this section shall be applied to the costs of administering and enforcing this Article. (1991, c. 576, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 6; c. 1039, s. 11; 2006-66, s. 11.7(a).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 11.7(b), provides: “The Department of Environment and Natural Resources may create a schedule for phasing in the new fees added to G.S. 130A-328, as amended by subsection (a) of this section, over multiple operating permit cycles.”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 11.7(a), effective January 1, 2007, substituted "Public" for "Community" in the catchline; inserted "or non transient non-community" following "a community" in (a); rewrote subsection (b); added subsections (c) and (d); and redesignated former second paragraph of (b) as present (e).

§§ 130A-329 through 130A-332: Reserved for future codification purposes.

Article 11.

Wastewater Systems.

§ 130A-333. Purpose.

The General Assembly finds and declares that continued installation, at a rapidly and constantly accelerating rate, of septic tank systems and other types of wastewater systems in a faulty or improper manner and in areas where unsuitable soil and population density adversely affect the efficiency and functioning of these systems, has a detrimental effect on the public health and environment through contamination of land, groundwater and surface waters. Recognizing, however, that wastewater can be rendered ecologically safe and the public health protected if methods of wastewater collection, treatment and disposal are properly regulated and recognizing that wastewater collection, treatment and disposal will continue to be necessary to meet the needs of an expanding population, the General Assembly intends to ensure the regulation of wastewater collection, treatment and disposal systems so that these systems may continue to be used, where appropriate, without jeopardizing the public health. (1973, c. 452, s. 3; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1991 (Reg. Sess., 1992), c. 944, ss. 1, 2.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 15.18, provides that, notwithstanding the provisions of Article 11 of Chapter 130A of the General Statutes to the contrary, the Department of Environment, Health, and Natural Resources (now the Department of Environment and Natural Resources) or the local health department shall issue an improvement permit and an authorization for wastewater system construction for any wastewater system that was the subject of an improvement permit issued by a local health department between July 1, 1982, and September 30, 1995, that expired prior to the installation of that wastewater system, upon certain conditions.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 2004-140, s. 1, provides: "A subsurface wastewater disposal system shall be located the maximum feasible horizontal distance, but not less than 10 feet from any other subsurface wastewater disposal system, when all of the following conditions are met:

"(1) The lot or tract of land on which the system will be located is specifically described in a deed, other instrument conveying fee simple title, or on a plat recorded prior to 1 July 1977.

"(2) The lot or tract of land is of insufficient size to allow the minimum horizontal separation distance for a conventional wastewater system required in 15A NCAC 18A.1950.

"(3) The system will receive sewage from only one single-family residence not to exceed four bedrooms.

"(4) The residence is not capable of being served by a public or community wastewater system at the time construction of the system commences.

"(5) The system will be installed in sand or loamy sand soils as defined in 15A NCAC

18A.1935 and installed in accordance with rules adopted pursuant to Article 11 of Chapter 130A of the General Statutes."

Session Laws 2004-140, s. 2, provides: "The Commission for Health Services [now the Commission for Public Health] may adopt rules that incorporate the provisions of Section 1 of this act [Session Laws 2004-140]. Except as provided by Section 1 of this act [Session Laws 2004-140], this act [Session Laws 2004-140] does not limit the authority of the Commission for Health Services [now the Commission for Public Health] or the Environmental Management Commission to adopt rules governing the location, construction, operation, maintenance, or repair of subsurface wastewater disposal systems pursuant to G.S. 130A-335 or other provisions of Article 11 of Chapter 130A of the General Statutes."

Session Laws 2006-255, s. 5.1(b), provides: "Management, including land application, of septage generated by the operation of a wastewater system permitted under Article 11 of Chapter 130A of the General Statutes shall be governed by 40 Code of Federal Regulations Part 503 (July 1, 2003, Edition) and rules adopted by the Commission for Health Services [now the Commission for Public Health] pursuant to G.S. 130A-291.1, as amended by subsection (a) of this section."

CASE NOTES

Cited in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989).

§ 130A-334. Definitions.

The following definitions shall apply throughout this Article:

(1) "Construction" means any work at the site of placement done for the purpose of preparing a residence, place of business or place of public assembly for initial occupancy, or subsequent additions or modifications which increase sewage flow.

(1a) "Department" means the Department of Environment and Natural Resources.

(2) Repealed by Session Laws 1985, c. 462, s. 18.

(2a) "Industrial process wastewater" means any water-carried waste resulting from any process of industry, manufacture, trade, or business.

(3) "Location" means the initial placement for occupancy of a residence, place of business or place of public assembly.

(3a) "Maintenance" means normal or routine maintenance including replacement of broken pipes, cleaning, or adjustment to an existing wastewater system.

(4), (5) Repealed by Session Laws 1985, c. 462, s. 18.

(6) "Place of business" means a store, warehouse, manufacturing establishment, place of amusement or recreation, service station, office building or any other place where people work.

(7) "Place of public assembly" means a fairground, auditorium, stadium, church, campground, theater or any other place where people assemble.

(7a) "Plat" means a property survey prepared by a registered land surveyor, drawn to a scale of one inch equals no more than 60 feet, that includes: the specific location of the proposed facility and appurtenances, the site for the proposed wastewater system, and the location of water supplies and surface waters. "Plat" also means, for subdivision lots approved by the local planning authority and recorded with the county register of deeds, a copy of the recorded subdivision plat that is accompanied by a site plan that is drawn to scale.

(7b) "Pretreatment" means any biological, chemical, or physical process or system for improving wastewater quality and reducing wastewater constituents prior to final treatment and disposal in a subsurface wastewater system and includes, but is not limited to aeration, clarification, digestion, disinfection, filtration, separation, and settling.

(8) "Public or community wastewater system" means a single system of wastewater collection, treatment and disposal owned and operated by a sanitary district, a metropolitan sewage district, a water and sewer authority, a county or municipality or a public utility.

(9) "Relocation" means the displacement of a residence or place of business from one site to another.

(9a) "Repair" means the extension, alteration, replacement, or relocation of existing components of a wastewater system.

(10) "Residence" means a private home, dwelling unit in a multiple family structure, hotel, motel, summer camp, labor work camp, manufactured home, institution or any other place where people reside.

(10a) "Secretary" means the Secretary of Environment and Natural Resources.

(11) Repealed by Session Laws 1992, c. 944, s. 3.

(12) "Septic tank system" means a subsurface wastewater system consisting of a settling tank and a subsurface disposal field.

(13) "Sewage" means the liquid and solid human body waste and liquid waste generated by water-using fixtures and appliances, including those associated with foodhandling. The term does not include industrial process wastewater or sewage that is combined with industrial process wastewater.

(13a) "Site plan" means a drawing not necessarily drawn to scale that shows the existing and proposed property lines with dimensions, the location of the facility and appurtenances, the site for the proposed wastewater system, and the location of water supplies and surface waters.

(14) "Wastewater" means any sewage or industrial process wastewater discharged, transmitted, or collected from a residence, place of business, place of public assembly, or other places into a wastewater system.

(15) "Wastewater system" means a system of wastewater collection, treatment, and disposal in single or multiple components, including a privy, septic tank system, public or community wastewater system, wastewater reuse or recycle system, mechanical or biological wastewater treatment system, any other similar system, and any chemical toilet used only for human waste. (1973, c. 452, s. 4; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1985, c. 462, s. 18; c. 487, s. 9; 1987, c. 435; 1991, c. 256, s. 1; 1991 (Reg. Sess., 1992), c. 944, s. 3; c. 1028, s. 4; 1995, c. 285, s. 1; 1995 (Reg. Sess., 1996), c. 585, s. 1; 1996, 2nd Ex. Sess., c. 18, ss. 27.31(a), (b); 1997-443, s. 11A.82.)

Editor's Note. — The subdivision designations (7a) and (7b) were redesignated at the direction of the Revisor of Statutes, the definition of "Plat" having been enacted as subdivision (7b).

Session Laws 2006-136, s. 1, provides: "The definitions in G.S. 130A-334 apply throughout this act. For the purposes of this act, 'Commission' means the Commission for Health Services [now the Commission for Public Health]. 'Licensed soil scientist' has the same meaning as in G.S. 89F-3(3)."

Session Laws 2006-136, s. 2(a), provides: "The Department of Environment and Natural Resources shall develop and implement a pilot program to begin no later than 1 August 2006 and to terminate 1 July 2011 regarding the process for the issuance of an improvement permit for an on-site wastewater system pursuant to Article 11 of Chapter 130A of the General Statutes. A county that meets all of the following criteria may participate in the pilot program:

"(1) The population of the county must not exceed 25,000 according to the most recent federal decennial census.

"(2) The county must have more than 900 applications for improvement permits or authorizations to construct that are pending before the local health department on the effective date of this act.

"(3) The board of county commissioners and the local board of health for the county must both approve a resolution requesting to participate in the pilot program."

Session Laws 2006-136, s. 2(b), provides: "Notwithstanding G.S. 130A-336, the Department of Environment and Natural Resources shall authorize licensed soil scientists and the local health department to evaluate any proposed site for a residence, place of business, or place of public assembly in an area not served by an approved wastewater system. The local health department shall issue an improvement permit after one of the following has occurred:

"(1) A soil and site evaluation has been completed by an authorized agent of the Department or local health department that finds that the site is suitable for a wastewater system.

"(2) The local health department receives a completed soil and site evaluation for a wastewater system designed to treat 3,000 gallons per day or less of sewage that has been signed and sealed by a licensed soil scientist that finds that the site is suitable for a wastewater system."

Session Laws 2006-136, s. 2(c), provides: "A licensed soil scientist who submits a completed soil and site evaluation pursuant to this section shall have in force errors and omissions coverage or other appropriate liability insurance that has policy limits of not less than one million dollars ($1,000,000) per claim and that shall remain in force for at least six years after the date on which the improvement permit is approved. The licensed soil scientist shall provide the local health department with evidence satisfactory to the local health department that the coverage required by this section is in force. The local health department shall maintain a register of all licensed soil scientists who work in the county that have submitted completed soil and site evaluations under this section."

Session Laws 2006-136, s. 2(d), provides: "An improvement permit issued pursuant to this section shall include:

"(1) For permits that are valid for five years, a site plan drawn to scale with setbacks labeled. No permits shall be issued that are valid without expiration.

"(2) A description of the facility the proposed site is to serve and any factors that would affect the wastewater load.

"(3) The type and layout of the proposed wastewater system and its location.

"(4) The design wastewater flow and characteristics.

"(5) Any proposed landscape, site, drainage, or soil modifications.

"(6) A detailed soil profile description of at least two locations within the proposed disposal area. The detailed soil profile descriptions shall include soil taxonomic classifications, horizons, depth, texture, structure, soil wetness conditions, restrictive horizons, matrix color, and redoximorphic colors.

"(7) Any other information required by the rules of the Commission."

Session Laws 2006-136, s. 2(e), provides: "An improvement permit issued pursuant to this section shall not be affected by change in ownership of the site for the wastewater system provided both the site for the wastewater system and the facility the system serves are unchanged and remain under the ownership or control of the person owning the facility. No person shall commence or assist in the construction, location, or relocation of a residence, place of business, or place of public assembly in an area not served by an approved wastewater system unless an improvement permit and an authorization for wastewater system construction are obtained from the local health department. This requirement shall not apply to a manufactured residence exhibited for sale or stored for later sale and intended to be located at another site after sale."

Session Laws 2006-136, s. 2(f), provides: "The local health department shall issue an authorization for wastewater system construction authorizing work to proceed and the installation or repair of a wastewater system when it has determined after a field investigation that the system can be installed and operated in compliance with Article 11 of Chapter 130A of the General Statutes and rules adopted pursuant to the Article. This authorization for wastewater system construction shall be valid for a period equal to the period of validity of the improvement permit, not to exceed five years, and may be issued at the same time the improvement permit is issued. No person shall commence or assist in the installation, construction, or repair of a wastewater system unless an improvement permit and an authorization for wastewater system construction have been obtained from the local health department. No improvement permit or authorization for wastewater system construction shall be required for maintenance of a wastewater system. The Department of Environment and Natural Resources and the local health department may impose conditions on the issuance of an improvement permit and an authorization for wastewater system construction."

Session Laws 2006-136, s. 2(g), provides: "When a local health department issues an improvement permit or authorization to construct based upon work performed by a licensed soil scientist pursuant to this section, the improvement permit or authorization to construct shall bear a statement that reads: 'The soil, site, and system evaluation and documentation necessary to issue this ________ (improvement permit or authorization to construct) was performed by ________ (name of licensed soil scientist), a licensed soil scientist, license number ________ (license number).'."

Session Laws 2006-136, s. 2(h), provides: "When a local health department denies an application for an improvement permit or authorization to construct prepared by a licensed soil scientist pursuant to this section, the denial shall include a written report that specifically identifies the provisions of Article 11 of Chapter 130A of the General Statutes or rules adopted pursuant to the Article on which the denial is based."

Session Laws 2006-136, s. 2(i), provides: "A local health department may employ or contract with a licensed soil scientist for the review of an application for an improvement permit or authorization to construct. A licensed soil scientist who reviews a completed application for an improvement permit or authorization to construct under this subsection shall have in force errors and omissions coverage or other appropriate liability insurance that has policy limits of not less than one million dollars ($1,000,000) per claim."

Session Laws 2006-136, s. 2(j), provides: "The Department of Environment and Natural Resources shall: (i) specify uniform procedures for the review of an application prepared by a licensed soil scientist; (ii) establish documentation that must be included in the application; (iii) establish the necessary documentation that must be included in the local health department's written permit application review report; and (iv) specify the rights and obligations of each party."

Session Laws 2006-136, s. 2(k), provides: "In addition to any fees authorized under G.S. 130A-39(g), a local board of health may impose an additional fee not to exceed two hundred dollars ($200.00) for the costs of review and consideration of applications for an improvement permit or an authorization to construct that has been prepared by a licensed soil scientist pursuant to this section."

Session Laws 2006-136, s. 2(*l*), provides: "Except as provided in this section, the provisions of Article 11 of Chapter 130A of the General Statutes and rules adopted pursuant to that Article apply to this section. This section applies only to the counties eligible to participate in the pilot program."

Session Laws 2006-136, s. 3, provides: "In order to determine the effectiveness of the pilot program, the Department of Environment and Natural Resources shall evaluate whether: (i) the program resulted in a reduction in the length of time improvement permits or authorizations to construct are pending in the participating counties; (ii) the program resulted in increased system failures or other adverse impacts; and (iii) the program resulted in new or increased environmental impacts. The Department shall annually report its interim findings and recommendations, including any legislative proposals, to the Environmental Review Commission beginning 1 October 2007. The Department shall report its final findings and recommendations, including any legislative proposals, to the Environmental Review Commission no later than 1 October 2011."

CASE NOTES

Property owners' negligent misrepresentation claim against the county agencies concerning an application for a septic tank on the owners' property was barred by sovereign immunity because the North Carolina Legislature vested the North Carolina Department of Health and Human Services via the local boards of health with the authority to approve and regulate wastewater systems, including septic tank systems. Tabor v. County of Orange, 156 N.C. App. 88, 575 S.E.2d 540, 2003 N.C. App. LEXIS 28 (2003).

§ 130A-335. Wastewater collection, treatment and disposal; rules.

(a) A person owning or controlling a residence, place of business or a place of public assembly shall provide an approved wastewater system. A wastewater system may include components for collection, treatment and disposal of wastewater.

(b) All wastewater systems shall be regulated by the Department under rules adopted by the Commission except for the following wastewater systems that shall be regulated by the Department under rules adopted by the Environmental Management Commission:

(1) Wastewater collection, treatment, and disposal systems designed to discharge effluent to the land surface or surface waters.

(2) Wastewater systems designed for groundwater remediation, groundwater injection, or landfill leachate collection and disposal.

(3) Wastewater systems designed for the complete recycle or reuse of industrial process wastewater.

(c) A wastewater system subject to approval under rules of the Commission shall be reviewed and approved under rules of a local board of health in the following circumstances:

(1) The local board of health, on its own motion, has requested the Department to review its proposed rules concerning wastewater systems; and

(2) The local board of health has adopted by reference the wastewater system rules adopted by the Commission, with any more stringent modifications or additions deemed necessary by the local board of health to protect the public health; and

(3) The Department has found that the rules of the local board of health concerning wastewater collection, treatment and disposal systems are at least as stringent as rules adopted by the Commission and are sufficient and necessary to safeguard the public health.

(d) The Department may, upon its own motion, upon the request of a local board of health or upon the request of a citizen of an affected county, review its findings under subsection (c) of this section.

The Department shall review its findings under subsection (c) of this section upon modification by the Commission of the rules applicable to wastewater systems. The Department may deny, suspend, or revoke the approval of local board of health wastewater system rules upon a finding that the local wastewater rules are not as stringent as rules adopted by the Commission, are not sufficient and necessary to safeguard the public health, or are not being enforced. Suspension and revocation of approval shall be in accordance with G.S. 130A-23.

(e) The rules of the Commission and the rules of the local board of health shall address at least the following: Wastewater characteristics; Design unit; Design capacity; Design volume; Criteria for the design, installation, operation, maintenance and performance of wastewater collection, treatment and disposal systems; Soil morphology and drainage; Topography and landscape position; Depth to seasonally high water table, rock and water impeding formations; Proximity to water supply wells, shellfish waters, estuaries, marshes, wetlands, areas subject to frequent flooding, streams, lakes, swamps and other bodies of surface or groundwaters; Density of wastewater collection, treatment and disposal systems in a geographical area; Requirements for issuance, suspension and revocation of permits; and Other factors which affect the effective operation and performance of wastewater collection, treatment and disposal systems. The rules regarding required design capacity and required design volume for wastewater systems shall provide that exceptions may be granted upon a showing that a system is adequate to meet actual daily water consumption.

(f) The rules of the Commission and the rules of the local board of health shall classify systems of wastewater collection, treatment and disposal according to size, type of treatment and any other appropriate factors. The rules shall provide construction requirements, including pretreatment and system control requirements, standards for operation, maintenance, monitoring, reporting, and ownership requirements for each classification of systems of wastewater collection, treatment and disposal in order to prevent, as far as reasonably possible, any contamination of the land, groundwater and surface waters. The Department and local health departments may impose conditions on the issuance of permits and may revoke the permits for failure of the system to satisfy the conditions, the rules, or this Article. Permits other than improvement permits shall be valid for a period prescribed by rule. Improvement permits shall be valid upon a showing satisfactory to the Department or the local health department that the site and soil conditions are unaltered, that the facility, design wastewater flow, and wastewater characteristics are not increased, and that a wastewater system can be installed that meets the permitting requirements in effect on the date the improvement permit was issued. Improvement permits for which a plat is provided shall be valid without expiration. Improvement permits for which a site plan is provided shall be valid for five years. The period of time for which the permit is valid and a statement that the permit is subject to revocation if the site plan or plat, whichever is applicable, or the intended use changes shall be displayed prominently on both the application form for the permit and the permit.

(f1) A preconstruction conference with the owner or developer, or an agent of the owner or developer, and a representative of the local health department shall be required for any authorization for wastewater system construction issued with an improvement permit under G.S. 130-336 when the authorization is greater than five years old. Following the conference, the local health department shall issue a revised authorization for wastewater system construction that includes current technology that can reasonably be expected to improve the performance of the system.

(f2) For each septic tank system that is designed to treat 3,000 gallons per day or less of sewage, rules adopted pursuant to subsection (f) of this section shall require the use of an effluent filter to reduce the total suspended solids entering the drainfield and the use of an access device for each compartment of the septic tank to provide access to the compartment in order to facilitate maintenance of the septic tank. The Commission shall not adopt specifications for the effluent filter and access device that exceed the requirements of G.S. 130A-335.1. Neither this section nor G.S. 130A-335.1 shall be construed to prohibit the use of an effluent filter or access device that exceeds the requirements of G.S. 130A-335.1. The Department shall approve effluent filters that meet the requirements of this section, G.S. 130A-335.1, and rules adopted by the Commission.

(g) Prior to denial of an improvement permit, the local health department shall advise the applicant of possible site modifications or alternative systems, and shall provide a brief description of those systems. When an improvement permit is denied, the local health department shall issue the site evaluation in writing stating the reasons for the unsuitable classification. The evaluation shall also inform the applicant of the right to an informal review by the Department, the right to appeal under G.S. 130A-24, and to have the appeal held in the county in which the site for which the improvement permit was requested is located.

(h) Except as provided in this subsection, a chemical or portable toilet may be placed at any location where the chemical or portable toilet can be operated and maintained under sanitary conditions. A chemical or portable toilet shall not be used as a replacement or substitute for a water closet or urinal where a water closet or urinal connected to a permanent wastewater treatment system is required by the North Carolina State Building Code, except that a chemical or portable toilet may be used to supplement a water closet or urinal during periods of peak use. A chemical or portable toilet shall not be used as an alternative to the repair of a water closet, urinal, or wastewater treatment system. It shall be unlawful to discharge sewage or other waste from a chemical or portable toilet used for human waste except into a wastewater system that has been approved by the Department under rules adopted by the Commission or by the Environmental Management Commission or at a site that is permitted by the Department under G.S. 130A-291.1. (1957, c. 1357, s. 1; 1973, c. 471, s. 1; c. 476, s. 128; c. 860; 1977, c. 857, s. 1; 1979, c. 788, s. 2;

1981, c. 949, s. 3; c. 1127, s. 47; 1983, c. 891, s. 2; 1987, c. 267, ss. 1, 2; 1989, c. 727, s. 147; c. 764, ss. 6, 7; 1989 (Reg. Sess., 1990), c. 1075, s. 2; 1991 (Reg. Sess., 1992), c. 944, s. 4; 1993, c. 173, s. 5; 1995, c. 285, s. 1; 1995 (Reg. Sess., 1996), c. 585, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 27.31(c); 1998-126, s. 1; 1998-217, s. 46(a).)

Editor's Note. — Session Laws 2004-140, s. 1, provides: "A subsurface wastewater disposal system shall be located the maximum feasible horizontal distance, but not less than 10 feet from any other subsurface wastewater disposal system, when all of the following conditions are met:

"(1) The lot or tract of land on which the system will be located is specifically described in a deed, other instrument conveying fee simple title, or on a plat recorded prior to 1 July 1977.

"(2) The lot or tract of land is of insufficient size to allow the minimum horizontal separation distance for a conventional wastewater system required in 15A NCAC 18A.1950.

"(3) The system will receive sewage from only one single-family residence not to exceed four bedrooms.

"(4) The residence is not capable of being served by a public or community wastewater system at the time construction of the system commences.

"(5) The system will be installed in sand or loamy sand soils as defined in 15A NCAC 18A.1935 and installed in accordance with rules adopted pursuant to Article 11 of Chapter 130A of the General Statutes."

Session Laws 2004-140, s. 2, provides: "The Commission for Health Services [now the Commission for Public Health] may adopt rules that incorporate the provisions of Section 1 of this act [Session Laws 2004-140]. Except as provided by Section 1 of this act [Session Laws 2004-140], this act [Session Laws 2004-140] does not limit the authority of the Commission for Health Services [now the Commission for Public Health] or the Environmental Management Commission to adopt rules governing the location, construction, operation, maintenance, or repair of subsurface wastewater disposal systems pursuant to G.S. 130A-335 or other provisions of Article 11 of Chapter 130A of the General Statutes."

CASE NOTES

Preliminary Soil Evaluation. — Where the rules of the Commission for Health Services [now the Commission for Public Health] did not provide for nor prohibit the use of preliminary soil evaluations, local sanitarian was enforcing the rules of the Commission when it conducted such an evaluation. Cates v. North Carolina Dep't of Justice, 121 N.C. App. 243, 465 S.E.2d 64 (1996), modified and aff'd, 346 N.C. 781, 487 S.E.2d 723 (1997).

Cited in EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), overruled on other grounds, Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997); Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

OPINIONS OF ATTORNEY GENERAL

Effect of Commission Rules on Local Rules. — The rules and regulations of a local board of health may permit the installation of a septic tank system or an alternative ground absorption sewage disposal system in soil classified as "unsuitable" if such installation will not have a detrimental effect on the public health. However, after the effective date of the rules and regulations of the Commission for Health Services [now the Commission for Public Health] governing sewage disposal, the provisions of such rules may apply. See opinion of Attorney General to Mr. Howard B. Campbell, 23 July 1975, rendered under former G.S. 130-166.25.

§ 130A-335.1. Effluent filters and access devices for certain septic tank systems.

(a) The person who manufactures, installs, repairs, or pumps any septic tank to be installed in this State as a part of a septic tank system that is designed to treat 3,000 gallons per day or less of sewage shall provide an effluent filter approved by the Department pursuant to the requirements of G.S. 130A-335, this section, and rules adopted by the Commission. Any person who manufactures, installs, repairs, or pumps systems described in this section may purchase and install any approved filters on the systems. The person who installs the effluent filter shall install the effluent filter as a part of the septic tank system in accordance with the specifications provided by the manufacturer of the effluent filter. An effluent filter shall:

(1) Be made of materials that are capable of withstanding the corrosives to which septic tank systems are normally subject.
(2) Prevent solid material larger than one-sixteenth of an inch, as measured along the shortest axis of the material, from entering the drainfield.
(3) Be designed and constructed to allow for routine maintenance.
(4) Be designed and constructed so as not to require maintenance more frequently than once in any three-year period under normally anticipated use.

(b) The access device required by G.S. 130A-335(f) shall provide access to each compartment of a septic tank for inspection and maintenance either by means of an opening in the top of the septic tank or by a riser assembly and shall include an appropriate cover. The access device shall:

(1) Be of sufficient size to facilitate inspection and service.
(2) Be designed and constructed to equal or exceed the minimum loading specifications applicable to the septic tank.
(3) Prevent water entry.
(4) Come to within six inches of the finished grade.
(5) Be visibly marked so that the access device can be readily located. (1998-126, s. 2; 2006-255, s. 4; 2006-264, s. 63(a).)

Editor's Note. — Session Laws 2006-264, s. 63(a), rewrote the introductory paragraph of subsection (a). However, Session Laws 2006-264, s. 63(b) provided that if Session Laws 2006-255 becomes law, Session Laws 2006-264, s. 63 is repealed. Therefore, the amendments made by Session Laws 2006-264, s. 63(a) have not been implemented.

Effect of Amendments. — Session Laws 2006-255, s. 4, effective August 23, 2006, in subsection (a), substituted "person who manufactures, installs, repairs, or pumps any" for "manufacturer of each" in the beginning of the first sentence, added the second sentence, and substituted "effluent filter" for "septic tank system" near the beginning of the third sentence.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 130A-336. Improvement permit and authorization for wastewater system construction required.

(a) Any proposed site for a residence, place of business, or place of public assembly in an area not served by an approved wastewater system shall be evaluated by the local health department in accordance with rules adopted pursuant to this Article. An improvement permit shall be issued in compliance with the rules adopted pursuant to this Article. An improvement permit shall include:

(1) For permits that are valid without expiration, a plat or, for permits that are valid for five years, a site plan.
(2) A description of the facility the proposed site is to serve.
(3) The proposed wastewater system and its location.
(4) The design wastewater flow and characteristics.
(5) The conditions for any site modifications.
(6) Any other information required by the rules of the Commission.

The improvement permit shall not be affected by change in ownership of the site for the wastewater system provided both the site for the wastewater system and the facility the system serves are unchanged and remain under the ownership or control of the person owning the facility. No person shall commence or assist in the construction, location, or relocation of a residence, place of business, or place of public assembly in an area not served by an approved wastewater system unless an improvement permit and an authorization for wastewater system construction are obtained from the local health department. This requirement shall not apply to a manufactured residence exhibited for sale or stored for later sale and intended to be located at another site after sale.

(b) The local health department shall issue an authorization for wastewater system construction authorizing work to proceed and the installation or repair of a wastewater system when it has determined after a field investigation that the system can be installed and operated in compliance with this Article and rules adopted pursuant to this Article. This authorization for wastewater system construction shall be valid for a period equal to the period of validity of the improvement permit, not to exceed five years, and may be issued at the same time the improvement permit is issued. No person shall commence or assist in the installation, construction, or repair of a wastewater system unless an improvement permit and an authorization for wastewater system construction have been obtained from the Department or the local health department. No improvement permit or authorization for wastewater system construction shall be required for maintenance of a wastewater system. The Department and the local health department may impose conditions on the issuance of an improvement permit and an authorization for wastewater system construction.

(c) Unless the Commission otherwise provides by rule, plans, and specifications for all wastewater systems designed for the collection, treatment, and disposal of industrial process wastewater shall be reviewed and approved by the Department prior to the issuance of an authorization for wastewater system construction by the local health department.

(d) If a local health department repeatedly fails to issue or deny improvement permits for conventional septic tank systems within 60 days of receiving completed applications for the permits, then the Department of Environment and Natural Resources may withhold public health funding from that local health department. (1973, c. 452, s. 5; c. 476, s. 128; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1985, c. 273; 1991, c. 256, s. 2; 1991 (Reg. Sess., 1992), c. 944, s. 5; 1995, c. 285, s. 1; 1995 (Reg. Sess., 1996), c. 585, s. 3; 1996, 2nd Ex. Sess., c. 18, s. 27.31(d)-(f); 1997-443, ss. 11A.83, 11A.119(a).)

Editor's Note. — Session Laws 2006-136, s. 1, provides: "The definitions in G.S. 130A-334 apply throughout this act. For the purposes of this act, 'Commission' means the Commission for Health Services [now the Commission for Public Health]. 'Licensed soil scientist' has the same meaning as in G.S. 89F-3(3)."

Session Laws 2006-136, s. 2(a), provides: "The Department of Environment and Natural Resources shall develop and implement a pilot program to begin no later than 1 August 2006 and to terminate 1 July 2011 regarding the process for the issuance of an improvement permit for an on-site wastewater system pursuant to Article 11 of Chapter 130A of the General Statutes. A county that meets all of the following criteria may participate in the pilot program:

"(1) The population of the county must not exceed 25,000 according to the most recent federal decennial census.

"(2) The county must have more than 900 applications for improvement permits or authorizations to construct that are pending before the local health department on the effective date of this act.

"(3) The board of county commissioners and the local board of health for the county must both approve a resolution requesting to participate in the pilot program."

Session Laws 2006-136, s. 2(b), provides: "Notwithstanding G.S. 130A-336, the Department of Environment and Natural Resources shall authorize licensed soil scientists and the local health department to evaluate any proposed site for a residence, place of business, or place of public assembly in an area not served by an approved wastewater system. The local health department shall issue an improvement permit after one of the following has occurred:

"(1) A soil and site evaluation has been completed by an authorized agent of the Department or local health department that finds that the site is suitable for a wastewater system.

"(2) The local health department receives a completed soil and site evaluation for a wastewater system designed to treat 3,000 gallons per day or less of sewage that has been signed and sealed by a licensed soil scientist that finds that the site is suitable for a wastewater system."

Session Laws 2006-136, s. 2(c), provides: "A licensed soil scientist who submits a completed soil and site evaluation pursuant to this section shall have in force errors and omissions coverage or other appropriate liability insurance that has policy limits of not less than one million dollars ($1,000,000) per claim and that shall remain in force for at least six years after the date on which the improvement permit is approved. The licensed soil scientist shall provide the local health department with evidence satisfactory to the local health department that the coverage required by this section is in force. The local health department shall maintain a register of all licensed soil scientists who work in the county that have submitted completed soil and site evaluations under this section."

Session Laws 2006-136, s. 2(d), provides: "An improvement permit issued pursuant to this section shall include:

"(1) For permits that are valid for five years, a site plan drawn to scale with setbacks labeled. No permits shall be issued that are valid without expiration.

"(2) A description of the facility the proposed site is to serve and any factors that would affect the wastewater load.

"(3) The type and layout of the proposed wastewater system and its location.

"(4) The design wastewater flow and characteristics.

"(5) Any proposed landscape, site, drainage, or soil modifications.

"(6) A detailed soil profile description of at least two locations within the proposed disposal area. The detailed soil profile descriptions shall include soil taxonomic classifications, horizons, depth, texture, structure, soil wetness conditions, restrictive horizons, matrix color, and redoximorphic colors.

"(7) Any other information required by the rules of the Commission."

Session Laws 2006-136, s. 2(e), provides: "An improvement permit issued pursuant to this section shall not be affected by change in ownership of the site for the wastewater system provided both the site for the wastewater system and the facility the system serves are unchanged and remain under the ownership or control of the person owning the facility. No person shall commence or assist in the construction, location, or relocation of a residence, place of business, or place of public assembly in an area not served by an approved wastewater system unless an improvement permit and an authorization for wastewater system construction are obtained from the local health department. This requirement shall not apply to a manufactured residence exhibited for sale or stored for later sale and intended to be located at another site after sale."

Session Laws 2006-136, s. 2(f), provides: "The local health department shall issue an authorization for wastewater system construction authorizing work to proceed and the installation or repair of a wastewater system when it has determined after a field investigation that the system can be installed and operated in compliance with Article 11 of Chapter 130A of the General Statutes and rules adopted pursuant to the Article. This authorization for wastewater system construction shall be valid for a period equal to the period of validity of the improvement permit, not to exceed five years, and may be issued at the same time the improvement permit is issued. No person shall commence or assist in the installation, construction, or repair of a wastewater system unless an improvement permit and an authorization for wastewater system construction have been obtained from the local health department. No improvement permit or authorization for wastewater system construction shall be required for maintenance of a wastewater system. The Department of Environment and Natural Resources and the local health department may impose conditions on the issuance of an improvement permit and an authorization for wastewater system construction."

Session Laws 2006-136, s. 2(g), provides: "When a local health department issues an improvement permit or authorization to construct based upon work performed by a licensed soil scientist pursuant to this section, the improvement permit or authorization to construct shall bear a statement that reads: 'The soil, site, and system evaluation and documentation necessary to issue this __________ (improvement permit or authorization to construct) was performed by __________ (name of licensed soil scientist), a licensed soil scientist, license number __________ (license number).'."

Session Laws 2006-136, s. 2(h), provides: "When a local health department denies an application for an improvement permit or authorization to construct prepared by a licensed soil scientist pursuant to this section, the denial shall include a written report that specifically identifies the provisions of Article 11 of Chapter 130A of the General Statutes or rules adopted pursuant to the Article on which the denial is based."

Session Laws 2006-136, s. 2(i), provides: "A local health department may employ or contract with a licensed soil scientist for the review of an application for an improvement permit or authorization to construct. A licensed soil scientist who reviews a completed application for an improvement permit or authorization to construct under this subsection shall have in force errors and omissions coverage or other appropriate liability insurance that has policy limits of not less than one million dollars ($1,000,000) per claim."

Session Laws 2006-136, s. 2(j), provides: "The Department of Environment and Natural Resources shall: (i) specify uniform procedures for the review of an application prepared by a licensed soil scientist; (ii) establish documentation that must be included in the application; (iii) establish the necessary documentation that must be included in the local health department's written permit application review report; and (iv) specify the rights and obligations of each party."

Session Laws 2006-136, s. 2(k), provides: "In addition to any fees authorized under G.S. 130A-39(g), a local board of health may impose an additional fee not to exceed two hundred dollars ($200.00) for the costs of review and consideration of applications for an improvement permit or an authorization to construct that has been prepared by a licensed soil scientist pursuant to this section."

Session Laws 2006-136, s. 2(*l*), provides: "Except as provided in this section, the provisions of Article 11 of Chapter 130A of the General Statutes and rules adopted pursuant to that Article apply to this section. This section applies only to the counties eligible to participate in the pilot program."

Session Laws 2006-136, s. 3, provides: "In order to determine the effectiveness of the pilot program, the Department of Environment and Natural Resources shall evaluate whether: (i) the program resulted in a reduction in the length of time improvement permits or authorizations to construct are pending in the participating counties; (ii) the program resulted in increased system failures or other adverse impacts; and (iii) the program resulted in new or increased environmental impacts. The Department shall annually report its interim findings and recommendations, including any legislative proposals, to the Environmental Review Commission beginning 1 October 2007. The Department shall report its final findings and recommendations, including any legislative proposals, to the Environmental Review Commission no later than 1 October 2011."

CASE NOTES

Cited in EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), overruled on other grounds, Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997); Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994); Tabor v. County of Orange, 156 N.C. App. 88, 575 S.E.2d 540, 2003 N.C. App. LEXIS 28 (2003).

OPINIONS OF ATTORNEY GENERAL

Mobile Home Placed on Lot for Storage or Sale or Occupied for Business Purposes. — Former G.S. 130-166.25 required any person who located, relocated or caused to be located or relocated any mobile home to first obtain an improvements permit and required a certificate of completion to be obtained before any person occupied a mobile home. The section did not require an improvements permit and a certificate of completion before a mobile home was placed on a lot for storage and for sale or before a mobile home was occupied for business purposes. See opinion of Attorney General to Mr. Ben Eaton, Division of Health Services, Department of Human Resources, 43 N.C.A.G. 410 (1974), opinion rendered under former G.S. 130-166.25.

Special Duty Exception to Public Duty Doctrine Applied. — Montgomery County Health Department, an agent of the North Carolina Department of Environment and Natural Resources (NCDENR), was a state agency required to inspect sites for suitability of wastewater treatment systems before issuing improvement permits by G.S. 130A-336, and could avail itself of the protection afforded by the public duty doctrine; however, the special duty exception applied, as NCDENR, through the Health Department, made a promise to a property owner by issuing an improvement permit warranting that the owner could construct a three-bedroom home on the property as described in the site plan, and the owner relied on the permit in negotiating the purchase of the property. Watts v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007).

§ 130A-337. Inspection; operation permit required.

(a) No system of wastewater collection, treatment and disposal shall be covered or placed into use by any person until an inspection by the local health department has determined that the system has been installed or repaired in accordance with any conditions of the improvement permit, the rules, and this Article.

(b) Upon determining that the system is properly installed or repaired and that the system is capable of being operated in accordance with the conditions of the improvement permit, the rules, this Article and any conditions to be imposed in the operation permit, as applicable, the local health department shall issue an operation permit authorizing the residence, place of business or place of public assembly to be occupied and for the system to be placed into use or reuse.

(c) Upon determination that an existing wastewater system has a valid operation permit and is operating properly in a manufactured home park, the local health department shall issue authorization in writing for a manufactured home to be connected to the existing system and to be occupied. Notwithstanding G.S. 130A-336, an improvement permit is not required for the connection of a manufactured home to an existing system with a valid operation permit in a manufactured home park.

(d) No person shall occupy a residence, place of business or place of public assembly, or place a wastewater system into use or reuse for a residence, place of business or place of public assembly until an operation permit has been issued or authorization has been obtained pursuant to G.S. 130A-337(c). (1973, c. 452, s. 6; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1985, c. 487, s. 9; 1991 (Reg. Sess., 1992), c. 944, s. 6; 1995, c. 285, s. 1.)

CASE NOTES

Cited in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

§ 130A-338. Authorization for wastewater system construction required before other permits to be issued.

Where construction, location or relocation is proposed to be done upon a residence, place of business or place of public assembly, no permit required for electrical, plumbing, heating, air conditioning or other construction, location or relocation activity under any provision of general or special law shall be issued until an authorization for wastewater system construction has been issued under G.S. 130A-336 or authorization has been obtained under G.S. 130A-337(c). (1973, c. 452, s. 7; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1995, c. 285, s. 1.)

CASE NOTES

Cited in Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 2002 U.S. App. LEXIS 2747 (4th Cir. 2002).

§ 130A-339. Limitation on electrical service.

No person shall allow permanent electrical service to a residence, place of business or place of public assembly upon construction, location or relocation until the official electrical inspector with jurisdiction as provided in G.S. 143-143.2 certifies to the electrical supplier that the required improvement permit authorization for wastewater system construction and an operation permit or authorization under G.S. 130A-337(c) has been obtained. Temporary electrical service necessary for constructing a residence, place of business or place of public assembly can be provided upon compliance with G.S. 130A-338. (1973, c. 452, s. 8; 1981, c. 949, s. 3; 1983, c. 891, s. 2; 1995, c. 285, s. 1.)

§ 130A-340. Review procedures and appeals.

The Department, upon request by an applicant for an improvement permit, shall provide a technical review of any scientific data and system design submitted by the applicant. The data and system design shall be evaluated by professional peers of those who prepared the data and system design. The results of the technical review shall be available prior to a decision by the local health department and shall not affect an applicant's right to a contested hearing under Chapter 150B of the General Statutes. (1989, c. 764, s. 5.)

§ 130A-341. Consideration of a site with existing fill.

Upon application to the local health department, a site that has existing fill, including one on which fill material was placed prior to July 1, 1977, and that has sand or loamy sand for a depth of at least 36 inches below the existing ground surface, shall be evaluated for an on-site wastewater system. The Commission shall adopt rules to implement this section. (1989, c. 764, s. 8; 1991 (Reg. Sess., 1992), c. 944, s. 7.)

§ 130A-342. Residential wastewater treatment systems.

(a) Individual residential wastewater treatment systems that are approved and listed in accordance with the standards adopted by the National Sanitation Foundation, Inc. for Class I residential wastewater treatment systems, as set out in Standard 40 of the National Sanitation Foundation, Inc., (as approved 13 January 2001) as amended, shall be permitted under rules adopted by the Commission. The Commission may establish standards in addition to those set by the National Sanitation Foundation, Inc.

(b) A permitted system shall be operated and maintained by a certified wastewater treatment facility operator.

(c) Each county, in which one or more residential wastewater treatment systems permitted pursuant to this section are in use, shall document the performance of each system and report the results to the Department annually. (1989, c. 727, s. 223(b); c. 764, s. 9; 1989 (Reg. Sess., 1990), c. 1004, ss. 12, 37; 1991 (Reg. Sess., 1992), c. 944, s. 8; 1995, c. 285, s. 1; 1997-443, ss. 11A.84, 11A.119(a); 2001-505, s. 2.1.)

Editor's Note. — Session Laws 2001-505, s. 2.5, provides: "The Commission for Health Services [now the Commission for Public Health] shall adopt temporary and permanent rules to implement the provisions of Sections 2.1 and 2.2 of this act. The Commission may review its current rules to determine whether any wastewater system, as defined by G.S. 130A-334, that is described in its rules should be designated as an accepted wastewater system or approved as an innovative wastewater system, as those terms are defined in G.S. 130A-343, as amended by Section 2.2 of this act. Notwithstanding G.S. 130A-343, as amended by Section 2.2 of this act, the Commission may designate a wastewater system that, prior to 1 October 2001, is described in its rules as an accepted wastewater system whether or not the wastewater system was described or approved as an innovative wastewater system prior to 1 October 2001. If the Commission determines that a wastewater system that is described in its rules prior to 1 October 2001 should not be designated as an accepted wastewater system, the Commission may amend its rules to remove the description of the wastewater system. If the

Commission amends its rules to remove a description of a wastewater system pursuant to this section [s. 2.5 of Session Laws 2001-505], the wastewater system shall be deemed to be an approved innovative wastewater system without further action by the Department of Environment and Natural Resources. This section [s. 2.5 of Session Laws 2001-505] shall not be construed to require the Commission or the Department to change the current designation or approval status of any wastewater system."

§ 130A-343. Approval of on-site subsurface wastewater systems.

(a) Definitions. — As used in this section:

(1) "Accepted wastewater system" means any wastewater system, other than a conventional wastewater system, or any technology, device, or component of a wastewater system that: (i) has been previously approved as an innovative wastewater system by the Department; (ii) has been in general use in this State as an innovative wastewater system for more than five years; and (iii) has been approved by the Commission for general use or use in one or more specific applications. An accepted wastewater system may be approved for use in applications for which a conventional wastewater system is unsuitable. The Commission may impose any design, operation, maintenance, monitoring, and management requirements on the use of an accepted wastewater system that it determines to be appropriate.

(2) "Controlled demonstration wastewater system" means any wastewater system or any technology, device, or component of a wastewater system that, on the basis of acceptable research, is approved by the Department for research, testing, or trial use under actual field conditions in this State pursuant to a protocol that has been approved by the Department.

(3) "Conventional wastewater system", "conventional sewage system", or "conventional septic tank system" means a wastewater system that consists of a traditional septic or settling tank and a gravity-fed subsurface disposal field that uses washed gravel or crushed stone to distribute effluent to soil in one or more nitrification trenches and that does not include any other appurtenance.

(4) "Experimental wastewater system" means any wastewater system or any technology, device, or component of a wastewater system that is approved by the Department for research, testing, or limited trial use under actual field conditions in this State pursuant to a protocol that has been approved by the Department.

(5) "Innovative wastewater system" means any wastewater system, or any technology, device, or component of a wastewater system that: (i) has been demonstrated to perform in a manner equal or superior to a conventional wastewater system; (ii) is constructed of materials whose physical and chemical properties provide the strength, durability, and chemical resistance to allow the system to withstand loads and conditions as required by rules adopted by the Commission; and (iii) has been approved by the Department for general use or for one or more specific applications. An innovative wastewater system may be approved for use in applications for which a conventional wastewater system is unsuitable. The Department may impose any design, operation, maintenance, monitoring, and management requirements on the use of an innovative wastewater system that it determines to be appropriate.

(b) Adoption of Rules Governing Approvals. — The Commission shall adopt rules for the approval and permitting of experimental, controlled demonstration, innovative, and accepted wastewater systems. The rules shall address the criteria to be considered prior to issuing a permit for a system, requirements for preliminary design plans and specifications that must be submitted, methodology to be used, standards for monitoring and evaluating the system, research evaluation of the system, the plan of work for monitoring system performance and maintenance, and any additional matters the Commission deems appropriate.

(c) Approved Systems. — The Department may modify, suspend, or revoke the approval of a wastewater system if the Department determines that the approval is based on false, incomplete, or misleading information or if the Department finds that modification, suspension, or revocation is necessary to protect public health, safety, or welfare. The Department shall provide a listing of all approved experimental, controlled demonstration, innovative, and accepted wastewater systems to the local health departments annually, and more frequently, when the Department makes a final agency decision related to the approval of a wastewater system or the Commission adopts rules related to the approval of a wastewater system.

(d) Evaluation Protocols. — The Department shall approve one or more nationally recognized protocols for the evaluation of on-site subsurface wastewater systems. Any protocol approved by the Department shall specify a minimum number of sites that must be evaluated and the duration of the evaluation period. At the request of a manufacturer of a wastewater system, the Department may approve an alternative protocol for use in the evaluation of the performance of the manufacturer's wastewater system. A protocol for the evaluation of an on-site subsurface wastewater system is a scientific standard within the meaning of G.S. 150B-2(8a)h.

(e) Experimental Systems. — A manufacturer of a wastewater system that is intended for on-site subsurface use may apply to the Department to have the system evaluated as an experimental wastewater system as provided in this subsection. The manufacturer shall submit a proposal for evaluation of the system to the Department. The proposal for evaluation shall include the design of the system, a description of any laboratory or field research or testing that will be used to evaluate the system, a description of the research or testing protocol, and the credentials of the independent laboratory, consultant, or other entity that will be conducting the research or testing on the system. The proposal may include an evaluation of research and testing conducted in other states to the extent that the research and testing involves soil types, climate, hydrology, and other relevant conditions that are comparable to conditions in this State and if the research or testing was conducted pursuant to a protocol acceptable to the Department. The manufacturer shall enter into a contract for an evaluation of the performance of the experimental wastewater system with an independent laboratory, consultant, or other entity that has expertise in the evaluation of wastewater systems and that is approved by the Department. The manufacturer may install up to 50 experimental systems pursuant to a protocol approved by the Department on sites that are suitable for a conventional wastewater system and that have a repair area of sufficient size to allow installation of a conventional wastewater system, an approved innovative wastewater system, or an accepted wastewater system if the experimental wastewater system fails to perform properly.

(f) Controlled Demonstration Systems. — A manufacturer of a wastewater system intended for on-site subsurface use may apply to the Department to have the system evaluated as a controlled demonstration wastewater system as provided in this subsection. The manufacturer shall submit a proposal for evaluation of the system to the Department. The proposal for evaluation shall include the design of the system, a description of any laboratory or field research or testing that will be used to evaluate the system, a description of the research or testing protocol, and the credentials of the independent laboratory, consultant, or other entity that will be conducting the research or testing on the system. If the system was evaluated as an experimental system under subsection (e) of this section, the proposal shall include the results of the evaluation. The proposal may include an evaluation of research and testing conducted in other states to the extent that the research and testing involves soil types, climate, hydrology, and other relevant conditions that are comparable to conditions in this State and if the research or testing was conducted pursuant to a protocol acceptable to the Department. The manufacturer shall enter into a contract for an evaluation of the performance of the controlled demonstration wastewater system with an independent laboratory, consultant, or other entity that has expertise in the evaluation of wastewater systems and that is approved by the Department. The manufacturer may install up to 200 controlled demonstration wastewater systems pursuant to a protocol approved by the Department on sites that are suitable for a conventional wastewater system and that have a repair area of sufficient size to allow installation of a conventional wastewater system, an approved innovative wastewater system, or an accepted wastewater system if the controlled demonstration wastewater system fails to perform properly. If the controlled demonstration wastewater system is intended for use on sites that are not suitable, or that are provisionally suitable, for a conventional wastewater system, the Department may approve the installation of the controlled demonstration wastewater system if the Department determines that the manufacturer can provide an acceptable alternative method for collection, treatment, and disposal of the wastewater.

(g) Innovative Systems. — A manufacturer of a wastewater system for on-site subsurface use that has been evaluated as an experimental wastewater system as provided in subsection (e) of this section or that has been evaluated as a controlled demonstration wastewater system as provided in subsection (f) of this section may apply to the Department to have the system approved as an innovative wastewater system as provided in this subsection. A manufacturer of a wastewater system for on-site subsurface use that has not been evaluated as an experimental wastewater system or as a controlled demonstration wastewater system may also apply to the Department to have the system approved as an innovative wastewater system on the basis of research and testing conducted in other states. The manufacturer shall provide the Department with the data and findings of all evaluations of the performance of the system that have been conducted in any state by or on behalf of the manufacturer. The manufacturer shall also provide the Department with a summary of the data and findings of all other evaluations of the performance of the system that are known to the manufacturer. The Department shall publish a notice that the manufacturer has submitted an application under this subsection in the North Carolina Register and may provide additional notice to the public via the Internet or by other means. The Department shall receive public comment on the application for at least 30 days after the date the notice is published in the North Carolina Register. In making a determination under this subsection, the Department shall consider the data, findings, and recommendations submitted by the manufacturer and all public comment. The Department may also consider any other information that the Department determines to be relevant. The Department shall determine: (i) whether the system performs in a manner equal or superior to a conventional wastewater system; (ii) whether the system is constructed of materials whose physical and chemical properties provide the strength, durability, and chemical resistance to allow the system to withstand loads and conditions as required by rules adopted by the Commission; (iii) the circumstances in which use of the system is appropriate; and (iv) any conditions and limitations related to the use of the system. The Department shall make the determinations required by this subsection and approve or deny the application within 180 days after the Department receives a complete application from a manufacturer. If the Department fails to act on the application within 180 days, the manufacturer may treat the application as denied and challenge the denial by filing a contested case as provided in Article 3 of Chapter 150B of the General Statutes. If the Department approves an innovative wastewater system, the Department shall specify the circumstances in which use of the system is appropriate and any conditions and limitations related to the use of the system.

(h) Accepted Systems. — A manufacturer of an innovative wastewater system that has been in general use in this State for more than five years may petition the Commission to have the system designated as an accepted wastewater system as provided in this subsection. The manufacturer shall provide the Commission with the data and findings of all prior evaluations of the performance of the system. In addition, the manufacturer shall provide the Commission with information sufficient to enable the Commission to fully evaluate the performance of the system in this State for at least the five-year period immediately preceding the petition. The Commission shall designate a wastewater system as an accepted wastewater system only if it finds that there is clear, convincing, and cogent evidence (i) to confirm the findings made by the Department at the time the Department approved the system as an innovative wastewater system and (ii) that the system performs in a manner that is equal or superior to a conventional wastewater system under actual field conditions in this State. The Commission shall specify the circumstances in which use of the system is appropriate and any conditions and limitations related to the use of the system.

(i) Miscellaneous Provisions. —

(1) In evaluating applications for approval under this section, the Department may consult with persons who have special training and experience related to on-site subsurface wastewater systems and may form a technical advisory committee for this purpose. However, the Department is responsible for making timely and appropriate determinations under this section.

(2) The Department may initiate a review of a nonproprietary wastewater system and approve the system for on-site subsurface use as an experimental wastewater system, a controlled demonstration wastewater system, or an innovative wastewater system without having received an application from a manufacturer. The Department may recommend that the Commission designate a nonproprietary wastewater system as an accepted wastewater system without having received a petition from a manufacturer.

(j) Warranty Required in Certain Circumstances. — The Department shall not approve a reduction of the total nitrification trench length for an innovative wastewater system or accepted wastewater system handling untreated septic tank effluent of more than twenty-five percent (25%) as compared to the total nitrification trench length required for a 36-inch-wide conventional wastewater system unless the manufacturer of the innovative wastewater system or accepted wastewater system provides a performance warranty for the nitrification trench system to each owner or purchaser of the system for a warranty period of at least five years from the date on which the wastewater system is placed in operation. The warranty shall provide that the manufacturer shall provide all material and labor that may be necessary to provide a fully functional wastewater system. The Commission shall establish minimum terms and conditions for the warranty required by this subsection. This subsection shall not be construed to require that a manufacturer warrant a wastewater system that is not properly sized to meet the design load required for a particular use, that is improperly installed, or that is improperly operated and maintained.

(k) Fees. — The Department shall collect the following fees under this section:

(1)	Review of an alternative protocol under subsection (d) of this section	$1,000.00
(2)	Review of an experimental system	$3,000.00
(3)	Review of a controlled demonstration system	$3,000.00
(4)	Review of an innovative system	$3,000.00
(5)	Review of an accepted system	$3,000.00
(6)	Review of a residential wastewater treatment system pursuant to G.S. 130A-342	$1,500.00
(7)	Review of a component of a system	$ 100.00
(8)	Modification to approved innovative system	$1,000.00

(*l*) On-Site Wastewater System Account. — The On-Site Wastewater System Account is established as a nonreverting account within the Department. Fees collected pursuant to this section shall be placed in the On-Site Wastewater System Account and shall be applied only to the costs of implementing this section. (1989, c. 764, s. 10; 1991 (Reg. Sess., 1992), c. 944, s. 9; 1995, c. 285, s. 1; 2001-505, s. 2.2.)

Editor's Note. — Session Laws 2001-505, s. 2.3 and 2.4, provide: “Section 2.3. Until the Department approves an evaluation protocol as provided in G.S. 130A-343(d), as amended by Section 2.2 of this act [s. 2.2 of Session Laws 2001-505], the Department may accept for review the data and findings of evaluations of performance of experimental, controlled demonstration, and innovative wastewater systems that are conducted as provided in: (i) ‘Protocol for the Verification of Wastewater Treatment Technologies’ prepared by NSF International for the United States Environmental Protection Agency (April 2001); (ii) ‘Protocol for the Verification of Residential Wastewater Treatment Technologies for Nutrient Reduction’ prepared by NSF International for the United States Environmental Protection Agency (27 November 2000); and (iii) ‘A Protocol for Testing, Assessing, and Approving Innovative or Alternative On-Site Wastewater Disposal Systems’ prepared by New Jersey Department of Environmental Protection (24 July 2001).

“Section 2.4. The Department of Environment and Natural Resources shall not accept an application for approval of an innovative wastewater system until it has acted on all applications for approval of innovative wastewater systems that were submitted to the Department prior to 1 October 2001. The Department shall act on all applications for approval of innovative wastewater systems that were submitted to the Department prior to 1 October 2001 within 120 days of the date on which this act [Session Laws 2001-505] becomes effective. The Department may act on an application for a reduction of the total nitrification trench length for an innovative wastewater system handling untreated septic tank effluent as compared to the total nitrification trench length required for a 36-inch-wide conventional wastewater system that was submitted to the Department prior to 1 October 2001 only as provided in this section [s. 2.4 of Session Laws 2001-505]. The Department may approve a reduction of the total nitrification trench length for an innovative wastewater system handling untreated septic tank effluent of not more than thirty-five percent (35%) as compared to the total nitrification trench length required for a 36-inch-wide conventional wastewater system. The Department shall not approve a reduction of the total nitrification trench length for an innovative wastewater system handling untreated septic tank effluent of more than twenty-five percent (25%) as compared to the total nitrification trench length required for a 36-inch-wide conventional wastewater system unless the manufacturer of the innovative wastewater system provides a performance warranty for the nitrification trench system to each owner or purchaser of the innovative wastewater system for a warranty period of at least five years from the date on which the innovative wastewater system is placed in operation. The warranty shall provide that the manufacturer shall provide all material and labor that may be necessary to provide a fully functional wastewater system. The Department shall approve the terms and conditions of the warranty. This section [s. 2.4 of Session Laws 2001-505] shall not be construed to require that a manufacturer warrant an innovative wastewater system that is not properly sized to meet the design load required for a particular use, that is improperly installed, or that is improperly operated and maintained.”

Session Laws 2001-505, s. 2.5, provides: “The

Commission for Health Services [now the Commission for Public Health] shall adopt temporary and permanent rules to implement the provisions of Sections 2.1 and 2.2 of this act. The Commission may review its current rules to determine whether any wastewater system, as defined by G.S. 130A-334, that is described in its rules should be designated as an accepted wastewater system or approved as an innovative wastewater system, as those terms are defined in G.S. 130A-343, as amended by Section 2.2 of this act. Notwithstanding G.S. 130A-343, as amended by Section 2.2 of this act, the Commission may designate a wastewater system that, prior to 1 October 2001, is described in its rules as an accepted wastewater system whether or not the wastewater system was described or approved as an innovative wastewater system prior to 1 October 2001. If the Commission determines that a wastewater system that is described in its rules prior to 1 October 2001 should not be designated as an accepted wastewater system, the Commission may amend its rules to remove the description of the wastewater system. If the Commission amends its rules to remove a description of a wastewater system pursuant to this section [s. 2.5 of Session Laws 2001-505], the wastewater system shall be deemed to be an approved innovative wastewater system without further action by the Department of Environment and Natural Resources. This section [s. 2.5 of Session Laws 2001-505] shall not be construed to require the Commission or the Department to change the current designation or approval status of any wastewater system."

§ 130A-343.1. Transfer of ownership of provisionally approved septic tanks and innovative septic tank systems to joint agency in certain counties; inspection fees in those counties.

(a) As used in this section, "provisionally approved septic tank or innovative septic tank system" means a septic tank system located in soil that is classified as provisionally suitable or an innovative septic tank system, as those terms are used in Subchapter 18A of Chapter 18 of Title 15A of the North Carolina Administrative Code, G.S. 130A-343, and any applicable local rules or ordinances.

(b) As used in this subsection, "unit of local government" has the same meaning as in G.S. 160A-460. One or more units of local government located in the Counties of Camden, Chowan, Currituck, Gates, Hertford, Pasquotank, Perquimans, Tyrrell, and Washington may establish a joint agency for the purpose of owning and operating a provisionally approved septic tank or innovative septic tank system as provided in Article 20 of Chapter 160A of the General Statutes. Bertie County may join any joint agency established under this subsection. The owner of any provisionally approved septic tank or innovative septic tank system may, upon acceptance by a joint agency established under this subsection, transfer ownership of any real or personal property or interest therein that is a part of or used in connection with the provisionally approved septic tank or innovative septic tank system to the joint agency. Notwithstanding G.S. 160A-462(a), a joint agency created pursuant to this subsection may hold real property necessary to the undertaking. Any county named in this subsection may accept real or personal property described in this subsection from the owner of the property for transfer to a joint agency established as provided in this subsection.

(c) The Counties of Bertie, Camden, Chowan, Currituck, Gates, Hertford, Pasquotank, Perquimans, Tyrrell, and Washington may adopt an ordinance providing that any fee for the inspection, maintenance, and repair of a provisionally approved septic tank or other innovative septic tank system may be billed as property taxes, may be payable in the same manner as property taxes, and in the case of nonpayment, may be collected in any manner by which property taxes can be collected. If the ordinance states that delinquent fees can be collected in the same manner as delinquent real property taxes, the delinquent fees are a lien on the real property described on the bill that includes the fee. (1999-288, ss. 1-3; 2001-78, ss. 1-3.)

Editor's Note. — Session Laws 2001-78, effective May 15, 2001, amended Session Laws 1999-288, expanding its applicability by inserting the third sentence in present subsection (b), relating to Bertie County, and by inserting reference to Bertie, Camden, Chowan, Currituck, Pasquotank, Perquimans, Tyrrell and Washington Counties in present subsection (c). At the direction of the Reviser of Statutes, ss. 1 to 3 of Session Laws 1999-288, as amended, have now been codified as G.S. 130A-343.1.

Subsection (c) of G.S. 130A-343.1, derived from s. 3 of Session Laws 1999-288, was originally made applicable to fees imposed for inspections performed in Gates and Hertford Counties on or after the effective date of the 1999 act (July 14, 1999).

Section 3 of Session Laws 2001-78 provides: "This act applies to only Bertie, Camden, Chowan, Currituck, Pasquotank, Perquimans, Tyrrell and Washington Counties."

Section 4 of Session Laws 2001-78 provides that s. 2 of that act, which amended present subsection (c), applies to fees imposed for inspections in Bertie, Camden, Chowan, Currituck, Pasquotank, Perquimans, Tyrrell, and Washington Counties performed on or after May 15, 2001, and that s. 2 applies to fees imposed for maintenance and repairs in these eight counties plus Gates and Hertford performed on or after that date.

§ **130A-344:** Repealed by Session Laws 1995, c. 285, s. 2.

§ **130A-345:** Reserved for future codification purposes.

Article 12.

Mosquito and Vector Control.

Part 1. Mosquito and Vector Control Program.

§ 130A-346. Mosquito and vector control program; definition.

(a) The Department shall establish and administer a vector control program to protect the public health and to promote an environment suitable for habitation. A vector is a living transporter and transmitter of the causative agent of a disease. The program shall address the problems presented by vectors and other arthropods and rodents of public health significance in this State, including, but not limited to, mosquitoes, ticks, rodents, fleas and flies. The Department is authorized to engage in research, conduct investigations and surveillance, implement a vector control program and take other actions necessary to control vectors.

(b) The Commission shall adopt rules necessary to implement the program including rules for the control of vectors and other arthropods and rodents.

(c) The following definitions shall apply throughout this Article:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Secretary" means the Secretary of Environment and Natural Resources. (1957, c. 832, ss. 1, 2; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1997-443, s. 11A.83A.)

§ 130A-347. Mosquito control funds.

Funds received by the Department for mosquito control may be used to aid mosquito control districts and other units of local government engaged in mosquito control. The Commission shall adopt rules concerning the allocation of the funds. The rules shall provide for priority funding to those local activities that involve the abatement of breeding grounds. The rules may include provisions to withhold part of the mosquito control funds for the suppression of potential or documented mosquito-borne disease outbreaks. State aid for local physical control methods such as, but not limited to, cleaning, reopening or construction of ditches, restoration of streams and construction of impoundments shall not exceed the amount of funds and the value of services and facilities provided locally except State aid may be provided up to twice the locally provided amount for physical control methods in salt marsh areas. State aid for local chemical and biological control methods such as, but not limited to, control of immature and adult mosquitoes by use of chemicals, bacteria, fungi and mosquito fish shall not exceed the amount of funds and the value of services and facilities provided locally. State aid shall not be granted with respect to each individual project until the Department finds and certifies in writing for each project that: (i) the required local share is available; (ii) there is a documented mosquito problem which requires abatement; (iii) a work plan describing the method and procedures to be used for abatement is appropriate; and (iv) the rules of the Commission have been met. (1957, c. 832, s. 4; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1995, c. 324, s. 26.7A.)

§ 130A-348. Control of impounded water.

For the protection of the public health, the Commission shall adopt rules concerning the impoundment of water. The rules shall address proper preparation of the land for inundation, maintenance of the shoreline after inundation and any other factors necessary to control mosquitoes. Persons shall obtain permits from the Department before constructing impoundments and impounding water. (1983, c. 891, s. 2.)

§ 130A-349. Control of outbreaks.

In the event of potential or documented outbreaks of vector-borne disease as determined by the Secretary, the Secretary is authorized to use all appropriate means, including the expenditure of unallocated mosquito control funds, to prevent or suppress the outbreaks. (1983, c. 891, s. 2.)

§§ 130A-350, 130A-351: Reserved for future codification purposes.

Part 2. Mosquito Control Districts.

§ 130A-352. Creation and purpose of mosquito control districts.

For the purpose of protecting and promoting the public health and welfare by providing for the control of mosquitoes and other arthropods of public health significance, mosquito control districts may be created in accordance with the provisions of this Part. A mosquito control district may be comprised of one or more contiguous counties or contiguous parts of one or more counties. (1957, c. 1247, s. 1; 1983, c. 891, s. 2.)

§ 130A-353. Nature of district; procedure for forming districts.

(a) A mosquito control district shall be a body politic and corporate and a political subdivision of the State. A mosquito control district may sue and be sued in its corporate name.

(b) If the proposed district lies wholly within a county, ten percent (10%) or nore of the resident freeholders within the proposed district may petition the oard of commissioners of the county in which the proposed district lies setting orth the boundaries of the district and a suggested name for the district. For he purposes of this Part, the term "freeholders" shall mean persons holding a eed to a tract of land within the district or proposed district, and also shall ean a person who has entered into a contract to purchase a tract of land ithin the district or proposed district, is making payments pursuant to a ontract, and will receive a deed upon completion of the contractual payments. f the county board of commissioners considers the formation of the district to e in the interest of the public health, the board shall forward the petition to he Department. If the Department considers the formation of the district to be n the interest of the public health, the Department shall notify the county oard of commissioners. Upon notification, the board shall give notice of a ublic hearing on the question of the formation of the district by advertising he time, place and purpose of the hearing once a week for four successive eeks prior to the hearing in a newspaper either published in the county or aving a general circulation in the county. The public hearing shall be presided ver by the chairman of the county board of commissioners and shall be ttended by a representative of the Department. The hearing may be continued as may be necessary to hear the proponents and opponents of the ormation of the district. If after the hearing, the county board of commissioners deem it advisable that the district be created, the board shall submit the uestion of whether or not the district shall be created to the voters residing ithin the proposed district at an election called for that purpose. Upon etermining that the district should be created and established, and prior to he submission of the question of the formation of the district to the voters of he proposed district, the county board of commissioners may determine the aximum amount of special tax to be levied for mosquito control purposes hould the formation of the district be approved by the voters. In no event shall he maximum authorized levy exceed thirty-five cents (35¢) upon the one undred dollar ($100.00) assessed valuation. If the county board of commissioners determines that the maximum amount of special tax to be levied for osquito control purposes is to be less than thirty-five cents (35¢) on the one undred dollar ($100.00) valuation, the maximum amount must appear on the allot to be used by the voters on the question of the creation of the district.

(c) Prior to the election, the county board of commissioners may make minor eviations in defining the boundaries of the proposed district if: (1) the board etermines that minor deviation from the boundaries described in the petition s in the interest of public health; and (2) ten percent (10%) of the resident reeholders within the revised boundaries have signed the petition proposing he creation of the district or additional resident freeholders within the revised oundaries of the proposed district sign the petition to bring the total number f petitioners within the proposed revised boundaries to not less than ten ercent (10%) of the voters therein.

(d) The county board of commissioners shall request the county board of lections to hold the election and shall pay the expense of the election. The lection shall be held in accordance with the applicable provisions of Chapter 63 of the General Statutes. Notice shall be given as provided in G.S. 63-33(8).

(e) The form of the question to be stated on the ballot shall be in substantially the following words:

> "☐ FOR creation of the (here insert name) Mosquito Control District and the levy of a special tax (here insert the words "not to exceed" and the maximum amount of special tax to be levied for mosquito control purposes if the county board of commissioners has deter-

mined that the maximum authorized amount is to be less than thirty-five cents (35¢) on the one hundred dollar ($100.00) assessed valuation) for mosquito control purposes.

☐ AGAINST creation of the (here insert name) Mosquito Control District and the levy of a special tax (here insert the words "not to exceed" and the maximum amount of special tax to be levied for mosquito control purposes if the county board of commissioners has determined that the maximum authorized amount is to be less than thirty-five cents (35¢) on the one hundred dollar ($100.00) assessed valuation) for mosquito control purposes."

The affirmative and negative forms shall be printed on one ballot and the voters shall make a mark of an "X" in one of the squares preceding the form.

(f) If a majority of the voters voting at the election vote in favor of creation of the district and the levy of the special tax, the county board of commissioners shall declare the district created and shall adopt a resolution to that effect.

(g) In the event the proposed mosquito control district shall embrace lands lying in two or more counties, the petition signed by the requisite number of resident freeholders within the proposed district shall be addressed to the Department. If the Department deems the formation of the proposed district to be in the interest of the public health, the Department shall hold public hearings within the proposed district after first giving notice of the time and place of the hearings by publication once a week for four successive weeks in a newspaper published or circulated in the proposed district. A public hearing shall be held in the courthouse of each of the counties in which any part of the proposed district is situated. After the hearing, if the Department deems the formation of the district to be in the interest of the public health, the Department shall order an election to be held upon the question of the formation of the district after first advertising the time of the election in the manner provided in subsection (d). At the request of the Commission, the county commissioners of the counties in which the proposed district lies shall request the county board of elections to hold an election on the question with substantially the same form of ballot set forth in subsection (e). Each county shall bear the expense of the election held in that county. The board of elections shall certify the results to the county commissioners and the Commission. If a majority of the votes cast favor creation of the district and the levy of the special tax, the Commission shall declare the district created and the county commissioners shall enter the certification upon the minutes of the board. Registration shall be in accordance with G.S. 163-288.2. (1957, c. 1247, s. 2; 1959, c. 622, s. 1; 1973, c. 476, s. 128; 1981, c. 188, ss. 1, 2; 1983, c. 891, s. 2.)

§ 130A-354. Governing bodies for mosquito control districts.

(a) A mosquito control district shall be governed by a board of commissioners. In the case of a district lying wholly within a single county, the board shall be composed of five members, all of whom shall be residents of the district. Three of the members shall be appointed by the county board of commissioners, one for an initial term of one year, one for an initial term of two years and one for an initial term of three years. All subsequent appointments made by the county board of commissioners shall be for terms of three years. One member shall be appointed by the Secretary and one member by the Director of the Wildlife Resources Commission. These two appointees shall serve at the pleasure of the appointing authority. A vacancy shall be filled by the authority which appointed the member creating the vacancy.

(b) In the case of a district lying in two or more counties, the Secretary shall appoint one member and the Director of the Wildlife Commission shall appoint one member. The board of commissioners of each county in which any part of the district lies shall appoint one member. In the event the district lies in only two counties, the board of commissioners of the county in which a majority of the acreage of the district lies shall appoint two members, one for an initial term of one year and the other for an initial term of two years. The other county shall appoint one member for an initial term of three years. All succeeding terms of county appointees shall be for three years. A vacancy shall be filled by the authority which appointed the member creating the vacancy, and the appointees of the Secretary and the Director of the Wildlife Resources Commission shall hold office at the pleasure of the appointing authority.

(c) At its first meeting, the board shall elect a chairman, a vice-chairman, a secretary and a treasurer. The office of secretary and treasurer may be held by the same member. All official acts done by the board shall be entered in a book of minutes to be kept by the secretary. The board shall meet at least quarterly and may meet in a special meeting at any time upon call of the chairman or any two members, and upon notice of the time, place and purpose of the meeting of not less than three days. Before entering upon the discharge of their duties, each member shall take and subscribe an oath of office as follows and the oath shall be entered in the minute book:

"I, ________, do solemnly swear that I will well and truly perform my duties as a Commissioner of the ________ Mosquito Control District.
____________________ Signature
Affirmed and subscribed before me this ________ day of ________ ________
________________________________ Signature of Officer Administering Oath."

(1957, c. 1247, s. 3; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1999-456, s. 59.)

§ 130A-355. Corporate powers.

A mosquito control district created in accordance with the provisions of this Part shall have and exercise through its board of commissioners the following corporate powers in addition to any incidental powers as may be necessary in order to discharge its corporate functions:

(1) To levy ad valorem taxes upon all the taxable property within the district at a rate not to exceed thirty-five cents (35¢) upon the adjusted one hundred dollar ($100.00) assessed valuation, except as provided in subdivision (a) of this subsection.

  a. Where a mosquito control district lies solely within a single county and includes the entire county, the county board of commissioners may levy and determine the rate of ad valorem tax to be levied at a rate not to exceed thirty-five cents (35¢) upon the adjusted one hundred dollar ($100.00) assessed valuation. Where a mosquito control district lies wholly within a single county and the maximum authorized special tax approved by the voters at the time of voting on the creation of the district was less than thirty-five cents (35¢) on the one hundred dollar assessed valuation, the ad valorem tax levy shall not exceed the lesser amount.

  b. In the case of a district lying wholly within a single county, the valuations assessed by the county tax authorities shall be used by the mosquito control district or the county board of commissioners as the basis for its tax assessment. The mosquito control district or the county board of commissioners shall certify its tax rate to the county tax collector or supervisor in time to have the rate and the amount of tax due upon the valuation entered upon the official county tax receipts and stubs or duplicates. The county tax collector shall collect the taxes at the same time as county taxes are collected and shall deposit the receipts to the credit of the mosquito control district in a depository or depositories designated by the governing board of the district.

c. In the case of a district lying in two or more counties, the commissioners of the mosquito control district shall horizontally equalize the assessed valuations of the property in all counties in which the district lies by adjusting the ratio of assessed valuation in the counties to the true values of the taxable property in the counties. From the adjusted and equalized valuations, any county board of commissioners may appeal to the Department of Revenue using the procedures set forth in Subchapter II of Chapter 105 of the General Statutes.

d. The board of commissioners of the mosquito control district shall levy a tax based upon the equalized assessed valuations and shall certify the amount of the levy against each taxpayer to the appropriate county tax collector or supervisor in time for the amount of the mosquito control district tax to be entered upon the county tax receipts and stubs or duplicates. The county tax collectors shall collect the tax and deposit the receipts to the credit of the mosquito control district in a depository or depositories designated by the commissioners of the district.

e. The taxes levied according to this Part shall become due; shall be subject to the same discounts, penalties and interest; and shall have the same remedies for the collection and refund of the taxes as provided for county and municipal ad valorem taxation by Chapter 310 of the Session Laws of 1939 as amended. These taxes shall constitute a lien to the same extent and with the same force and effect as county and municipal ad valorem taxes and shall have equal priority with those taxes;

(2) To accept gifts or endowments and to receive federal and State grants-in-aid. All money or property acquired under this section or any other source, shall be deposited in a separate fund to be used solely for the purpose of carrying out the provisions of this Part. The deposited funds shall be withdrawn by warrants signed by the chairperson of the governing board of the district and countersigned by the secretary;

(3) To take all necessary and proper steps to prevent the breeding of mosquitoes and other arthropods of public health significance within the district, and to destroy adult mosquitoes and other arthropods of public health significance found within the district;

(4) To conduct arthropod control measures in cooperation with individuals, firms and corporations, and federal, State and local governmental agencies;

(5) To enter all places both publicly and privately owned within the district to inspect, survey and treat with proper means all places where mosquitoes or other arthropods of public health significance are breeding and to take other actions as may be necessary;

(6) To acquire by purchase, condemnation or otherwise, and to hold real and personal property, easements, rights-of-way or other property necessary or convenient for accomplishing the purpose of this Part. Any land which has been acquired by the board and improved by drainage, filling, diking or other treatment, and other real property held by the board may be sold or leased through competitive bidding. All condemnation proceedings are to be in accordance with the provisions of Chapter 40A of the General Statutes;

(7) To employ necessary personnel; fix salaries; purchase equipment, supplies and materials; make contracts; rent office or storage space;

and perform other administrative functions necessary for the purpose of carrying out this Part;

(8) To borrow money in anticipation of tax collection and to execute and deliver its notes or bonds. Money shall be borrowed in gross amounts not to exceed the anticipated tax receipts for the fiscal year;

(9) To reimburse members and employees of the board for actual expenditures incurred in authorized travel; and

(10) To employ a district superintendent who is an engineer, entomologist or otherwise qualified as an arthropod control specialist. The professional qualifications of the superintendent must be approved by the Secretary. (1957, c. 1247, s. 4; 1959, c. 622, s. 2; 1973, c. 476, ss. 128, 193; 1981, c. 919, s. 15; 1983, c. 891, s. 2.)

§ 130A-356. Adoption of plan of operation.

(a) At least 60 days prior to the initiation of operations, the governing board of each mosquito control district must submit to the Secretary, a plan of procedure and operation in a form and manner prescribed by the Secretary. The Secretary shall have authority to approve, modify or take other appropriate action in regard to the plans. No contract may be entered into, program commenced or work begun prior to the approval of the plan by the Secretary.

(b) At least 60 days prior to the expiration of each fiscal year, the governing board of each mosquito control district must submit to the Secretary a plan of procedure and operation for the next fiscal year in a form and manner prescribed by the Secretary. The Secretary shall have authority to approve, modify or take other appropriate action in regard to the plans. No contract may be entered into, program commenced or work begun or continued prior to the approval of the plan by the Secretary. (1957, c. 1247, s. 5; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

Local Modification to Former § 130-214.
— Onslow: 1961, c. 750.

§ 130A-357. Bond issues.

A mosquito control district shall have power to issue bonds and notes under the Local Government Bond Act. (1957, c. 1247, s. 6; 1971, c. 780, s. 25; 1983, c. 891, s. 2.)

§ 130A-358. Dissolution of certain mosquito control districts.

Fifty-one percent (51%) or more of the resident freeholders of a mosquito control district which has no outstanding indebtedness may submit a petition for dissolution to the county board of commissioners in which all or the greater portion of the resident freeholders of the district are located. The county board of commissioners shall notify the Department and the county board of commissioners of any other county or counties in which any portion of the district lies, of the receipt of the petition, and shall request the Department to hold a joint public hearing with the county commissioners concerning the dissolution of the district. The Department and the chairperson of the county board of commissioners shall name a time and place within the district for the public hearing. The chairperson of the county board of commissioners of the county in which all or the greater portion of the resident freeholders of the district are located shall give prior notice of the hearing by posting a notice at the courthouse door of each county and also by publication in a newspaper or newspapers published in the county or counties at least once a week for four successive weeks. In the event that all matters pertaining to the dissolution of the mosquito control district cannot be concluded at the hearing, the hearing may be continued to a time and place determined by the Department. If after the hearing, the Commission and the county commissioners shall deem it advisable to comply with the request of the petition, the Commission shall adopt a resolution dissolving the district. (1959, c. 622, s. 3; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§§ 130A-359, 130A-360: Reserved for future codification purposes.

ARTICLE 13.

Nutrition.

§ 130A-361. Department to establish nutrition program.

(a) The Department shall establish and administer a nutrition program to promote the public health by achieving and maintaining optimal nutritional status in the population through activities such as nutrition screening and assessment; dietary counseling and treatment; nutrition education; follow-up; referral; and the direct provision of food. The program may also include, but shall not be limited to, establishing policies and standards for nutritional practices; monitoring and surveillance of nutritional status; promoting inter-agency cooperation, professional education and consultation; providing technical assistance; conducting and supporting field research; providing direct care; and advising State and private institutions and other State and local agencies and departments in the establishment of food, nutrition and food service management standards.

(b) The Commission for Public Health shall adopt rules necessary to implement the program. (Resolution 112, 1973, p. 1413; 1983, c. 891, s. 2; 1989, c. 204; 1991, c. 188, s. 1; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (b).

§§ 130A-362 through 130A-365: Reserved for future codification purposes.

ARTICLE 14.

Dental Health.

§ 130A-366. Department to establish dental health program.

(a) The Department shall establish and administer a dental health program for the delivery of preventive, educational and dental care services to preschool children, school-age children, and adults. The program shall include, but not be limited to, providing teacher training, adult and child education, consultation, screening and referral, technical assistance, community coordination, field research and direct patient care. The primary emphasis of the program shall be the delivery of preventive, educational, and dental care services to preschool children and school-age children.

(b) The Commission shall adopt rules necessary to implement the program. (1983, c. 891, s. 2; 1993, c. 321, s. 269.)

§ 130A-367. Dental providers for problem access areas.

The State's dental public health program shall encourage the expansion of current educational and training programs for dentists, dental hygienists, and dental assistants targeted to serve citizens' unmet needs, particularly in the rural and low-income areas that have traditionally had problems in accessing dental care. The program shall also promote and encourage the recruitment of in-State and out-of-state private sector dental personnel to work in these dental health professional shortage areas. (2002-37, s. 1.)

Cross References. — As to issuance of limited volunteer dental license to practice dentistry in nonprofit health care facilities serving low-income populations, see G.S. 90-37.1.

§§ 130A-368 through 130A-370: Reserved for future codification purposes.

ARTICLE 15.

State Center for Health Statistics.

§ 130A-371. State Center for Health Statistics established.

A State Center for Health Statistics is established within the Department. (1983, c. 891, s. 2.)

§ 130A-372. Definitions.

The following definitions shall apply throughout this Article:

(1) "Health data" means information relating to the health status of individuals, the availability of health resources and services, and the use and cost of these resources and services. The term shall not include vital records registered under the provisions of Article 4 of this Chapter.

(2) "Medical records" means health data relating to the diagnosis or treatment of physical or mental ailments of individuals. (1983, c. 891, s. 2.)

§ 130A-373. Authority and duties.

(a) The State Center for Health Statistics is authorized to:

(1) Collect, maintain and analyze health data on:
  a. The extent, nature and impact of illness and disability on the population of the State;
  b. The determinants of health and health hazards;
  c. Health resources, including the extent of available work power and resources;
  d. Utilization of health care;
  e. Health care costs and financing; and
  f. Other health or health-related matters; and

(2) Undertake and support research, demonstrations and evaluations respecting new or improved methods for obtaining data.

(b) The State Center for Health Statistics may collect health data on behalf of other governmental or nonprofit organizations.

(c) The State Center for Health Statistics shall collect data only on a voluntary basis except when there is specific legal authority to compel mandatory reporting of the health data. In collecting health data on a voluntary basis, the State Center for Health Statistics shall give the person a statement in writing:

(1) That the data is being collected on a voluntary basis and that the person is not required to respond; and

(2) The purposes for which the health data is being collected.

(d) Subject to the provisions of G.S. 130A-374, the State Center for Health Statistics may share health data with other persons, agencies and organizations.

(e) The State Center for Health Statistics shall:

(1) Take necessary action to assure that statistics developed under this Article are of high quality, timely and comprehensive, as well as specific and adequately analyzed and indexed; and

(2) Publish, make available and disseminate statistics on as wide a basis as practical.

(f) The State Center for Health Statistics shall coordinate health data activities within the State in order to eliminate unnecessary duplication of data collection and to maximize the usefulness of data collected by:

(1) Participating with State and local agencies in the design and implementation of a cooperative system for producing comparable and uniform health information and statistics at the State and local levels; and

(2) Undertaking and supporting research, development, demonstration and evaluation respecting the cooperative system. (1983, c. 891, s. 2)

§ 130A-374. Security of health data.

(a) Medical records of individual patients shall be confidential and shall not be public records open to inspection. The State Center for Health Statistics may disclose medical records of individual patients which identify the individual described in the record only if:

(1) The individual described in the medical record has authorized the disclosure; or

(2) The disclosure is for bona fide research purposes. The Commission shall adopt rules providing for the use of the medical records for research purposes.

(b) The State Center for Health Statistics shall take appropriate measures to protect the security of health data collected by the Center, including:

(1) Limiting the access to health data to authorized individuals who have received training in the handling of this data;

(2) Designating a person to be responsible for physical security; and

(3) Developing and implementing a system for monitoring security. (1983, c. 891, s. 2.)

§§ 130A-375, 130A-376: Reserved for future codification purposes.

ARTICLE 16.

Postmortem Investigation and Disposition.

Part 1. Postmortem Medicolegal Examinations and Services.

§ 130A-377. Establishment and maintenance of central and district offices.

The Department shall establish and maintain a central office with appropriate facilities and personnel for postmortem medicolegal examinations. District offices, with appropriate facilities and personnel, may also be established and maintained if considered necessary by the Department for the proper management of postmortem examinations. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2.)

§ 130A-378. Qualifications and appointment of the Chief Medical Examiner.

The Chief Medical Examiner shall be a forensic pathologist certified by the American Board of Pathology and licensed to practice medicine. The Chief Medical Examiner shall be appointed by the Secretary. (1983, c. 891, s. 2.)

§ 130A-379. Duties of the Chief Medical Examiner.

The Chief Medical Examiner shall perform postmortem medicolegal examinations as provided in this Part. The Chief Medical Examiner may, upon request, provide instruction in health science, legal medicine and other subjects related to his duties at The University of North Carolina, the North Carolina Justice Academy and other institutions of higher learning. (1983, c. 891, s. 2.)

§ 130A-380. The Chief Medical Examiner's staff.

The Chief Medical Examiner may employ qualified pathologists to serve as Associate and Assistant Medical Examiners in the central and district offices. The Associate and Assistant Medical Examiners shall perform duties assigned by the Chief Medical Examiner. Forensic chemists may be employed by the Chief Medical Examiner to provide toxicological and related support. (1983, c. 891, s. 2.)

CASE NOTES

Expert Testimony. — In a prosecution for murder, the witness' position as Assistant Medical Examiner and his testimony regarding the number of other cases he had seen indicated sufficient expertise such that the trial court did not err in admitting his opinion of the cause of death. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

§ 130A-381. Additional services and facilities.

In order to provide proper facilities for investigating deaths as authorized in this Part, the Chief Medical Examiner may arrange for the use of existing public or private laboratory facilities. Each county shall provide or contract for an appropriate facility for the examination and storage of bodies under Medical Examiner jurisdiction. The Chief Medical Examiner may contract with qualified persons to perform or to provide support services for autopsies and other studies and investigations. (1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 2007-187, s. 5.)

Effect of Amendments. — Session Laws 2007-187, s. 5, effective July 8, 2007, inserted the second sentence.

§ 130A-382. County medical examiners; appointment; term of office; vacancies.

One or more county medical examiners for each county shall be appointed by the Chief Medical Examiner for a three-year term. County medical examiners shall be appointed from a list of physicians licensed to practice medicine in this State submitted by the medical society of the county in which the appointment is to be made. If no names are submitted by the society, the Chief Medical Examiner shall appoint one or more medical examiners from physicians in the county licensed to practice medicine in this State. In the event no licensed physician in a county accepts an appointment, the Chief Medical Examiner may appoint as acting county medical examiner one or more physicians licensed to practice medicine in this State from other counties, a licensed physician assistant, a nurse, a coroner, or an individual who has taken an approved course of training as required by the Chief Medical Examiner. The acting county medical examiner shall have all the duties and authority of the physician medical examiner except to perform autopsies. A medical examiner may serve more than one county. The Chief Medical Examiner may take jurisdiction in any case or appoint another medical examiner to do so. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1963, c. 492, s. 4; 1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1981, c. 187, ss. 2-4; 1983, c. 891, s. 2; 2007-187, s. 4.)

Effect of Amendments. — Session Laws 2007-187, s. 4, effective July 8, 2007, in the fourth sentence, inserted "as acting county medical examiner" near the middle and substituted "a licensed physician assistant, a nurse, a coroner, or an individual who has taken an approved course of training as required by the Chief Medical Examiner" for "or the local registrar, deputy registrar, subregistrar or coroner" at the end; and rewrote the fifth sentence.

CASE NOTES

Cited in Epps v. Duke Univ., Inc., 122 N.C. App. 198, 468 S.E.2d 846 (1996).

§ 130A-383. Medical examiner jurisdiction.

(a) Upon the death of any person resulting from violence, poisoning, accident, suicide or homicide; occurring suddenly when the deceased had been in apparent good health or when unattended by a physician; occurring in a jail, prison, correctional institution or in police custody; occurring pursuant to Article 19 of Chapter 15 of the General Statutes; or occurring under any suspicious, unusual or unnatural circumstance, the medical examiner of the county in which the body of the deceased is found shall be notified by a physician in attendance, hospital employee, law-enforcement officer, funeral home employee, emergency medical technician, relative or by any other person having suspicion of such a death. No person shall disturb the body at the scene of such a death until authorized by the medical examiner unless in the unavailability of the medical examiner it is determined by the appropriate law enforcement agency that the presence of the body at the scene would risk the integrity of the body or provide a hazard to the safety of others. For the limited purposes of this Part, expression of opinion that death has occurred may be made by a nurse, an emergency medical technician or any other competent person in the absence of a physician.

(b) The discovery of anatomical material suspected of being part of a human body shall be reported to the medical examiner of the county in which the material is found.

(c) Upon completion of the investigation and in accordance with the rules of the Commission, the medical examiner shall release the body to the next of kin or other interested person who will assume responsibility for final disposition. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1963, c. 492, s. 4; 1967, c. 1154, s. 1; 1983, c. 891, s. 2; 1989, c. 353, s. 1.)

Local Modification to Former § 130-198. — Bladen: 1989, c. 267, s. 2; Cleveland: 1977, c. 189; Rutherford: 1977, c. 189.

CASE NOTES

Applied in Grad v. Kaasa, 312 N.C. App. 310, 321 S.E.2d 888 (1984).

Cited in Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

§ 130A-384. Notification concerning out-of-state body.

When a body is brought into this State for disposal and there is reason to believe either that the death was not investigated properly or that there is not an adequate certificate of death, the body shall be reported to a medical examiner in the county where the body resides or to the Chief Medical Examiner. These deaths may be investigated by the same procedure as deaths occurring in this State under G.S. 130A-383. (1983, c. 891, s. 2.)

§ 130A-385. Duties of medical examiner upon receipt of notice; reports; copies.

(a) Upon receipt of a notification under G.S. 130A-383, the medical examiner shall take charge of the body, make inquiries regarding the cause and manner of death, reduce the findings to writing and promptly make a full report to the Chief Medical Examiner on forms prescribed for that purpose.

The Chief Medical Examiner or the county medical examiner is authorized to inspect and copy the medical records of the decedent whose death is under investigation. In addition, in an investigation conducted pursuant to this Article, the Chief Medical Examiner or the county medical examiner is authorized to inspect all physical evidence and documents which may be relevant to determining the cause and manner of death of the person whose death is under investigation, including decedent's personal possessions associated with the death, clothing, weapons, tissue and blood samples, cultures, medical equipment, X rays and other medical images. The Chief Medical Examiner or county medical examiner is further authorized to seek an administrative search warrant pursuant to G.S. 15-27.2 for the purpose of carrying out the duties imposed under this Article. In addition to the requirements of G.S. 15-27.2, no administrative search warrant shall be issued pursuant to this section unless the Chief Medical Examiner or county medical examiner submits an affidavit from the office of the district attorney in the district in which death occurred stating that the death in question is not under criminal investigation.

The Chief Medical Examiner shall provide directions as to the nature, character and extent of an investigation and appropriate forms for the required reports. The facilities of the central and district offices and their staff services shall be available to the medical examiners and designated pathologists in their investigations.

(b) The medical examiner shall complete a certificate of death, stating the name of the disease which in his opinion caused death. If the death was from external causes, the medical examiner shall state on the certificate of death the means of death, and whether, in the medical examiner's opinion, the manner of death was accident, suicide, homicide, execution by the State, or undetermined. The medical examiner shall also furnish any information as may be required by the State Registrar of Vital Statistics in order to properly classify the death.

(c) The Chief Medical Examiner shall have authority to amend a medical examiner death certificate.

(d) A copy of the report of the medical examiner investigation may be forwarded to the appropriate district attorney.

(e) In cases where death occurred due to an injury received in the course of the decedent's employment, the Chief Medical Examiner shall forward to the Commissioner of Labor a copy of the medical examiner's report of the investigation, including the location of the fatal injury and the name and address of the decedent's employer at the time of the fatal injury. The Chief Medical Examiner shall forward this report within 30 days of receipt of the information from the medical examiner.

(f) If a death occurred in a facility licensed subject to Article 2 or Article 3 of Chapter 122C of the General Statutes, or Articles 1 or 1A of Chapter 131D of the General Statutes, and the deceased was a client or resident of the facility or a recipient of facility services at the time of death, then the Chief Medical Examiner shall forward a copy of the medical examiner's report to the Secretary of Health and Human Services within 30 days of receipt of the report from the medical examiner. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1977, 2nd Sess., c. 1145; 1983, c. 891, s. 2; 1989, c. 353, s. 2; c. 797; 1991 (Reg. Sess., 1992), c. 894, s. 6; 2000-129, s. 4.)

CASE NOTES

Medical Examiner's Expert Testimony Admissible. — Because a medical examiner was qualified as an expert in forensic pathology and medical examination, the trial court did not err in permitting his expert opinion as to the cause of the victims death. State v. Smith, 157 N.C. App. 493, 581 S.E.2d 448, 2003 N.C. App. LEXIS 748 (2003).

Cited in Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988); Melton v. City of Rocky Mount, 118 N.C. App. 249, 454 S.E.2d 704 (1995); In re J.S.B., — N.C. App. —, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

OPINIONS OF ATTORNEY GENERAL

Medical Examiners' Reports Are Public Records. — See opinion of Attorney General to Mr. Rodney C. Hobbs, Division of Health Services, 44 N.C.A.G. 193 (1974), rendered under former statutory provisions.

§ 130A-386. Subpoena authority.

The Chief Medical Examiner and the county medical examiners are authorized to issue subpoenas for the attendance of persons and for the production of documents as may be required by their investigation. (1983, c. 891, s. 2.)

§ 130A-387. Fees.

For each investigation and prompt filing of the required report, the medical examiner shall receive a fee paid by the State. However, if the deceased is a resident of the county in which the death or fatal injury occurred, that county shall pay the fee. The fee shall be one hundred dollars ($100.00). (1983, c. 891, s. 2; 1991, c. 463, s. 1; 2005-368, s. 1.)

Editor's Note. — The fee increase from $75.00 to $100.00 in this section, as amended by Session Laws 2005-368, s. 1, effective September 8, 2005, is applicable to deaths investigated on or after that date.

§ 130A-388. Medical examiner's permission necessary before embalming, burial and cremation.

(a) No person knowing or having reason to know that a death may be under the jurisdiction of the medical examiner pursuant to G.S. 130A-383 or 130A-384, shall embalm, bury or cremate the body without the permission of the medical examiner.

(b) A dead body shall not be cremated or buried at sea unless a medical examiner certifies that he has inquired into the cause and the manner of death and has the opinion that no further examination is necessary. This subsection shall not apply to deaths occurring less than 24 hours after birth or to deaths of patients resulting only from natural disease and occurring in a licensed hospital unless the death falls within the jurisdiction of the medical examiner under G.S. 130A-383 or 130A-384. The Commission is authorized to adopt rules creating additional exceptions to this subsection. For making this certification, the medical examiner shall be entitled to a fee in an amount determined reasonable and appropriate by the Secretary, not to exceed fifty dollars ($50.00), to be paid by the applicant. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1963, c. 492, s. 4; 1967, c. 1154, s. 1; 1971, c. 444, s. 7; 1973, c. 873, s. 7; 1983, c. 891, s. 2.)

§ 130A-389. Autopsies.

(a) If, in the opinion of the medical examiner investigating the case or of the Chief Medical Examiner, it is advisable and in the public interest that an autopsy or other study be made; or, if an autopsy or other study is requested by the district attorney of the county or by any superior court judge, an autopsy or other study shall be made by the Chief Medical Examiner or by a competent pathologist designated by the Chief Medical Examiner. A complete autopsy report of findings and interpretations, prepared on forms designated for the purpose, shall be submitted promptly to the Chief Medical Examiner. Subject to the limitations of G.S. 130A-389.1 relating to photographs and video or audio recordings of an autopsy, a copy of the report shall be furnished to any person upon request. A fee for the autopsy or other study shall be paid by the State. However, if the deceased is a resident of the county in which the death or fatal injury occurred, that county shall pay the fee. The fee shall be one thousand dollars ($1,000).

(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the autopsy, unless the deceased's health care power of attorney granted authority for such decisions to the health care agent. If the Chief Medical Examiner or a designated pathologist performs the autopsy at the request of the next of kin, the cost shall be paid by the next of kin.

(c) When the next-of-kin of a decedent whose death does not fall under G.S. 130A-383 or 130A-384 requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform that autopsy and the cost shall be paid by the next-of-kin.

(d) The report of autopsies performed pursuant to subsections (b) and (c) shall be a part of the decedents' medical records and therefore not public records open to inspection. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1967, c. 1154, s. 1; 1973, c. 47, s. 2; c. 476, s. 128; 1975, c. 9; 1981, c. 187, s. 7; c. 562, p. 5; 1983, c. 891, s. 2; 1991, c. 463, s. 2; 1998-212, s. 29A.10(a); 2005-351, s. 4; 2005-393, s. 2; 2006-226, s. 32.)

Editor's Note. — Session Laws 2005-393, s. 4, provides: "This act becomes effective December 1, 2005, and applies to offenses committed on or after that date. This act applies to all unauthorized disclosures of autopsy photographs or video or audio recordings that occur on or after the effective date, regardless of whether the autopsy was performed before or after that date."

Subsection (a), as amended by Session Laws 2005-393, s. 2, effective December 1, 2005, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2005-351, s. 4, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, substituted "autopsy, unless the deceased's health care power of attorney granted authority for such decisions to the health care agent. If the Chief Medical Examiner or a designated pathologist performs the autopsy at the request of the next of kin, the cost" for "autopsy and the cost" near the end of subsection (b).

CASE NOTES

The doctrine of governmental immunity protects a medical examiner from liability for alleged negligence when he was officially requested by another medical examiner to conduct an autopsy to serve the public interest. Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771, cert. denied, 335 N.C. 171, 436 S.E.2d 371 (1993).

No Liability for Mere Negligence. — If a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, but may be subject to liability for actions which are corrupt, malicious or outside the scope of his official duties. Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994).

OPINIONS OF ATTORNEY GENERAL

Chief Medical Examiner, after performing duties required by law, may release the body of the deceased to the spouse or next of kin who claims the body for final disposition even though he or she may be suspected of, arrested for, or indicted for a criminal act in connection with the death of the deceased. See opinion of Attorney General to Page Hudson, M.D., Chief Medical Examiner, 50 N.C.A.G. 7 (1980), rendered under former statutory provisions.

Public Records. — Autopsy reports, except upon exhumed body or remains, are public records. See opinion of Attorney General to Mr. Rodney C. Hobbs, Division of Health Services, 44 N.C.A.G. 193 (1974), rendered under former statutory provisions.

§ 130A-389.1. Photographs and video or audio recordings made pursuant to autopsy.

(a) Except as otherwise provided by law, any person may inspect and examine original photographs or video or audio recordings of an autopsy performed pursuant to G.S. 130A-389(a) at reasonable times and under reasonable supervision of the custodian of the photographs or recordings. Except as otherwise provided by this section, no custodian of the original recorded images shall furnish copies of photographs or video or audio recordings of an autopsy to the public. For purposes of this section, the Chief Medical Examiner shall be the custodian of all autopsy photographs or video or audio recordings unless the photographs or recordings were taken by or at the direction of an investigating medical examiner and the investigating medical examiner retains the original photographs or recordings. If the investigating medical examiner has retained the original photographs or recordings, then the investigating medical examiner is the custodian of the photographs or video or audio recordings and must allow the public to inspect and examine them in accordance with this subsection.

(b) The following public officials may obtain copies of autopsy photographs or video or audio recordings for official use only. These public officials shall not disclose the photographs or video or audio recordings to the public except as provided by law:

(1) The Chief Medical Examiner or a pathologist designated by the Chief Medical Examiner.
(2) Investigating Medical Examiner.
(3) District attorney.
(4) Superior court judge.
(5) Law enforcement officials conducting an investigation relating to the death.

A public official authorized by this subsection to obtain copies may provide a copy of the photograph or videotape to another person for the sole purpose of aiding in the identification of the deceased through publication of the photograph or videotape.

(c) The following persons may obtain copies of autopsy photographs or video or audio recordings but may not disclose the photographs or video or audio recordings to the public unless otherwise authorized by law:

(1) The personal representative of the estate of the deceased.
(2) A person authorized by an order issued in a special proceeding pursuant to subsection (d) of this section.
(3) A physician licensed to practice in North Carolina who uses a copy of the photographs or video or audio recording to confer with attorneys or others with a bona fide professional need to use or understand forensic science, provided that the physician promptly returns the copy to the custodian.
(4) After redacting all information identifying the decedent, including name, address, and social security number, and after anonymizing any physical recognition, a medical examiner, coroner, physician, or their designee who uses such material for:
    a. Medical or scientific teaching or training purposes;
    b. Teaching or training of law enforcement personnel;
    c. Teaching or training of attorneys or others with a bona fide professional need to use or understand forensic science;
    d. Conferring with medical or scientific experts in the field of forensic science; or
    e. Publication in a scientific or medical journal or textbook.

    A medical examiner, coroner, or physician who has in good faith complied with this subsection shall not be subject to any penalty under this section.

Any person who lawfully obtains a copy of a photograph or video or audio recording pursuant to this subsection shall be required to sign a statement acknowledging that they have received notice that any unauthorized disclosure of the photograph or video or audio recording is a Class 2 misdemeanor.

(d) A person who is denied access to copies of photographs or video or audio recordings, or who is restricted in the use the person may make of the photographs or video or audio recordings under this section, may commence a special proceeding in accordance with Article 33 of Chapter 1 of the General Statutes. Upon a showing of good cause, the clerk may issue an order authorizing the person to copy or disclose a photograph or video or audio recording of an autopsy and may prescribe any restrictions or stipulations that the clerk deems appropriate. In determining good cause, the clerk shall consider whether the disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether the disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to, or other handling of a photograph or video or audio recording of an autopsy shall be under the direct supervision of the Chief Medical Examiner or the Chief Medical Examiner's designee. A party aggrieved by an order of the clerk may appeal to the appropriate court in accordance with Article 27A of Chapter 1 of the General Statutes.

(e) The petitioner shall provide reasonable notice of the commencement of a special proceeding, as authorized by subsection (d) of this section, and reasonable notice of the opportunity to be present and heard at any hearing on the matter in accordance with Rule 5 of the Rules of Civil Procedure. The notice shall be provided to the personal representative of the estate of the deceased, if any, and to the surviving spouse of the deceased. If there is no surviving spouse, then the notice shall be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased or to the guardian or custodian of a minor child of the deceased.

(f) This section does not apply to the use of autopsy photographs or video or audio recordings in a criminal, civil, or administrative proceeding except that nothing in this section prohibits a court or presiding officer, upon good cause shown, from restricting or otherwise controlling the disclosure to persons other than the parties and attorneys to the proceeding of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner provided under this section.

(g) Any person who willfully and knowingly violates this section is guilty of a Class 2 misdemeanor, provided that more than one disclosure of the same item by the same person is not a separate offense.

(h) Any person not authorized by this section to obtain a copy of an autopsy photograph or video or audio recording, who knowingly and willfully removes, copies, or otherwise creates an image of an autopsy photograph or video or audio recording with intent to steal the same, is guilty of a Class 1 misdemeanor. (2005-393, s. 3.)

Editor's Note. — Session Laws 2005-393, s. 4, provides: "This act becomes effective December 1, 2005, and applies to offenses committed on or after that date. This act applies to all unauthorized disclosures of autopsy photographs or video or audio recordings that occur on or after the effective date, regardless of whether the autopsy was performed before or after that date."

§ 130A-390. Exhumations.

(a) In any case of death described in G.S. 130A-383 or 130A-384 where the body is buried without investigation by a medical examiner as to the cause and manner of death or where sufficient cause develops for further investigation after a body is buried as determined by a county medical examiner or the Chief Medical Examiner, the Chief Medical Examiner shall authorize an investigation and send a report of the investigation with recommendations to the appropriate district attorney. The district attorney may forward the report to the superior court judge and petition for disinterment. The judge may order that the body be exhumed and that an autopsy be performed by the Chief Medical Examiner. A report of the autopsy and other pathological studies shall be delivered to the judge. The cost of the exhumation, autopsy, transportation and disposition of the body shall be paid by the State. However, if the deceased is a resident of the county in which death or fatal injury occurred, that county shall pay the cost.

(b) Any person may petition a judge of the superior court for an order of exhumation. Upon showing of sufficient cause, the judge may order the body exhumed. The cost incurred shall be assigned to the petitioner.

(c) Without applying for a judicial exhumation order, the next-of-kin of a deceased person may have the remains exhumed, examined by the Chief Medical Examiner and redisposed. The cost shall be paid by the next-of-kin. (1983, c. 891, s. 2; 1991, c. 463, s. 3.)

CASE NOTES

Cited in Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992).

§ 130A-391. Corneal tissue removal.

(a) A medical examiner or a regional pathologist may provide corneal tissue from a decedent under the jurisdiction of the medical examiner or the regional pathologist to the North Carolina Eye and Human Tissue Bank or other donee specified in G.S. 130A-405 under the following conditions:

(1)a. Consent from next-of-kin is obtained in accordance with G.S. 130A-404; or

b., c. Repealed by Session Laws 1983 (Regular Session, 1984), c. 992, s. 1.

d. No objections are known to the medical examiner or regional pathologist; and

(2) The removal of the corneal tissue for transplant will not interfere with any subsequent course of investigation or autopsy or alter the postmortem facial appearance.

(b) If the requirements of subsection (a) have been met, neither the medical examiner, the regional pathologist, nor the donee shall be liable in any civil action brought by the next-of-kin on the contention that authorization of next-of-kin was required to remove the corneal tissue. (1981, c. 782, s. 1; 1983, c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 992, s. 1.)

Editor's Note. — Session Laws 2007-538, s. 13, provides: "The North Carolina General Statutes Commission ('General Statutes Commission') shall review G.S. 130A-391, G.S. 90-602, and other statutes related to organ donation to determine whether the statutes should be amended to be consistent with and conform to the Revised Uniform Anatomical Gift Act as enacted in this act. The General Statutes Commission shall make its recommendations upon the convening of the 2008 Regular Session of the 2007 General Assembly."

G.S. 130A-404, referred to in subdivision (a)(1)a, and G.S. 130A-405, referred to in subsection (a), were repealed by Session Laws 2007-538, s. 3.(b).

§ 130A-392. Reports and records as evidence.

Reports of investigations made by a county medical examiner or by the Chief Medical Examiner and toxicology and autopsy reports made pursuant to this Part may be received as evidence in any court or other proceeding. Copies of records, photographs, laboratory findings and records in the Office of the Chief Medical Examiner, any county medical examiner or designated pathologist, when duly certified, shall have the same evidentiary value as the original. (1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1981, c. 187, s. 8; 1983, c. 891, s. 2.)

CASE NOTES

Statements Listing Insured's Death as Suicide Excluded. — In case brought by widow of insured to recover under life insurance policy, statements listing suicide as the cause of death in the medical examiner's report were properly excluded at trial. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

Cited in Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

§ 130A-393. Rules.

The Commission shall adopt rules to carry out the intent and purpose of this

Part. (1967, c. 1154, s. 1; 1973, c. 476, s. 128; 1981, c. 614, s. 15; 1983, c. 891, s. 2.)

§ 130A-394. Coroner to hold inquests.

In every case requiring the medical examiner to be notified, as provided by G.S. 130A-383, the coroner shall be notified by the medical examiner, and the coroner shall hold an inquest and preliminary hearing in those instances as required in G.S. 152-7. The coroner shall file a written report of his investigation with the district attorney of the superior court and the medical examiner. The body shall remain in the custody and control of the medical examiner. However, if a county has abolished the office of coroner pursuant to the provisions of Chapter 152A at a time when Chapter 152A was in effect in the county: (i) The provisions of this Article relating to coroner shall not be applicable to the county, (ii) the provisions of G.S. 152A-9 shall remain in full force and effect in the county, and (iii) Chapter 152 of the General Statutes shall not be applicable in the county. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1967, c. 1154, s. 1; 1969, c. 299; 1973, c. 47, s. 2; 1983, c. 891, s. 2; 1985, c. 462, s. 1.)

Editor's Note. — Chapter 152A, referred to in this section, was repealed by Session Laws 1967, c. 1154, s. 8.

§ 130A-395. Handling and transportation of bodies.

(a) It shall be the duty of the physician licensed to practice medicine under Chapter 90 attending any person who dies and is known to have smallpox, plague, HIV infection, hepatitis B infection, rabies, or Jakob-Creutzfeldt to provide written notification to all individuals handling the body of the proper precautions to prevent infection. This written notification shall be provided to funeral service personnel at the time the body is removed from any hospital, nursing home, or other health care facility. When the patient dies in a location other than a health care facility, the attending physician shall notify the funeral service personnel verbally of the precautions required in subsections (b) and (c) as soon as the physician becomes aware of the death.

(b) The body of a person who died from smallpox or plague shall not be embalmed. The body shall be enclosed in a strong, tightly sealed outer case which will prevent leakage or escape of odors as soon as possible after death and before the body is removed from the hospital room, home, building, or other premises where the death occurred. This case shall not be reopened except with the consent of the local health director.

(c) Persons handling bodies of persons who died and were known to have HIV infection, hepatitis B infection, Jakob-Creutzfeldt, or rabies shall be provided written notification to observe blood and body fluid precautions. (1989, c. 698, s. 4.)

§§ 130A-396, 130A-397: Reserved for future codification purposes.

Part 2. Autopsies.

§ 130A-398. Limitation on right to perform autopsy.

The right to perform an autopsy shall be limited to those cases in which:

(1) The Chief Medical Examiner or a county medical examiner, acting pursuant to G.S. 130A-389, directs that an autopsy be performed;

(2) The Commission of Anatomy, acting pursuant to G.S. 130A-415, has given written consent for an autopsy to be performed on an unclaimed body;

(3) A prosecuting officer or district attorney, acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed;

(4) The decedent directs in writing prior to death that an autopsy be performed upon the occurrence of the decedent's death;

(4a) The health care agent under a health care power of attorney with authority to make decisions with respect to autopsies requests that an autopsy be performed upon the deceased principal;

(5) The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent; or

(6) Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual opposition by a member of the same or prior class, authorizes an autopsy to be performed:

a. The spouse;
b. Any adult child or stepchild;
c. Any parent or stepparents;
d. Any adult sibling;
e. A guardian of the person of the decedent at the time of the decedent's death;
f. Any relative or person who accepts responsibility for final disposition of the body by other customary and lawful procedures;
g. Any person under obligation to dispose of the body. (1931, c. 152; 1933, c. 209; 1967, c. 1154, s. 4; 1969, c. 444; 1973, c. 47, s. 2; 1983, c. 891, s. 2; 2005-351, s. 5; 2006-226, s. 32.)

Effect of Amendments. — Session Laws 2005-351, s. 5, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, added subdivision (4a).

CASE NOTES

A cause of action exists in this State for wrongful autopsy. The cause of action arises from a quasi-property right of the surviving next-of-kin to bury the dead without wrongful interference. Grad v. Kaasa, 68 N.C. App. 128, 314 S.E.2d 755, rev'd on other grounds, 312 N.C. 310, 321 S.E.2d 888 (1984), decided under former G.S. 130-198 and G.S. 130-200.

But a Violation Will Not Automatically Result in Liability. — Although the regulations and statutes limit a medical examiner's authority to order autopsies, a violation will not inevitably result in liability. A public official will be held liable only if it is shown that he acted entirely outside the scope of his authority or that his act, while inside his authority, was malicious or corrupt. Grad v. Kaasa, 68 N.C. App. 128, 314 S.E.2d 755, rev'd on other grounds, 312 N.C. 310, 321 S.E.2d 888 (1984), decided under former G.S. 130-198 and G.S. 130-200.

When Medical Examiner Is Immune from Liability. — A medical examiner acts outside his authority if he subjectively determines that an autopsy is not authorized by statute, yet proceeds anyway, or if he fails to make any subjective determination at all concerning whether an autopsy would serve the public interest before proceeding. Conversely, where a medical examiner receives a death report under G.S. 130-198 (see now G.S. 130A-383) or 10 N.C. Administrative Code § 11.0203, and then makes a subjective determination that an autopsy is advisable and in the public interest, his actions are within the scope of his authority and he is immune from liability unless his actions are motivated by malice or corruption. Grad v. Kaasa, 68 N.C. App. 128, 314 S.E.2d 755, rev'd on other grounds, 312 N.C. 310, 321 S.E.2d 888 (1984), decided under former G.S. 130-198 and G.S. 130-200.

§ 130A-399. Postmortem examination of inmates of certain public institutions.

Upon the death of any inmate of an institution maintained by the State, or a city, county or other political subdivision of the State, for the care of the sick, mentally ill or mentally retarded, the administrator of the institution in which the death occurs is empowered to authorize a postmortem examination of the deceased person. The examination shall be of a scope and nature necessary to promote knowledge of the human organism and its disorders. (1943, c. 87, s. 1; 1983, c. 891, s. 2.)

§ 130A-400. Written consent for postmortem examinations required.

An administrator of an institution shall not authorize a postmortem examination described in G.S. 130A-399 without first securing the written consent of the deceased person's spouse, one of the next-of-kin or nearest known relative, or other person charged by law with the duty of burial, in the order named and as known. A copy of the written consent shall be filed in the office of the administrator of the institution where the inmate died. (1943, c. 87, s. 3; 1983, c. 891, s. 2.)

§ 130A-401. Postmortem examinations in certain medical schools.

The postmortem examinations and studies authorized by G.S. 130A-399 may be made in the laboratories of medical schools of colleges and universities on conditions established by the administrator. (1943, c. 87, s. 2; 1983, c. 891, s. 2.)

Part 3. Uniform Anatomical Gift Act.

§§ 130A-402 through 130A-412.2: Repealed by Session Laws 2007-538, s. 3.(b), effective October 1, 2007.

Editor's Note. — As to present similar provisions pertaining to the Revised Uniform Anatomical Gift Act, as enacted by Session Laws 2007-538, s. 1, see G.S. 130A-412.3 et seq.

Former G.S. 130A-410, 130A-411, 130A-412.1, and 130A-412.2 of this Part were recodified under Part 3A of Article 16 of Chapter 130A, as G.S. 130A-412.30, 130A-412.31, 130A-412.32, and 130-412.33, respectively, by Session Laws 2007-538, s. 3(a), effective October 1, 2007.

Part 3A. Revised Uniform Anatomical Gift Act.

§ 130A-412.3. Short title.

This Part may be cited as the Revised Uniform Anatomical Gift Act. (2007-538, s. 1.)

Editor's Note. — Session Laws 2007-538, s. 14, made this Part effective October 1, 2007.

Session Laws 2007-538, s. 11, provides: "The North Carolina Department of Transportation, Division of Motor Vehicles, in cooperation with the License to Give Trust Fund Commission, shall use available grant-in-aid funds from the State and federal governments and other sources to enhance online access such that donors and prospective donors may update, amend, or revoke information on the donor's or prospective donor's drivers license or donor card."

Session Laws 2007-538, s. 12, provides: "This act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., but does not modify, limit, or supersede section 101(a) of that act, 15 U.S.C. § 7001, or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. § 7003(b)."

Session Laws 2007-538, s. 13, provides: "The North Carolina General Statutes Commission ('General Statutes Commission') shall review G.S. 130A-391, G.S. 90-602, and other statutes related to organ donation to determine whether the statutes should be amended to be consistent with and conform to the Revised Uniform Anatomical Gift Act as enacted in this act. The General Statutes Commission shall make its recommendations upon the convening of the 2008 Regular Session of the 2007 General Assembly."

§ 130A-412.4. Definitions.

The following definitions apply in this Part:

(1) "Adult" means an individual who is at least 18 years of age.

(2) "Agent" means an individual:

- a. Authorized to make an anatomical gift on the principal's behalf under a power of attorney for health care; or
- b. Expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal.

(3) "Anatomical gift" means a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.

(4) "Body part" means an organ, an eye, or tissue of a human being. The term does not include the whole body.

(5) "Decedent" means a deceased individual whose body or body part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than this Article, a fetus.

(6) "Disinterested witness" means any individual except for the following:

- a. The donor's: spouse, child, parent, sibling, grandchild, grandparent, or guardian.
- b. An adult who exhibited special care and concern for the donor.
- c. A person to whom an anatomical gift could pass under G.S. 130A-412.13.

(7) "Document of gift" means a donor card or other record used to make an anatomical gift. The term includes a statement or symbol on a drivers license, identification card, or donor registry.

(8) "Donor" means an individual whose body or body part is the subject of an anatomical gift.

(9) "Donor registry" means a database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(10) "Drivers license" means a license or permit issued by the North Carolina Department of Transportation, Division of Motor Vehicles, to operate a vehicle, whether or not conditions are attached to the license or permit.

(11) "Eye bank" means an entity that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes.

(12) "Guardian" means a person appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem.

(12a) "Health care decision" means any decision made regarding the health care of the prospective donor.

(13) "Hospital" means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

(14) "Identification card" means an identification card issued by the North Carolina Department of Transportation, Division of Motor Vehicles.
(15) "Know" means to have actual knowledge.
(16) "Minor" means an individual who is under 18 years of age.
(17) "Organ procurement organization" means a person designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization.
(18) "Parent" means a parent whose parental rights have not been terminated.
(19) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
(20) "Physician" means an individual authorized to practice medicine or osteopathy under the law of any state.
(21) "Procurement organization" means an eye bank, organ procurement organization, or tissue bank.
(22) "Prospective donor" means an individual who is dead or near death and has been determined by a procurement organization to have a body part that could be medically suitable for transplantation, therapy, research, or education. The term does not include an individual who has made a refusal.
(23) "Reasonably available" means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.
(24) "Recipient" means an individual into whose body a decedent's body part has been or is intended to be transplanted.
(25) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
(26) "Refusal" means a record created under G.S. 130A-412.9 that expressly states an intent to bar other persons from making an anatomical gift of an individual's body or body part.
(27) "Sign" means, with the present intent to authenticate or adopt a record:
  a. To execute or adopt a tangible symbol; or
  b. To attach to or logically associate with the record an electronic symbol, sound, or process.
(28) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
(29) "Technician" means an individual determined to be qualified to remove or process body parts by an appropriate organization that is licensed, accredited, or regulated under federal or state law. The term includes an enucleator.
(30) "Tissue" means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education.
(31) "Tissue bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue.
(32) "Transplant hospital" means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients. (2007-538, s. 1.)

§ 130A-412.5. Applicability.

This act applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift, whenever made. (2007-538, s. 1.)

§ 130A-412.6. Who may make an anatomical gift before donor's death.

Subject to G.S. 130A-412.10, an anatomical gift of a donor's body or body part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided in G.S. 130A-412.7 by:

(1) The donor, if the donor is an adult or if the donor is a minor and is:
  a. Emancipated; or
  b. Authorized under State law to apply for a drivers license because the donor is at least 16 years of age;
(2) An agent of the donor to the extent authorized under a power of attorney for health care or other record;
(3) A parent of the donor, if the donor is an unemancipated minor; or
(4) The donor's guardian. (2007-538, s. 1.)

§ 130A-412.7. Manner of making anatomical gift before donor's death.

(a) A donor may make an anatomical gift by any of the following methods:

(1) By authorizing that a statement or symbol be imprinted on the donor's drivers license or identification card indicating that the donor has made an anatomical gift. Anatomical gifts made by this method shall not include a donation of tissue or the donor's body.
(2) In a will.
(3) During a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness.
(4) As provided in subsection (b) of this section.

(b) A donor or other person authorized to make an anatomical gift under G.S. 130A-412.6 may make a gift by a signed donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry. If the donor or other person is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and must:

(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and
(2) State that it has been signed and witnessed as provided in subdivision (1) of this subsection.

(c) Revocation, suspension, expiration, or cancellation of a drivers license or identification card upon which an anatomical gift is indicated does not invalidate the gift.

(d) An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift. (2007-538, s. 1.)

§ 130A-412.8. Amending or revoking anatomical gift before donor's death.

(a) Subject to G.S. 130A-412.10, a donor or other person authorized to make an anatomical gift under G.S. 130A-412.6 may amend or revoke an anatomical gift by:

(1) A record signed by:
  a. The donor;
  b. The other person; or
  c. Subject to subsection (b) of this section, another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or
(2) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

(b) A record signed pursuant to sub-subdivision c. of subdivision (1) of subsection (a) of this section must:
(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and
(2) State that it has been signed and witnessed as provided in subdivision (1) of this subsection.

(c) Subject to G.S. 130A-412.10, a donor or other person authorized to make an anatomical gift under G.S. 130A-412.6 may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

(d) A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(e) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in subsection (a) of this section. (2007-538, s. 1.)

§ 130A-412.9. Refusal to make anatomical gift; effect of refusal.

(a) An individual may refuse to make an anatomical gift of the individual's body or body part by:
(1) A record signed by:
  a. The individual; or
  b. Subject to subsection (b) of this section, another individual acting at the direction of the individual if the individual is physically unable to sign;
(2) The individual's will, whether or not the will is admitted to probate or invalidated after the individual's death; or
(3) Any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(b) A record signed pursuant to sub-subdivision b. of subdivision (1) of subsection (a) of this section must:
(1) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual; and
(2) State that it has been signed and witnessed as provided in subdivision (1) of this subsection.

(c) An individual who has made a refusal may amend or revoke the refusal:
(1) In the manner provided in subsection (a) of this section for making a refusal;
(2) By subsequently making an anatomical gift pursuant to G.S. 130A-412.7 that is inconsistent with the refusal; or
(3) By destroying or canceling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal.

(d) Except as otherwise provided in G.S. 130A-412.10(h), in the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or body part bars all other persons from making an anatomical gift of the individual's body or body part. (2007-538, s. 1.)

§ 130A-412.10. Preclusive effect of an anatomical gift, amendment, or revocation.

(a) Except as otherwise provided in subsection (g) of this section and subject to subsection (f) of this section, in the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor's body or body part if either of the following apply:

(1) The donor made an anatomical gift of the donor's body or body part under G.S. 130A-412.7.

(2) The donor made an amendment to an anatomical gift of the donor's body or body part under G.S. 130A-412.8.

(b) A donor's revocation of an anatomical gift of the donor's body or body part under G.S. 130A-412.8 is not a refusal and does not bar another person specified in G.S. 130A-412.6 or G.S. 130A-412.11 from making an anatomical gift of the donor's body or body part under G.S. 130A-412.7 or G.S. 130A-412.12.

(c) If a person other than the donor makes an unrevoked anatomical gift of the donor's body or body part under G.S. 130A-412.7 or an amendment to an anatomical gift of the donor's body or body part under G.S. 130A-412.8, another person may not make, amend, or revoke the gift of the donor's body or body part under G.S. 130A-412.12.

(d) A revocation of an anatomical gift of a donor's body or body part under G.S. 130A-412.8 by a person other than the donor does not bar another person from making an anatomical gift of the body or body part under G.S. 130A-412.7 or G.S. 130A-412.12.

(e) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under G.S. 130A-412.6, an anatomical gift of a body part is neither a refusal to give another body part nor a limitation on the making of an anatomical gift of another body part at a later time by the donor or another person.

(f) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under G.S. 130A-412.6, an anatomical gift of a body part for one or more of the purposes set forth in G.S. 130A-412.6 is not a limitation on the making of an anatomical gift of the body part for any of the other purposes by the donor or any other person under G.S. 130A-412.7 or G.S. 130A-412.12.

(g) If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or body part.

(h) If an unemancipated minor who signed a refusal dies, a parent of the minor who is reasonably available may revoke the minor's refusal. (2007-538, s. 1.)

§ 130A-412.11. Who may make an anatomical gift of decedent's body or body part.

(a) Subject to subsections (b) and (c) of this section, and unless barred by G.S. 130A-412.9 or G.S. 130A-412.10, an anatomical gift of a decedent's body or body part for purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed:

(1) An agent of the decedent at the time of death who could have made an anatomical gift under G.S. 130A-412.6(2) immediately before the decedent's death;
(2) The spouse of the decedent;
(3) Adult children of the decedent;
(4) Parents of the decedent;
(5) Adult siblings of the decedent;
(6) Adult grandchildren of the decedent;
(7) Grandparents of the decedent;
(8) An adult who exhibited special care and concern for the decedent;
(9) The persons who were acting as the guardians of the person of the decedent at the time of death; and
(10) Any other person having the authority to dispose of the decedent's body.

(b) If there is more than one member of a class listed in subdivision (a)(1), (3), (4), (5), (6), (7), or (9) of this section entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to which the gift may pass under G.S. 130A-412.13 knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subsection (a) of this section is reasonably available to make or to object to the making of an anatomical gift. (2007-538, s. 1.)

§ 130A-412.12. Manner of making, amending, or revoking anatomical gift of decedent's body or body part.

(a) A person authorized to make an anatomical gift under G.S. 130A-412.11 may make an anatomical gift by a document of gift signed by the person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.

(b) Subject to subsection (c) of this section, an anatomical gift by a person authorized under G.S. 130A-412.11 may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. If more than one member of the prior class is reasonably available, the gift made by a person authorized under G.S. 130A-412.11 may be:

(1) Amended only if a majority of the reasonably available members agrees to the amending of the gift; or
(2) Revoked only if a majority of the reasonably available members agrees to the revoking of the gift or if they are equally divided as to whether to revoke the gift.

(c) A revocation under subsection (b) of this section is effective only if, before an incision has been made to remove a body part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital, or physician or technician knows of the revocation. (2007-538, s. 1.)

§ 130A-412.13. Persons that may receive anatomical gift; purpose of anatomical gift.

(a) An anatomical gift may be made to the following persons named in the document of gift:

(1) A hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, including the Commission on Anatomy, for research or education;

(2) Subject to subsection (b) of this section, an individual designated by the person making the anatomical gift if the individual is the recipient of the body part;

(3) An eye bank or tissue bank.

(b) If an anatomical gift to an individual under subdivision (a)(2) of this section cannot be transplanted into the individual, the body part passes in accordance with subsection (g) of this section in the absence of an express, contrary indication by the person making the anatomical gift.

(c) If an anatomical gift of one or more specific body parts or of all body parts is made in a document of gift that does not name a person described in subsection (a) of this section but identifies the purpose for which an anatomical gift may be used, the following rules apply:

(1) If the body part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank.

(2) If the body part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank.

(3) If the body part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ.

(4) If the body part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

(d) For the purpose of subsection (c) of this section, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift must be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education.

(e) If an anatomical gift of one or more specific body parts is made in a document of gift that does not name a person described in subsection (a) of this section and does not identify the purpose of the gift, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this section.

(f) If a document of gift specifies only a general intent to make an anatomical gift by words such as “donor,” “organ donor,” or “body donor,” or by a symbol or statement of similar import, the gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g) of this section.

(g) For purposes of subsections (b), (e), and (f) of this section, the following rules apply:

(1) If the body part is an eye, the gift passes to the appropriate eye bank.

(2) If the body part is tissue, the gift passes to the appropriate tissue bank.

(3) If the body part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ.

(h) An anatomical gift of an organ for transplantation or therapy, other than an anatomical gift under subdivision (a)(2) of this section, passes to the organ procurement organization as custodian of the organ.

(i) If an anatomical gift does not pass pursuant to subsections (a) through (h) of this section or the decedent’s body or body part is not used for transplantation, therapy, research, or education, then custody of the body or body part passes to the person under obligation to dispose of the body or body part.

(j) A person may not accept an anatomical gift if the person knows that the gift was not effectively made under G.S. 130A-412.7 or G.S. 130A-412.12 or if the person knows that the decedent made a refusal under G.S. 130A-412.9 that was not revoked. For purposes of this subsection, if a person knows that an anatomical gift was made on a document of gift, the person is deemed to know of any amendment or revocation of the gift or any refusal to make an anatomical gift on the same document of gift.

(k) Except as otherwise provided in subdivision (a)(2) of this section, nothing in this act affects the allocation of organs for transplantation or therapy. (2007-538, s. 1.)

§ 130A-412.14. Search and notification.

(a) The following persons shall make a reasonable search of an individual who the person reasonably believes is dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) A law enforcement officer, firefighter, paramedic, or other emergency rescuer finding the individual; and

(2) If no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital.

(b) If a document of gift or a refusal to make an anatomical gift is located by the search required by subdivision (a)(1) of this section and the individual or deceased individual to whom it relates is taken to a hospital, the person responsible for conducting the search shall send the document of gift or refusal to the hospital.

(c) A person is not subject to criminal or civil liability for failing to discharge the duties imposed by this section but may be subject to administrative sanctions. (2007-538, s. 1.)

§ 130A-412.15. Delivery of document of gift not required; right to examine.

(a) A document of gift need not be delivered during the donor's lifetime to be effective.

(b) Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass under G.S. 130A-412.13. (2007-538, s. 1.)

§ 130A-412.16. Rights and duties of procurement organization and others.

(a) When a hospital refers an individual at or near death to a procurement organization, the organization shall make a reasonable search of the records of the North Carolina Department of Transportation, Division of Motor Vehicles, and any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift.

(b) A procurement organization must be allowed reasonable access to information in the records of the North Carolina Department of Transportation, Division of Motor Vehicles, to ascertain whether an individual at or near death is a donor.

(c) When a hospital refers an individual at or near death to a procurement organization, the organization may conduct any reasonable examination necessary to ensure the medical suitability of a body part that is or could be the subject of an anatomical gift for transplantation, therapy, research, or education from a donor or a prospective donor. During the examination period, measures necessary to ensure the medical suitability of the body part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent.

(d) Unless prohibited by law other than this Part, at any time after a donor's death, the person to which a body part passes under G.S. 130A-412.13 may conduct any reasonable examination necessary to ensure the medical suitability of the body or body part for its intended purpose.

(e) Unless otherwise prohibited by law, an examination under subsection (c) or (d) of this section may include an examination of all medical and dental records of the donor or prospective donor.

(f) Upon the death of a minor who was a donor or had signed a refusal, unless a procurement organization knows the minor is emancipated, the procurement organization shall conduct a reasonable search for the parents of the minor and provide the parents with an opportunity to revoke or amend the anatomical gift or revoke the refusal.

(g) Upon referral by a hospital under subsection (a) of this section, a procurement organization shall make a reasonable search for any person listed in G.S. 130A-412.11 having priority to make an anatomical gift on behalf of a prospective donor. If a procurement organization receives information that an anatomical gift to any other person was made, amended, or revoked, it shall promptly advise the other person of all relevant information.

(h) Subject to G.S. 130A-412.13(i) and G.S. 130A-412.25, the rights of the person to which a body part passes under G.S. 130A-412.13 are superior to the rights of all others with respect to the body part. The person may accept or reject an anatomical gift in whole or in part. Subject to the terms of the document of gift and this Part, a person that accepts an anatomical gift of an entire body may allow embalming, burial, or cremation, and use of remains in a funeral service. If the gift is of a body part, the person to which the body part passes under G.S. 130A-412.13, upon the death of the donor and before embalming, burial, or cremation, shall cause the body part to be removed without unnecessary mutilation.

(i) Neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent.

(j) A physician or technician may remove a donated body part from the body of a donor that the physician or technician is qualified to remove. (2007-538, s. 1.)

§ 130A-412.17. Coordination of procurement and use.

Each hospital in this State shall enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts. (2007-538, s. 1.)

§ 130A-412.18. Sale or purchase of body parts prohibited.

(a) Except as otherwise provided in subsection (b) of this section, a person, that for valuable consideration, knowingly purchases or sells a body part for transplantation or therapy if removal of a body part from an individual is intended to occur after the individual's death commits a Class H felony and upon conviction may be fined up to fifty thousand dollars ($50,000) for each offense.

(b) A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a body part. (2007-538, s. 1.)

§ 130A-412.19. Other prohibited acts.

A person that, in order to obtain a financial gain, intentionally falsifies, forges, conceals, defaces, or obliterates a document of gift, an amendment or revocation of a document of gift, or a refusal commits a Class H felony and upon conviction may be fined up to fifty thousand dollars ($50,000) for each offense. (2007-538, s. 1.)

§ 130A-412.20. Immunity.

(a) A person that acts with due care in accordance with this Part or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this Part, a person may rely upon representations of an individual listed in subdivisions (2) through (8) of G.S. 130A-412.11(a) relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue. (2007-538, s. 1.)

§ 130A-412.21. Law governing validity; choice of law as to execution of document of gift; presumption of validity.

(a) A document of gift is valid if executed in accordance with:

(1) This Part;

(2) The laws of the state or country where it was executed; or

(3) The laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence, or was a national at the time the document of gift was executed.

(b) If a document of gift is valid under this section, the law of this State governs the interpretation of the document of gift.

(c) A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed or was revoked. (2007-538, s. 1.)

§ 130A-412.22. Donor registry.

The online Organ Donor Registry Internet site established pursuant to G.S. 20-43.2 shall be the State donor registry for anatomical gifts made pursuant to this Part. Requirements for maintenance and use of the State donor registry shall be as provided under G.S. 20-43.2. (2007-538, s. 1.)

§ 130A-412.23. Cooperation between a medical examiner and the procurement organization.

(a) The medical examiner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education.

(b) If a medical examiner receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the jurisdiction of the medical examiner and a postmortem examination is going to be performed, unless the medical examiner denies recovery in accordance with G.S. 130A-412.24, the medical examiner or designee shall conduct a postmortem examination of the body or the body part in a manner and within a period compatible with its preservation for the purposes of the gift.

(c) A body part may not be removed from the body of a decedent under the jurisdiction of a medical examiner for transplantation, therapy, research, or education unless the body part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the medical examiner may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection does not preclude a medical examiner from performing the medicolegal investigation upon the body or body parts of a decedent under the jurisdiction of the medical examiner.

(d) As used in this section and G.S. 130A-412.24, "medical examiner" includes the Chief Medical Examiner, a county medical examiner, or a designee of either. (2007-538, s. 1.)

§ 130A-412.24. Facilitation of anatomical gift from decedent whose body is under the jurisdiction of a medical examiner.

(a) Upon request of a procurement organization, a medical examiner shall release to the procurement organization the name, contact information, and available medical and social history of a decedent whose body is or will come under the jurisdiction of the medical examiner. If the decedent's body or body part is medically suitable for transplantation, therapy, research, or education, the medical examiner shall release postmortem examination results to the procurement organization. The procurement organization may make a subsequent disclosure of the postmortem examination results or other information received from the medical examiner only if relevant to transplantation or therapy.

(b) The medical examiner may conduct a medicolegal examination, including physical examination of a donor or prospective donor and review of all medical records, laboratory test results, X-rays, other diagnostic results, and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the medical examiner or whose body would be under the medical examiner's jurisdiction upon death and that the medical examiner determines may be relevant to the investigation.

(c) A person that has any information requested by a medical examiner pursuant to subsection (b) of this section shall provide that information as expeditiously as possible to allow the medical examiner to conduct the medicolegal investigation within a period compatible with the preservation of body parts for the purpose of transplantation, therapy, research, or education.

(d) If an anatomical gift has been or might be made of a body part of a decedent whose body is under the jurisdiction of the medical examiner and a postmortem examination is not required, or the medical examiner determines that a postmortem examination is required but that the recovery of the body part that is the subject of an anatomical gift will not interfere with the examination, the medical examiner and procurement organization shall cooperate in the timely removal of the body part from the decedent for the purpose of transplantation, therapy, research, or education.

(e) If an anatomical gift of a body part from the decedent under the jurisdiction of the medical examiner has been or might be made, but the medical examiner initially believes that the recovery of the body part could interfere with the postmortem investigation into the decedent's cause or manner of death, the collection of evidence, or the description, documentation, or interpretation of injuries on the body, the medical examiner shall consult with the procurement organization or physician or technician designated by the procurement organization about the proposed recovery. After consultation, the medical examiner may deny or allow the recovery.

(f) If the medical examiner or designee allows recovery of a body part under subsection (d) or (e) of this section, the procurement organization shall provide the medical examiner or designee with a record describing the condition of the body part signed by the physician or technician who removes the body part and any other information and observations that would assist in the postmortem examination. (2007-538, s. 1.)

§§ 130A-412.25 through 130A-412.29: Reserved for future codification purposes.

§ 130A-412.30. Use of tissue declared a service; standard of care; burden of proof.

The procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing or transplanting any of them into the human body is declared to be, for all purposes, the rendition of a service by every participating person or institution. Whether or not any remuneration is paid, the service is declared not to be a sale of whole blood, plasma, blood products, blood derivatives or other human tissues, for any purpose. No person or institution shall be liable in warranty, express or implied, for the procurement, processing, distribution or use of these items but nothing in this section shall alter or restrict the liability of a person or institution in negligence or tort in consequence of these services. (1971, c. 836; 1983, c. 891, s. 2; 2007-538, s. 3(a).)

Editor's Note. — Session Laws 2007-538, s. 3(a), recodified former G.S. 130A-410 as G.S. 130A-412.30, effective October 1, 2007.

Legal Periodicals. — For note, "The Legal Liability of Blood Donor Services and Transfusion Providers in the Wake of the AIDS Crisis," see 290 N.C. Cent. L.J. 20 (1992).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

Editor's Note. — *The cases below were decided under former G.S. 130A-410.*

Personal Jurisdiction over Organ Procurement Organization. — Under the Uniform Anatomical Gift Act the procurement of organs is expressly considered a service, and where out-of-state organ procurement organization was responsible for the transportation of a kidney to the destination of a recipient member of organ procurement network, packaged and shipped the kidney to North Carolina so that its service was not complete until the kidney was delivered to this State, and directly billed a North Carolina entity for its services, the exercise of jurisdiction over the organ procurement organization pursuant to G.S. 1-75.4(5)(a) was proper. Slaughter v. Life Connection, 907 F. Supp. 929 (M.D.N.C. 1995).

Cited in Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

§ 130A-412.31. Giving of blood by persons 17 years of age or more.

A person who is 17 years of age or more may give or donate blood to an individual, hospital, blood bank or blood collection center without the consent of the parent or parents or guardian of the donor. It shall be unlawful for a person under the age of 18 years to sell blood. (1971, c. 10; c. 1093, s. 16; 1977, c. 373; 1983, c. 891, s. 2; 2007-538, s. 3(a).)

Editor's Note. — Session Laws 2007-538, s. 3(a), recodified former G.S. 130A-411 as G.S. 130A-412.31, effective October 1, 2007.

§ 130A-412.32. Duty of hospitals to establish organ procurement protocols.

(a) In order to facilitate the goals of this Part, each hospital shall establish written protocols that:

(1) Require that only the organ procurement organization designated by the Secretary of Health and Human Services be notified of all deaths or impending brain deaths meeting criteria for notification as established by the designated organ procurement organization; and

(2) Ensure that notification required under subdivision (1) of this subsection be made as soon as it is determined that brain death is imminent or cardiac death has occurred.

(b) Hospitals shall provide their federally designated organ procurement organizations and tissue banks reasonable access to patients' medical records for the purpose of determining organ or tissue donation potential.

(c) The family of any person whose organ or tissue is donated for transplantation shall not be financially liable for any costs related to the evaluation of the suitability of the donor's organ or tissue for transplantation, or for any costs of retrieval of the organ or tissue.

(d) Each hospital shall provide its federally designated organ procurement organization with reasonable access during regular business hours to the medical records of deceased patients for the following purposes:

(1) Determining the hospital's organ and tissue donation potential;

(2) Assessing the educational needs of the hospital in regard to the organ and tissue donation process; and

(3) Providing documentation to the hospital to evaluate the effectiveness of the hospital's efforts.

(e) Each hospital shall have a signed agreement with its federally designated organ procurement organization that addresses the requirements of this section and the requirements of G.S. 130A-412.33.

(f) The requirements of this section, or of any hospital procurement protocols established pursuant to this section, shall not exceed those provided for by the hospital organ protocol provisions of Title XI of the Social Security Act, except for the purposes of this section the term "organ and tissue donors" shall include cornea and tissue donors for transplantation.

(g) Hospitals and hospital personnel shall not be subject to civil or criminal liability nor to discipline for unprofessional conduct for actions taken in good faith to comply with this section. This subsection shall not provide immunity from civil liability arising from gross negligence. (1987, c. 719, s. 1; 1989, c. 537, s. 4; 1997-192, s. 2; 1997-456, s. 48; 2007-538, ss. 3(a), 4.)

Editor's Note. — Session Laws 2007-538, s. 3(a), recodified former G.S. 130A-412.1 as G.S. 130A-412.32, effective October 1, 2007.

Effect of Amendments. — Session Laws 2007-538, s. 4, effective October 1, 2007, substituted "G.S. 130A-412.33" for "G.S. 130A-412.2" at the end of subsection (e).

§ 130A-412.33. Duty of designated organ procurement organizations and tissue banks.

(a) After notification regarding an impending brain death, brain death, or cardiac death has been made to the federally designated organ procurement organization, the federally designated organ procurement organization shall evaluate donation potential.

(b) The federally designated organ procurement organization or tissue bank shall assure that families of potential organ and tissue donors are made aware of the option of organ and tissue donation and their option to decline.

(c) The federally designated organ procurement organization or tissue bank shall, working collaboratively with the hospital, request consent for organ or tissue donation in the order of priority established under G.S. 130A-412.11 and shall have designated, trained staff available to perform the consent process 24 hours a day, 365 days a year.

(d) The federally designated organ procurement organization or tissue bank shall encourage discretion and sensitivity with respect to the circumstances, views, and beliefs of the families of potential organ and tissue donors.

(e) All hospital and patient information, interviews, reports, statements, memoranda, and other data obtained or created by a tissue bank or federally designated organ procurement organization from the medical records review described in G.S. 130A-412.33 shall be privileged and confidential and may be used by the tissue bank or federally designated organ procurement organization only for the purposes set forth in G.S. 130A-412.33 and shall not be subject to discovery or introduction as evidence in any civil action, suit, or proceeding. However, hospital and patient information, interviews, reports, statements, memoranda, and other data otherwise available are not immune from discovery or use in a civil action, suit, or proceeding merely because they were obtained or created by a tissue bank or federally designated organ procurement organization from the medical records review described in G.S. 130A-412.33.

(f) If the hospital is made a party of any action, suit, or proceeding arising out of the failure of a federally designated organ procurement organization or tissue bank to comply with the requirements of this section, the hospital shall be held harmless from any and all liability and costs, including the amounts of judgments, settlements, fines, or penalties, and expenses and reasonable attorneys' fees incurred in connection with the action, suit, or proceeding. (1997-192, s. 3; 2007-538, ss. 3(a), 5, 6.)

Editor's Note. — Session Laws 2007-538, s. 3(a), recodified former G.S. 130A-412.2 as G.S. 130A-412.33, effective October 1, 2007.

Effect of Amendments. — Session Laws 2007-538, ss. 3(a), 5, and 6, effective October 1, 2007, recodified former G.S. 130A-412.2 as this section; substituted "G.S. 130A-412.11" for "G.S. 130A-404(b)" near the middle of subsection (c); and substituted "G.S. 130A-412.33" for "G.S. 130A-412.1" three times in subsection (e).

Part 4. Human Tissue Donation Program.

§ 130A-413. Coordinated human tissue donation program; legislative findings and purpose; program established.

(a) The General Assembly finds that there is an increasing need for human tissues for transplantation purposes; that there is a continuing need for human tissues for the purposes of medical education and research; and that these needs are not being sufficiently filled at the present because of a shortage of human tissue donors. The General Assembly establishes a coordinated human tissue donation program to facilitate the acquisition and distribution of human tissues to promote the public health. For the purposes of this Part, the term "human tissue" includes cadavers.

(b) The Department shall establish and administer a coordinated program among departments and agencies of the State and all groups, both public and private, involved in the acquisition and distribution of human tissue to:

(1) Increase awareness of the need for human tissue donations and of the methods by which these donations are made;
(2) Increase awareness of the existing programs of human tissue transplantation and of medical research and education which employs human tissue and share information with the public;
(3) Study the problems surrounding the acquisition and distribution of human tissue and make suggestions for their solution;
(4) Disseminate information to health and other professionals concerning the techniques of human tissue retrieval and transplantation, the legalities involved in making anatomical gifts; and
(5) Arrange for the quick and precise transportation of donated human tissue in emergency transplant situations.

(c) All departments and agencies of the State and county and municipal law-enforcement agencies shall cooperate with the coordinated human tissue donation program instituted by the Department. (1983, c. 891, s. 2.)

Legal Periodicals. — For note, "Organ Allocation and the States: Can the States Restrict Broader Organ Sharing?" see 1999 Duke L.J. 261.

§ **130A-414:** Repealed by Session Laws 1987, c. 719, s. 2.

Part 5. Disposition of Unclaimed Bodies.

§ 130A-415. Unclaimed bodies; bodies claimed by the Lifeguardianship Council of the Association for Retarded Citizens of North Carolina; disposition.

(a) Any person, including officers, employees and agents of the State or of any unit of local government in the State, undertakers doing business within the State, hospitals, nursing homes or other institutions, having physical possession of a dead body shall make reasonable efforts to contact relatives of the deceased or other persons who may wish to claim the body for final disposition. If the body remains unclaimed for final disposition for 10 days, the person having possession shall notify the Commission of Anatomy. Upon request of the Commission of Anatomy, the person having possession shall deliver the dead body to the Commission of Anatomy at a time and place specified by the Commission of Anatomy or shall permit the Commission of Anatomy to take and remove the body.

(b) All dead bodies not claimed for final disposition within 10 days of the decedent's death may be received and delivered by the Commission of Anatomy pursuant to the authority contained in G.S. 130A-33.30 and this Part and in accordance with the rules of the Commission of Anatomy. Upon receipt of a body by the Commission of Anatomy all interests in and rights to the unclaimed dead body shall vest in the Commission of Anatomy. The recipient to which the Commission of Anatomy delivers the body shall pay all expenses for the embalming and delivery of the body, and for the reasonable expenses arising from efforts to notify relatives or others.

(b1) The 10-day period referenced in subsections (a) and (b) of this section may be shortened by the county director of social services upon determination that a dead body will not be claimed for final disposition within the 10-day period.

(c) Should the Commission of Anatomy decline to receive a dead body, the person with possession shall inform the director of social services of the county in which the body is located. The director of social services of that county shall arrange for prompt final disposition of the body, either by cremation or burial. Reasonable costs of disposition and of efforts made to notify relatives and others shall be considered funeral expenses and shall be paid in accordance with G.S. 28A-19-6 and G.S. 28A-19-8. If those expenses cannot be satisfied from the decedent's estate, they shall be borne by the decedent's county of residence. If the deceased is not a resident of this State, or if the county of residence is unknown, those expenses shall be borne by the county in which the death occurred.

(d) No autopsy shall be performed on an unclaimed body without the written consent of the Commission of Anatomy except that written consent is not required for an autopsy performed pursuant to Part 2 of this Article.

(e) Due caution shall be taken to shield the unclaimed body from public view.

(f) Notwithstanding anything contained in this section, an unclaimed body shall not mean a dead body for which the deceased has made a gift pursuant to Part 3 of this Article.

(g) Nothing in this Part shall require the officers, employees or agents of a county to notify the Commission of Anatomy regarding the bodies of minors who were in the custody of the county at the time of death and whose final disposition will be arranged by the county. In the absence of notification, the expenses of the final disposition shall be a charge upon the county having custody.

(h) The provisions of this Part shall not apply to bodies within the jurisdiction of the medical examiner under G.S. 130A-383 or 130A-384.

(i) In addition to the other duties of the Commission of Anatomy, when the Commission of Anatomy is notified by the Lifeguardianship Council of the Association of Retarded Citizens of North Carolina, Inc., that the Council intends to claim a body, the Commission shall release the body to the Council. The Lifeguardianship Council shall notify the Commission of Anatomy within 24 hours after death of its intent to claim a body for burial or other humane and caring disposition. (1975, c. 694, s. 3; 1977, c. 458; 1983, c. 891, s. 2; 1987, c. 470; 1989, c. 222; c. 770, s. 75.)

§ 130A-416. Commission of Anatomy rules.

The Commission of Anatomy is authorized to adopt rules necessary to implement the provisions of this Part. (1983, c. 891, s. 2.)

Part 6. Final Disposition or Transportation of Deceased Migrant Agricultural Workers and Their Dependents.

§ 130A-417. Definitions.

The following definitions shall apply throughout this Part:

(1) "Dependent" means child, grandchild, spouse or parent of a migrant agricultural worker who moves with the migrant agricultural worker in response to the demand for seasonal agricultural labor.

(2) "Migrant agricultural worker" means a worker who moves in response to the demand for seasonal agricultural labor. (1983, c. 891, s. 2.)

§ 130A-418. Deceased migrant agricultural workers and their dependents.

(a) Notwithstanding any other provisions of law, a person having knowledge of the death of a migrant agricultural worker or a worker's dependent shall without delay report the death to the department of social services in the county in which the body is located together with any information regarding the deceased including identity, place of employment, permanent residence, and the name, address and telephone number of any relative and any interested person. The county department of social services shall, within a reasonable time of receiving this report, transmit to the Department notice of the death and information received upon notification. The Department shall make reasonable effort to inform the next-of-kin and any interested person of the death.

(b) If the identity of the person cannot be determined within a reasonable period of time, or if the body is unclaimed 10 days after death, the body shall be offered to the Commission of Anatomy and, upon its request, shall be delivered to the Commission of Anatomy. If the Commission of Anatomy does not request an unclaimed body offered it or the estate, and if the relatives or other interested persons claiming the body are unable to provide for the final disposition of the migrant agricultural worker or dependent, the Department is authorized and directed to arrange for the final disposition of the decedent.

(c) If the estate, relatives or interested persons are able to provide for final disposition but are unable to effect the transportation of the decedent to the decedent's legal residence or the legal residence of the relatives or interested persons, the Department is authorized and directed to allocate a sum of not more than two hundred dollars ($200.00) to defray the transportation expenses.

(d) The Secretary is authorized to adopt rules necessary to implement this section. (1975, c. 891; 1977, c. 648; 1983, c. 891, s. 2.)

§ **130A-419:** Reserved for future codification purposes.

Part 7. Disposition of Body or Body Parts.

§ 130A-420. Authority to dispose of body or body parts.

(a) An individual at least 18 years of age may authorize the type, place, and method of disposition of the individual's own dead body by methods in the following order:

(1) Pursuant to a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes or pursuant to a cremation authorization form executed pursuant to Article 13C of Chapter 90 of the General Statutes.
(2) Pursuant to a written will.
(3) Pursuant to a written statement other than a will signed by the individual and witnessed by two persons who are at least 18 years old.
(4) Pursuant to a health care power of attorney to the extent provided in Article 3 of Chapter 32A of the General Statutes.

An individual may also delegate his or her right to dispose of his or her own dead human body to any person by any means authorized in subdivisions (1) through (3) of this subsection.

(b) If a decedent has left no written authorization for the disposal of the decedent's body as permitted under subsection (a) of this section, the following competent persons in the order listed may authorize the type, method, place, and disposition of the decedent's body:

(1) The surviving spouse.
(2) A majority of the surviving children over 18 years of age, who can be located after reasonable efforts.
(3) The surviving parents.

(4) A majority of the surviving siblings over 18 years of age, who can be located after reasonable efforts.

(5) A majority of the persons in the classes of the next degrees of kinship, in descending order, who, under State law, would inherit the decedent's estate if the decedent died intestate who are at least 18 years of age and can be located after reasonable efforts.

(6) A person who has exhibited special care and concern for the decedent and is willing and able to make decisions about the disposition.

(7) In the case of indigents or any other individuals whose final disposition is the responsibility of the State or any of its instrumentalities, a public administrator, medical examiner, coroner, State-appointed guardian, or any other public official charged with arranging the final disposition of the decedent.

(8) In the case of individuals who have donated their bodies to science or whose death occurred in a nursing home or private institution and in which the institution is charged with making arrangements for the final disposition of the decedent, a representative of the institution.

(9) In the absence of any of the persons described in subdivisions (1) through (8) of this subsection, any person willing to assume responsibility for the disposition of the body.

This subsection does not grant to any person the right to cancel a preneed funeral contract executed pursuant to Article 13D of Chapter 90 of the General Statutes, to prohibit the substitution of a preneed licensee as authorized under G.S. 90-210.63, or to permit modification of preneed contracts under G.S. 90-210.63A. If an individual is incompetent at the time of the decedent's death, the individual shall be treated as if he or she predeceased the decedent. An attending physician may certify the incompetence of an individual and the certification shall apply to the rights under this section only. Any individual under this section may waive his or her rights under this subsection by any written statement notarized by a notary public or signed by two witnesses.

(b1) A person who does not exercise his or her right to dispose of the decedent's body under subsection (b) of this section within five days of notification or 10 days from the date of death, whichever is earlier, shall be deemed to have waived his or her right to authorize disposition of the decedent's body or contest disposition in accordance with this section.

(c) An individual at least 18 years of age may, in a writing signed by the individual, authorize the disposition of one or more of the individual's body parts that has been or will be removed. If the individual does not authorize the disposition, a person listed in subsection (b) of this section may authorize the disposition as if the individual was deceased.

(d) This section does not apply to the disposition of dead human bodies as anatomical gifts under Part 3 of Article 16 of Chapter 130A of the General Statutes or the right to perform autopsies under Part 2 of Article 16 of Chapter 130A of the General Statutes. (1997-399, s. 34; 2007-531, s. 26.)

Editor's Note. — The section above has been designated as G.S. 130A-420 at the direction of the Revisor of Statutes, the number in the enacting act having been G.S. 130A-422.

Effect of Amendments. — Session Laws 2007-531, s. 26, effective August 31, 2007, rewrote subsection (a); in subdivisions (b)(2), and (b)(4), added "over 18 years of age, who can be located after reasonable efforts"; and in subdivision (b)(5) added "who are at least 18 years of age and can be located after reasonable efforts"; added subdivisions (b)(7) through (b)(9); rewrote the last paragraph of subsection (b); and added subsection (b1).

§ **130A-421:** Reserved for future codification purposes.

Article 17.

Childhood Vaccine-Related Injury Compensation Program.

§ 130A-422. Definitions.

The following definitions apply throughout this Article, unless the context clearly implies otherwise:

(1) "Claimant" means any person who files a claim for compensation for a vaccine-related injury pursuant to G.S. 130A-425(b). In the case of a minor or incompetent, a claim may be filed by a guardian ad litem, parent, guardian, or other legal representative; and, in the case of a decedent, the claim may be filed by an administrator, executor, or other legal representative.

In the event that more than one person claims to have suffered compensable injuries as the result of the administration of a covered vaccine to a single individual, all these persons shall be treated for purposes of this Article as if they were a single claimant. A single joint claim shall be filed on behalf of all these persons, and the limitations on awards set forth in G.S. 130A-427(b) apply to that joint claim or subsequent joint action as if it were a claim filed on behalf of a single individual.

(2) "Commission" means the North Carolina Industrial Commission.

(3) "Covered vaccine" means a vaccine administered pursuant to the requirements of G.S. 130A-152.

(4) "Respondent" means the person or entity the claimant identifies in the claim as the agent of causality of the vaccine-related injury.

(5) "Vaccine-related injury", with respect to persons engaged in the manufacture, distribution, or sale, or administration of a covered vaccine, means any injury, disability, illness, death, or condition caused by the vaccine. "Vaccine-related injury" shall not mean any injury, disability, illness, death, or condition caused by the method of injection of the vaccine into the body. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 8.)

CASE NOTES

Cited in Goetz v. Wyeth-Lederle Vaccines, 168 N.C. App. 712, 608 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005).

§ 130A-423. North Carolina Childhood Vaccine-Related Injury Compensation Program; exclusive remedy; relationship to federal law; subrogation.

(a) There is established the North Carolina Childhood Vaccine-Related Injury Compensation Program.

(b) The rights and remedies granted the claimant, the claimant's parent, guardian ad litem, guardian, or personal representative shall exclude all other rights and remedies of the claimant, his parent, guardian ad litem, guardian, or personal representative against any respondent at common law or otherwise on account of injury, illness, disability, death, or condition. If an action is filed, it shall be dismissed, with prejudice, on the motion of any party under law.

(b1) A claimant may file a petition pursuant to this Article only after the claimant has filed an election pursuant to Section 2121 of the Public Health Service Act, P.L. 99-660, permitting the claimant to file a civil action for damages for a vaccine-related injury or death or if the claimant is otherwise permitted by federal law to file an action against a vaccine manufacturer.

(c) Nothing in this Article prohibits any individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if the action is not barred by federal law under subtitle 2 of Title XXI of the Public Health Service Act.

(d) If any action is brought against a vaccine manufacturer as permitted by subtitle 2 of Title XXI of the Public Health Service Act and subsection (c) of this section, the plaintiff in the action may recover damages only to the extent permitted by subdivisions (1) through (3) of subsection (a) of G.S. 130A-427. The aggregate amount awarded in any action may not exceed the limitation established by subsection (b) of G.S. 130A-427. Regardless of whether an action is brought against a vaccine manufacturer, a claimant who has filed an election pursuant to Section 2121 of the Public Health Service Act, as enacted into federal law by Public Law 99-660, permitting a claimant to file a civil action for damages for a vaccine-related injury or death, or who is otherwise permitted by federal law to file an action against a vaccine manufacturer, may file a petition pursuant to G.S. 130A-425 to obtain services from the Department pursuant to subdivision (5) of subsection (a) of G.S. 130A-427 and, if no action has been brought against a vaccine manufacturer, to obtain other relief available pursuant to G.S. 130A-427.

(e) In order to prevent recovery of duplicate damages, or the imposition of duplicate liability, in the event that an individual seeks an award pursuant to G.S. 130A-427 and also files suit against the manufacturer as permitted by subtitle 2 of Title XXI of the Public Health Service Act and subsection (c) of this section, the following provisions shall apply:

(1) If, at the time an award is made pursuant to G.S. 130A-427, an individual has already recovered damages from a manufacturer pursuant to a judgment or settlement, the award shall consist only of a commitment to provide services pursuant to subdivision (5) of subsection (a) of G.S. 130A-427.

(2) If, at any time after an award is made to a claimant pursuant to G.S. 130A-427, an individual recovers damages for the same vaccine-related injury from a manufacturer pursuant to a judgment or settlement, the individual who recovers the damages shall reimburse the State for all amounts previously recovered from the State in the prior proceeding. Before a defendant in any action for a vaccine-related injury pays any amount to a plaintiff to discharge a judgment or settlement, he shall request from the Secretary a statement itemizing any reimbursement owed by the plaintiff pursuant to this subdivision, and, if any reimbursement is owed by the plaintiff to the Department, the defendant shall pay the reimbursable amounts, as determined by the Secretary, directly to the Department. This payment shall discharge the plaintiff's obligations to the State under this subdivision and any obligation the defendant may have to the plaintiff with respect to these amounts.

(3) If:

   a. An award has been made to a claimant for an element of damages pursuant to G.S. 130A-427; and

   b. An individual has recovered for the same element of damages pursuant to a judgment in, or settlement of, an action for the same vaccine-related injury brought against a manufacturer, and that amount has not been remitted to the State pursuant to subdivision (2) of this subsection; and

   c. The State seeks to recover the amounts it paid in an action it brings against the manufacturer pursuant to G.S. 130A-430;

any judgment obtained by the State under G.S. 130A-430 shall be reduced by the amount necessary to prevent the double recovery of any element of damages from the manufacturer. Nothing in this subdivision limits the State's right to obtain reimbursement from a claimant under subdivision (2) of this subsection with respect to any double payment that might be received by the claimant.

(f) Subrogation claims pursued under the National Childhood Vaccine Injury Act of 1986 shall be filed with the appropriate court, not with the Industrial Commission. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, ss. 1, 2; 1989, c. 727, ss. 148, 149; 1991, c. 410, s. 1; 1997-443, s. 11A.85.)

Editor's Note. — Session Laws 1987, c. 215, s. 9, made the amendment by s. 2 of the act, which added subsection (f), effective upon ratification (May 19, 1987). Section 9 further provided that the amendment by s. 1 of the act, which amended the catchline and added subsections (c), (d) and (e), would become effective only on and after the effective date of subtitle 2 of Title XXI of the Public Health Service Act, as enacted into federal law pursuant to Title III of Public Law 99-660, and only if this federal law on its effective date contained language forbidding a state from establishing or enforcing a law prohibiting an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if this action is not barred by federal law.

Section 300aa-22(e) of Title 42 of the United States Code, effective October 1, 1988, appears to contain such language.

CASE NOTES

Cited in Goetz v. Wyeth-Lederle Vaccines, 168 N.C. App. 712, 608 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005).

§ 130A-424. Industrial Commission authorized to hear and determine claims; damages.

The North Carolina Industrial Commission is authorized to hear and pass upon all claims filed pursuant to this Article. The members of the Commission, or a deputy thereof, have power to issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, opinions, settlements, and awards, and punish for contempt. The Commission may appoint deputies and clerical assistants to carry out the purpose and intent of this Article, and this deputy or deputies are vested with the same power and authority to hear and determine claims filed pursuant to this Article as is by this Article vested in the members of the Commission. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

CASE NOTES

Cited in Goetz v. Wyeth-Lederle Vaccines, 168 N.C. App. 712, 608 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005).

§ 130A-425. Filing of claims.

(a) Notwithstanding any other provision of State law, no action for compensation for a vaccine-related injury may be filed against any person unless that person was named as a respondent in a claim filed pursuant to this section and unless the claim was filed within the applicable time period set forth in G.S. 130A-429.

(b) In all claims filed pursuant to this Article, the claimant or the person in whose behalf the claim is made shall file with the Commission a verified petition in duplicate, setting forth the following information:

(1) The name and address of the claimant;
(2) The name and address of each respondent;
(3) The amount of compensation in money and services sought to be recovered;
(4) The time and place where the injury occurred;
(5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim; and
(6) Supporting documentation and a statement of the claim that the claimant or the person in whose behalf the claim is made suffered a vaccine-related injury and has not previously collected an award or settlement of a civil action for damages for this injury. This supporting documentation shall include all available medical records pertaining to the alleged injury, including autopsy reports, if any, and if the injured person was under two years of age at the time of injury, all prenatal, obstetrical, and pediatric records of care preceding the injury, and an identification of any unavailable records known to the claimant or the person in whose behalf the claim is made.
(7) Documentation to show that the claimant has filed an election pursuant to Section 2121 of the Public Health Service Act, P.L. 99-660, permitting such claimant to file a civil action for damages for a vaccine-related injury or death or documentation to show that such claimant is otherwise permitted by federal law to file an action against a vaccine manufacturer.

(c) Upon receipt of this verified petition in duplicate, the Commission shall enter the case upon its hearing docket and shall determine the matter in the county where the injury occurred unless the parties agree or the Commission directs that the case may be heard in some other county. All parties shall be given reasonable notice of the date when and the place where the claim will be heard. Immediately upon receipt of the claim, the Commission shall serve a copy of the verified petition on each respondent by registered or certified mail. The Commission shall also send a copy of the verified petition to the Secretary, who shall be a party to all proceedings involving the claim, and to the Attorney General who shall represent the State's interest in all the proceedings involving the claim.

(d) The Commission shall adopt rules necessary to govern the proceedings required by this Article. The Rules of Civil Procedure as contained in G.S. 1A-1 et seq. and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 apply to claims filed with the Industrial Commission under this Article. The Commission shall keep a record of all proceedings conducted under this Article, and has the right to subpoena any persons and records it considers necessary in making its determinations. The Commission may require all persons called as witnesses to testify under oath or affirmation, and any member of the Commission may administer oaths. If any persons refuse to comply with any subpoena issued pursuant to this Article or to testify with respect to any matter relevant to proceedings conducted under this Article, the Superior Court of Wake County, on application of the Commission, may issue an order requiring the person to comply with the subpoena and to testify. Any failure to obey any such order may be punished by the court as for contempt. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 3; 1989, c. 727, s. 150; 1991, c. 410, s. 2.)

§ 130A-426. Determination of claims.

(a) The Commission shall determine, on the basis of the evidence presented to it, the following issues:
(1) Whether any injuries alleged in the claim are vaccine-related injuries; and

(2) How much compensation, if any, is awardable pursuant to G.S. 130A-427.

(b) If the Commission determines pursuant to subsection (a) of this section that the injuries alleged in the claim are not vaccine-related injuries, it shall render a decision denying any compensation. If the Commission decides that any of the injuries are vaccine-related injuries it shall make an award pursuant to guidelines it establishes specifically adopted to relate to vaccine-related injuries. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-427. Commission awards for vaccine-related injuries; duties of Secretary.

(a) Upon determining that a claimant has sustained a vaccine-related injury, the Commission shall make an award providing compensation or services for any or all of the following:

(1) Actual and projected reasonable expenses of medical care, developmental evaluation, special education, vocational training, physical, emotional or behavioral therapy, and residential and custodial care and service expenses, that cannot be provided by the Department pursuant to subdivision (5) of this subsection;

(2) Loss of earnings and projected earnings, determined in accordance with generally accepted actuarial principles;

(3) Noneconomic, general damages arising from pain, suffering, and emotional distress;

(4) Reasonable attorneys fees;

(5) Needs that the Secretary determines on a case-by-case basis shall be met by medical, health, developmental evaluation, special education, vocational training, physical, emotional, or behavioral therapy, residential and custodial care, and other essential and necessary services, to be provided the injured party by the programs and services administered by the Department. The Secretary shall develop an itemized list of the service needs of the injured party upon review and evaluation of the injured party's medical record and shall present it to the Commission prior to the Commission's determination. In the event that the Commission's award includes the provision of any of these services, the Secretary shall develop a comprehensive, coordinated plan for the delivery of these services to the injured party. Notwithstanding any other provision of State law, the Secretary shall waive all eligibility criteria in determining eligibility for services provided by the Department under the plan of care developed pursuant to this subdivision. If the award includes any such services, these services shall be provided by the Department free of any cost to the injured party.

(b) The money compensation component of the award may not be made pursuant to this section in excess of an aggregate amount of the present day value amount of three hundred thousand dollars ($300,000) with respect to all injuries claimed to have resulted from the administration of a covered vaccine to a single individual. The value of all services to be provided by the Department, as part of this award is in addition to the total amount of money compensation, and is not included in the limitation prescribed by this subsection on the amount of money compensation that may be awarded. No damages may be awarded pursuant to subdivision (a)(3) on behalf of any person to whom the covered vaccine was not administered. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1989, c. 727, s. 151; 1997-443, s. 11A.86.)

CASE NOTES

Cited in Goetz v. Wyeth-Lederle Vaccines, 168 N.C. App. 712, 608 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005).

§ 130A-428. Notice of determination of claim; appeal t full commission.

(a) Decisions of the Commission pursuant to G.S. 130A-427 shall be fina and binding on the claimant and each respondent.

(b) Notwithstanding subsection (a), upon determination of the claim, th Commission shall notify all parties concerned in writing of its decision and an party shall have 15 days after receipt of such notice within which to file notic of appeal with the Commission. This appeal, when so taken, shall be heard b the Commission, sitting as a full commission, on the basis of the record in th matter and upon oral argument of the parties, and the full commission ma amend, set aside, or strike out the decision of the hearing commissioner an may issue its own findings of fact and conclusions of law. Upon determinatio of the claim by the Commission, sitting as a full commission, the Commissio shall notify all parties concerned in writing of its decision.

(c) The decision of the Commission, if not reviewed in due time, or an awar of the Commission, shall be conclusive and binding as to all questions of fac but any party to the proceedings may, within 30 days from the date of th decision or award, or within 30 days after receipt of notice to be sent b registered mail or certified mail of the award, but not thereafter, appeal fro the decision or award of the Commission to the Court of Appeals for errors o law under the same terms and conditions as govern appeals from the Superio Court to the Court of Appeals in ordinary civil actions. The procedure for th appeal shall be provided by the Rules of Appellate Procedure. (1985 (Reg. Sess. 1986), c. 1008, s. 1.)

CASE NOTES

Full Commission Must Hear Appeal. — In a claim brought under the North Carolina Childhood Vaccine-Related Injury Compensation Program, (vaccine injury act), G.S. 130A-422 to G.S. 130A-434, although a decision may be rendered by a two commissioner majority of the North Carolina Industrial Commission, th appeal must nonetheless be heard by the ful three commissioner panel. Goetz v. Wyeth Lederle Vaccines, 168 N.C. App. 712, 60 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005

§ 130A-429. Limitation on claims.

(a) Except as provided in subsection (b) of this section, any claim under thi Article that is filed more than six years after the administration of a vaccin alleged to have caused a vaccine-related injury is barred. Claims on behalf o minors or incompetent persons shall be filed by their parents, guardians a litem, or guardians within the applicable limitations period established by thi section.

(b) Claims that are filed in accordance with the procedures set forth in G.S 130A-425(b) within six years after the date of the enactment of this Articl shall not be barred unless, on the date the claim was filed, the claimant wa barred by the applicable statute of limitations from filing an action fo damages with respect to the subject matter of the claim.

(c) The period of limitation set forth in this section shall be stayed beginnin on the date the claimant files a petition under Section 2111 of the Public Healt Service Act, P.L. 99-660, and ending 120 days after the date final judgment i entered on the petition. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1991, c. 410, s. 3.)

§ 130A-430. Right of State to bring action against health care provider and manufacturer.

(a) If the Industrial Commission makes an award for a claimant who it determines has sustained a vaccine-related injury, the State may, within two years of the date the Commission renders its decision, bring an action against the health care provider who administered the vaccine on the ground that the health care provider was negligent in administering the vaccine. Damages in an action brought under this section are limited to the amount of the award made by the Commission plus the estimated present value of all the services to be provided to the claimant by the Department under G.S. 130A-427.

(b) Manufacturer. — If the Industrial Commission makes an award for a claimant who it determines has sustained a vaccine-related injury, the State may, within two years of the date the Commission renders its decision, bring an action against the manufacturer who made the vaccine on the ground that the vaccine was a defective product. Damages in an action brought under this section are limited to the amount of the award made by the Commission plus the estimated present value of all the services to be provided to the claimant by the Department under G.S. 130A-427, the reasonable costs of prosecuting the action, including, but not limited to, attorneys fees, fees charged by witnesses, and costs of exhibits. For purposes of this subsection, a defective product is a covered vaccine that was manufactured, transported, or stored in a negligent manner, or was distributed after its expiration date, or that otherwise violated the applicable requirements of any license, approval, or permit, or any applicable standards or requirements issued under Section 351 of the Public Health Service Act, as amended, or the federal Food, Drug, and Cosmetic Act, as these standards or requirements were interpreted or applied by the federal agency charged with their enforcement. The negligence or other action in violation of applicable federal standards or requirements shall be demonstrated by the State, by a preponderance of the evidence, to be the proximate cause of the injury for which an award was rendered pursuant to G.S. 130A-427, in order to allow recovery by the State against the manufacturer pursuant to this subsection. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 4; 1989, c. 727, s. 152; 1997-443, s. 11A.87.)

§ 130A-431. Certain vaccine diversions made felony.

Any person who (i) receives a vaccine designated by the manufacturer for use in the State, (ii) directly or indirectly diverts the vaccine to a location outside the State, and (iii) directly or indirectly profits as a result of this diversion, is guilty of a Class I felony. The fine shall be twenty-five dollars ($25.00) per dose of the diverted vaccine or one hundred thousand dollars ($100,000), whichever is less. A health care professional convicted of a Class I felony pursuant to this section who is found by the court to have diverted more than 300 doses of covered vaccine shall have his license suspended for one year. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 5; 1993, c. 539, s. 1306; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 130A-432. Scope.

This Article applies to all claims for vaccine-related injuries occurring on and after October 1, 1986 and, at the option of the claimant, to claims for vaccine-related injuries that occurred before October 1, 1986 if such claim has not been resolved by final judgment or by settlement agreement or is not barred by a statute of limitations.

This Article applies to all claims for vaccine-related injuries alleged to have been caused by covered vaccines administered within the State, regardless of where an action relating to the injuries is brought and regardless of where the injuries are alleged to have occurred. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 6.)

§ 130A-433. Contracts for purchase of vaccines; distribution; fee; rules.

(a) Notwithstanding any law to the contrary, the Secretary may enter into contracts with the manufacturers and suppliers of covered vaccines and with other public entities either within or without the State for the purchase of covered vaccines and may provide for the distribution or sale of the covered vaccines to health care providers. Local health departments shall distribute the covered vaccines at the request of the Department. The Secretary shall adopt rules to implement this Article except for subsection (b) of this section.

(b) A health care provider who receives vaccine from the State may charge no more than a reasonable fee established by the Commission for Public Health for the administration of the vaccine. Vaccines provided by the State to local health departments for administration shall be administered at no cost to the patient. (1985 (Reg. Sess., 1986), c. 1008, s. 2; 1987, c. 215, s. 7; 1989, c. 727, s. 153; 1993, c. 321, s. 281(b); 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (b).

§ 130A-434. Child Vaccine Injury Compensation Fund established; payments from Fund; transfer of appropriations and receipts.

(a) There is established the Child Vaccine Injury Compensation Fund within the Department to finance the North Carolina Childhood Vaccine-Related Injury Compensation Program created by this article. The money compensation components of all awards made pursuant to Article 17 of Chapter 130A of the General Statutes shall be paid by the Department from the Fund.

(b) Should the Department find that the sum of appropriations and receipts is insufficient to meet financial obligations incurred in the administration of this article, appropriations and receipts in the Department which would otherwise revert to the General Fund may be transferred to the Child Vaccine Injury Compensation Fund in order to meet such obligations. The Department may also budget anticipated receipts as needed to implement this article. (1985 (Reg. Sess., 1986), c. 1008, s. 3(a), 3(b); 1989, c. 727, s. 154; 1997-443, s. 11A.88.)

§§ 130A-435 through 130A-439: Reserved for future codification purposes.

Article 18.

Health Assessments for Kindergarten Children in the Public Schools.

§ 130A-440. Health assessment required.

(a) Every child in this State entering kindergarten in the public schools shall receive a health assessment. The health assessment shall be made no more than 12 months prior to the date of school entry. No child shall attend kindergarten unless a health assessment transmittal form, developed pursuant to G.S. 130A-441, indicating that the child has received the health assessment required by this section, is presented to the school principal. The medical provider, or the parent, guardian, or person *in loco parentis*, must present a completed health assessment transmittal form to the principal of the school on or before the child's first day of attendance. If a health assessment transmittal form is not presented on or before the first day, the principal shall present a notice of deficiency to the parent, guardian, or responsible person. The parent, guardian, or responsible person shall have 30 calendar days from the first day of attendance to present the required health assessment transmittal form for the child. Upon termination of 30 calendar days, the principal shall not permit the child to attend the school until the required health assessment transmittal form has been presented.

(b) A health assessment shall include a medical history and physical examination with screening for vision and hearing and, if appropriate, testing for anemia and tuberculosis. Vision screening shall be conducted in accordance with G.S. 130A-440.1. The health assessment may also include dental screening and developmental screening for cognition, language, and motor function.

(c) The health assessment shall be conducted by a physician licensed to practice medicine, a physician's assistant as defined in G.S. 90-18.1(a), a certified nurse practitioner, or a public health nurse meeting the Department's Standards for Early Periodic Screening, Diagnosis, and Treatment Screening.

(d) This Article shall not apply to children entering kindergarten in private church schools, schools of religious charter, or qualified nonpublic schools, regulated by Article 39 of Chapter 115C of the General Statutes. (1985 (Reg. Sess., 1986), c. 1017, s. 1; 1987, c. 114, s. 1; 1989, c. 727, s. 155; 1993, c. 124, s. 1; 1995, c. 123, s. 10; 2006-240, s. 1(b).)

Editor's Note. — Session Laws 1999-22, s. 1, provides that the North Carolina Children's Vision Screening Improvement Program of the Department of Health and Human Services, which is administered through Prevent Blindness North Carolina and trains and certifies vision screeners who assess children in North Carolina schools, is designated the Kenneth C. Royall, Jr. Children's Vision Screening Improvement Program in recognition of Kenneth C. Royall, Jr.'s 32 years of leadership in Prevent Blindness North Carolina and his commitment to children's vision screening.

Effect of Amendments. — Session Laws 2006-240, s. 1(b), effective August 13, 2006, added the second sentence in subsection (b).

§ 130A-440.1. Early Childhood Vision Care.

(a) Vision Screening Required for Children Entering Kindergarten. — Every child in this State entering kindergarten in the public schools, beginning with the 2007-2008 school year, shall obtain vision screening in accordance with vision screening standards adopted by the Governor's Commission on Early Childhood Vision Care. Within 180 days of the start of the school year, the parent of the child shall present to the school principal or the principal's designee certification that the child has, within the past 12 months, obtained vision screening conducted by a licensed physician, optometrist, physician assistant, nurse practitioner, registered nurse, orthoptist, or a vision screener certified by Prevent Blindness North Carolina, or a comprehensive eye examination performed by an ophthalmologist or optometrist. The health assessment transmittal form required pursuant to G.S. 130A-440 qualifies as certification that the child has obtained the required vision screening. All providers conducting vision screening shall provide each parent in writing the results of the vision screening on forms bearing the signature of the provider supplied to the provider by the Governor's Commission on Early Childhood

Vision Care. The provider shall also orally communicate this information to the parent and shall take reasonable steps to ensure that the parent understands the information communicated. In the instance where a child enters the first grade without having been enrolled in a kindergarten program requiring a vision screening, the requirements for vision screening under this subsection shall apply.

comprehensive eye examination pursuant to the terms of this section not more than six months prior to the date of school entry

(a1) Comprehensive Eye Examination. — For children who receive and fail to pass a vision screening as required under subsection (a) of this section, a comprehensive eye examination is required. If a public school teacher, administrator, or other appropriate school personnel has reason to believe that a child enrolled in kindergarten through third grade is having problems with vision, the school personnel may recommend to the child's parent that the child have a comprehensive eye examination. Notification to the parent shall also inform the parent that funds may be available from the Governor's Commission on Early Childhood Vision Care to pay providers for the examination, including corrective lenses.

The comprehensive eye examination shall be conducted by a duly licensed optometrist or ophthalmologist. The comprehensive eye examination conducted pursuant to this section shall consist of a complete and thorough examination of the eye and shall include:

(1) Measurement of visual acuity;
(2) Ocular alignment and motility;
(3) Depth perception — stereopsis;
(4) Fusion;
(5) Slit lamp examination of the lid margins, conjunctivae, cornea, anterior chamber, iris, and crystalline lens;
(6) Examination of the ocular adnexa, the anterior segment, and pupils; and
(7) Cycloplegic refraction and dilated fundus examination.

Health assessment vision screening under G.S. 130A-440 is not a comprehensive eye examination for purposes of this section.

(b) Repealed by Session Laws 2006-240, s. 1(a), effective August 13, 2006.

(c) The results of a comprehensive eye examination conducted under this section shall be included on the comprehensive eye examination transmittal form developed by the Commission pursuant to G.S. 143B-216.75 and shall contain a summary of the comprehensive eye examination performed by the optometrist or ophthalmologist. Any treatment recommendations by the optometrist or ophthalmologist, such as spectacles for schoolwork, shall appear in the summary and school health card. The provider shall present a signed transmittal form to the parent upon completion of the examination. The parent shall submit the transmittal form to the school in accordance with this section.

(d) Repealed by Session Laws 2006-240, s. 1(a), effective August 13, 2006.

(e) G.S. 130A-441, 130A-442, and 130A-443, pertaining to health assessments, apply to comprehensive eye examinations required under this section.

(f) No child shall be excluded from attending school for a parent's failure to obtain a comprehensive eye examination required under this section. If a parent fails or refuses to obtain a comprehensive eye examination or to provide the certification of a comprehensive eye examination, the school shall send a written reminder to the parent of required eye examinations and shall include information about funds that may be available from the Governor's Commission on Early Childhood Vision Care.

(g) In adopting standards for vision screening under this section and as required under G.S. 130A-440, the Commission shall take into account the resources necessary to comply with the standards and, if standards will require additional resources, shall mitigate the impact on resources without compromising vision screening effectiveness.

(h) As used in this section, the term "parent" means the parent, guardian, or person standing in loco parentis. (2005-276, s. 10.59F(g); 2005-345, s. 20(d); 2006-240, s. 1(a).)

Cross References. — As to the Governor's Commission on Early Childhood Vision Care, see G.S. 143B-216.70.

Governor's Vision Program Established. — Session Laws 2005-276, s. 10.59F(a)-(c), provides: "(a) Program established. — There is established in the Department of Health and Human Services, Division of Public Health, the Governor's Vision Care Program. The purpose of the Program is to provide funds for early detection and correction of vision problems in children enrolled in grades K through 3 who are eligible for services under the Program. These funds shall be allocated to reimburse optometrists and ophthalmologists licensed to practice in this State for the comprehensive eye examination, including necessary spectacles, provided to meet the requirements of G.S. 130A-440.1.

"(b) Eligibility. — Children eligible for services under this section shall be those with a family income not exceeding two hundred fifty percent (250%) of the federal poverty level, who do not have private health insurance coverage, and are not eligible for services under NC Health Choice, Medicaid, the Department of Health and Human Services' Commission for the Blind programs, VSP's Sight for Students, or the Lions Club Foundation.

"(c) For the purposes of this section, 'comprehensive eye examination' means a complete and thorough examination of the eye and human visual system that includes an evaluation, determination, and diagnosis of:

"(1) Visual acuity at distance and near;

"(2) Alignment and ocular motility;

"(3) Binocular fusion abnormalities, including tracking;

"(4) Actual refractive errors, including verification by subject means;

"(5) Any color vision disorder;

"(6) Intraocular pressure as may be medically appropriate; and

"(7) Ocular health, including internal and external assessment.

"Routine screening that does not encompass all of the examination components listed in this subsection does not qualify for reimbursement from the Program."

Editor's note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 10.59F(h), as amended by Session Laws 2005-345, s. 20(d), provides that this section becomes effective beginning with the 2006-2007 school year.

Session Laws 2005-276, s. 46.5 is a severability clause.

The section above was amended by Session Laws 2006-240, s. 1(a), in the coded bill drafting format provided by G.S. 120-20.1. Subsection (a) is set out in the form above at the direction of the Revisor of Statutes. The text at the end of subsection (a) was part of the first sentence of subsection (a) as it existed prior to the 2006 amendment, but was omitted by Session Laws 2006-240, and consequently not stricken through.

Session Laws 2006-240, s. 6, provides: "Children who have received vision screenings prior to the availability of forms developed by the Governor's Commission on Early Childhood Vision Care in accordance with G.S. 130A-440.1 shall be deemed to have obtained the screening required under G.S. 130A-440.1, as amended by this act."

Effect of Amendments. — Session Laws 2006-240, s. 1(a), effective August 13, 2006, substituted "Early Childhood Vision Care" for "Comprehensive eye examination required" in the section catchline and rewrote this section.

§ 130A-441. Reporting.

(a) Health assessment results shall be submitted to the school principal by the medical provider on health assessment transmittal forms developed by the Department and the Department of Public Instruction.

(b) Each school having a kindergarten shall maintain on file the health assessment results. The files shall be open to inspection by the Department, the Department of Public Instruction, or their authorized representatives and persons inspecting the files shall maintain the confidentiality of the files. Upon transfer of a child to another kindergarten, a copy of the health assessment results shall be provided upon request and without charge to the new kindergarten.

(c) Within 60 calendar days after the commencement of a new school year, the principal shall file a health assessment status report with the Department on forms developed by the Department and the Department of Public Instruction. The report shall document the number of children in compliance and not in compliance with G.S. 130A-440(a). (1985 (Reg. Sess., 1986), c. 1017, s. 1; 1989, c. 727, s. 156; 1993, c. 124, s. 2.)

§ 130A-442. Religious exemption.

If the bona fide religious beliefs of the parent, guardian or person in loco parentis of a child are contrary to the health assessment requirements contained in this Article, this Article shall not apply to the child. Upon submission of a written statement of the bona fide religious beliefs and opposition to the health assessment requirements, the child may attend kindergarten without submitting a health assessment report. (1985 (Reg. Sess., 1986), c. 1017, s. 1.)

§ 130A-443. Rules.

Rules governing the contents for health assessment reports, the procedure for reporting under this Article, and those persons authorized to inspect the files shall be developed jointly by the Department of Public Instruction and the Commission for Public Health and shall be adopted by the Commission for Public Health. (1985 (Reg. Sess., 1986), c. 1017, s. 1; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, twice substituted "Commission for Public Health" for "Commission for Health Services."

Article 19.

Asbestos Hazard Management.

§ 130A-444. Definitions.

Unless a different meaning is required by the context, the following definitions apply throughout this Article:

(1) "AHERA" means Title II, Asbestos Hazard Emergency Response Act of the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq., as amended by the Asbestos School Hazard Abatement Reauthorization Act of 1990, P.L. 101-637, 104 Stat. 4589 ("ASHARA").

(2) "Asbestos" means asbestiform varieties of chrysotile (serpentine) crocidolite (riebeckite), amosite (cummingtonite-grunerite) anthophyllite, tremolite and actinolite.

(3) "Asbestos containing material" means material which contains more than one percent (1%) asbestos, including friable asbestos containing material and nonfriable asbestos containing material.

(3a) "Asbestos NESHAP for demolition and renovation" means that portion of the National Emission Standards for Hazardous Air Pollutants for asbestos that governs demolition and renovation as set out in 40 CFR §§ 61.141, 61.145, 61.150, and 61.154 (1 July 1993 edition).

(4) "Abatement" means work performed to repair, maintain, remove isolate, or encapsulate asbestos containing material. The term does not include inspections, preparation of management plans, abatement project design, taking of samples, or project overview.

(5) "Friable" means any material that when dry can be broken, crumbled pulverized, or reduced to powder by hand pressure, and includes

previously nonfriable material after such material becomes damaged to the extent that when dry it can be crumbled, pulverized, or reduced to powder by hand pressure.

(6) "Management" means all activities related to asbestos containing material, including inspections, preparation of management plans, abatement project design, abatement, project overview, and taking of samples.

(6a) "Person" means an individual, a corporation, a company, an association, a partnership, a unit of local government, a State or federal agency, or any other legal entity.

(7) "Public area" means those areas in any building other than a residence that are not covered under the Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C. § 651, et seq., as amended.

(8) "Removal" means stripping, chipping, sanding, sawing, drilling, scraping, sucking, and other methods of separating material from its installed location in a building.

(9) "Residence" means any single family dwelling or any multi-family dwelling of fewer than 10 units. (1989, c. 724, s. 1; 1993 (Reg. Sess., 1994), c. 686, s. 2; 1995, c. 123, s. 7.)

§ 130A-445. Management of asbestos containing material in schools.

All school buildings subject to the provisions of AHERA shall be inspected for asbestos containing materials and shall prepare and submit management plans to the Department. The Commission shall adopt rules governing school management plans. These rules shall specify the content and format of plans, the plan review and approval process, schedules and methods for implementation of approved plans, and periodic inspection requirements. (1989, c. 724, s. 1.)

§ 130A-446. Asbestos exposure standard for public areas.

The Commission shall adopt rules to establish a maximum airborne asbestos exposure level for public areas. Such rules shall also specify sampling and analysis procedures. (1989, c. 724, s. 1.)

§ 130A-447. Accreditation of persons performing asbestos management and approval of training courses.

(a) No person shall commence or continue to perform asbestos management activities unless he has been accredited by the Department. No person shall commence or continue to provide asbestos related training courses unless the course has been approved by the Department. The Commission shall adopt rules governing the accreditation of persons performing asbestos management activities and the approval of training courses. Such rules shall include categories of accreditation and shall specify appropriate education, experience, and training requirements. The rules shall establish separate categories of accreditation for inspectors, management planners, abatement designers, supervisors, workers, air monitors, and supervising air monitors. These rules shall be at least as stringent as the accreditation plan required under AHERA and regulations adopted pursuant thereto.

(b) A person who applies for accreditation in the worker category may engage in asbestos containing material management activities as though he were accredited in the worker category for up to 90 days after the date he submits his application. No person whose application is rejected may continue to engage in asbestos containing material management activities under this subsection.

(c) The following persons are exempt from the accreditation requirements:

(1) The owner or operator of a building, other than school buildings subject to the provisions of AHERA, and his permanent employees when performing small-scale, short duration activities, as defined in 40 C.F.R. Pt. 763, Subpt. E, Appendix C (1994).

(2) A person performing asbestos containing material management activities in his personal residence.

(3) Governmental regulatory personnel performing inspections of asbestos containing material management activities solely for the purpose of determining compliance with applicable statutes or regulations.

(4) Persons licensed by the General Contractors Licensing Board, State Board of Examiners of Plumbing and Heating Contractors, State Board of Examiners of Electrical Contractors, or the State Board of Refrigeration Examiners when engaged in activities associated with their license when performing small-scale, short duration activities, as defined in 40 C.F.R. Pt. 763, Subpt. E, Appendix C (1994). (1989, c. 724, s. 1; 1993 (Reg. Sess., 1994), c. 686, s. 3; 1995, c. 123, s. 8.)

§ 130A-448. Asbestos management accreditation fees and course approval fees.

(a) The Department shall establish and collect asbestos containing material management accreditation and annual renewal fees to support the asbestos hazard management program. The fees shall not exceed one hundred dollars ($100.00) per accreditation category, except that the fee for the abatement worker category shall not exceed twenty-five dollars ($25.00). A person who is accredited in more than one category shall pay a fee for each category.

(b) The Department shall establish and collect fees for approving asbestos management training courses and fees for renewing course approval annually to support the asbestos hazard management program. The fees for approving a training course shall not exceed one thousand five hundred dollars ($1,500) for each course. The annual renewal fees shall not exceed five hundred dollars ($500.00) for each course. Each category of a training course shall be subject to a separate fee for its initial approval and a separate fee for its annual renewal. (1989, c. 724, s. 1; 1993 (Reg. Sess., 1994), c. 686, s. 4.)

§ 130A-449. Asbestos containing material removal permits.

No person shall engage in asbestos abatement involving more than 35 cubic feet, 160 square feet, or 260 linear feet per job of asbestos containing material without an asbestos containing material removal permit issued by the Department. The Commission shall adopt rules governing such permits. Such rules may provide for exemption from the requirements of this section. (1989, c. 724, s. 1.)

§ 130A-450. Asbestos containing material removal permit fees.

The Department shall establish and collect an application fee for asbestos containing material removal permits to support the asbestos hazard management program. The fee shall not exceed one percent (1%) of the contracted price or twenty cents ($.20) per square foot or linear foot of asbestos containing material to be removed, whichever is greater. (1989, c. 724, s. 1.)

§ 130A-451. Commission to adopt rules.

For the protection of the public health, the Commission shall adopt rules to implement this Article, AHERA, and the asbestos NESHAP for renovations and demolitions. (1989, c. 724, s. 1; 1993 (Reg. Sess., 1994), c. 686, s. 5.)

§ 130A-452. Local air pollution control programs.

(a) The Department may authorize any local air pollution control program to adopt and enforce the asbestos NESHAP for demolition and renovation if the local air pollution control program is certified by the North Carolina Environmental Management Commission pursuant to G.S. 143-215.112. The Department shall authorize any local air pollution control program to adopt and enforce the asbestos NESHAP for demolition and renovation if the local air pollution control program was certified by the North Carolina Environmental Management Commission pursuant to G.S. 143-215.112 prior to October 1, 1994. A local air pollution control program shall continue to be authorized by the Department to enforce the asbestos NESHAP for demolition and renovation so long as the local air pollution control program maintains its certification under G.S. 143-215.112 and complies with any rules adopted by the Commission for Public Health pursuant to subsection (b) of this section. Any local air pollution control program authorized to adopt and enforce the asbestos NESHAP for demolition and renovation shall have the authority to enforce the asbestos NESHAP for demolition and renovation under G.S. 130A-18, 130A-22(b1), 130A-22(b2), and 130A-25. Judicial review of an administrative penalty assessed under G.S. 130-22(b1) and G.S. 130A-22(b2) shall be as provided in G.S. 143-215.112(d2)(1) and Article 4 of Chapter 150B of the General Statutes.

(b) The Commission for Public Health shall adopt rules regarding the authorization of local air pollution control programs to enforce the asbestos NESHAP for demolition and renovation. (1993 (Reg. Sess., 1994), c. 686, s. 7; 1995, c. 123, s. 6; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsections (a) and (b).

§ 130A-453: Reserved for future codification purposes.

Article 19A.

Lead-Based Paint Hazard Management Program.

§ 130A-453.01. Definitions.

Unless otherwise required by the context, the definitions set out in 40 Code of Federal Regulations § 745.223 (As set out in Vol. 61, No. 169, of the Federal Register, pages 45813 to 45815, 29 August 1996) apply throughout this Article. (1997-523, s. 1.)

Editor's Note. — Session Laws 1997-523, s. 3, provides that G.S. 130A-453.11, as enacted by this act, and section 3 of the act are effective when they become law. The remainder of the act becomes effective July 1, 1998 unless, as of that date, Subpart L of Part 745 of Title 40 of the Code of Federal Regulations (40 C.F.R. G.S. 745.220, et seq., as set out in the Federal Register of August 29, 1996) is scheduled to become effective later than September 1, 1998, in which case the remainder of the act becomes effective when Subpart L of Part 745 of Title 40 of the Code of Federal Regulations becomes effective. Subpart L of Part 745 of Title 40 of the Code of Federal Regulations became effective August 29, 1996, and G.S. 130A-453.01 to 130A-453.10 became effective July 1, 1998.

§ 130A-453.02. Purpose of Article.

(a) This Article is enacted to establish an authorized State program under section 404 of the Toxic Substances Control Act (15 U.S.C. § 2684), as enacted by Subtitle B, section 1021 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L. 102-550, 106 Stat. 3916), that will apply in this State in lieu of the corresponding federal program administered by the federal Environmental Protection Agency. This Article requires a person who performs an inspection, risk assessment, or abatement of a child-occupied facility or target housing to be certified and establishes the procedure and requirements for certification. It also requires a person who conducts an abatement of a child-occupied facility or target housing to obtain a permit for the abatement.

(b) This Article does not require the inspection, risk assessment, or abatement of a child-occupied facility or target housing under any circumstance. G.S. 130A-131.5 and the rules adopted to implement that section authorize the Department to order an abatement to eliminate a lead poisoning hazard. This Article does not expand or otherwise change that authority. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.03. Certification of individuals who perform inspections, risk assessments, or abatements.

(a) Requirement. — An individual shall not perform or offer to perform an inspection, risk assessment, or abatement of target housing or a child-occupied facility unless the individual is certified by the Department to perform the activity. Performance of an inspection, risk assessment, or abatement encompasses a range of activities. To ensure proper performance of all aspects of an inspection, risk assessment, or abatement, the certification requirement imposed on an individual applies to each activity. The categories of individual certification are inspector, risk-assessor, designer, supervisor, worker, and any other category required by federal law. The category of risk-assessor includes the category of inspector. Thus, a person who is certified as a risk-assessor is not required to be certified as an inspector. Otherwise, an individual who performs or offers to perform activities within the scope of more than one category must be certified in each category.

(b) Exemption. — The certification requirement imposed by this section does not apply to an individual who performs an abatement of a residential dwelling the person owns and occupies as a residence, unless the residential dwelling is occupied by a person or persons other than the owner or the owner's immediate family while an abatement is being performed, or a child residing in the dwelling has been identified as having an elevated blood lead level. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.04. Certification and other requirements of firms that perform inspections, risk assessments, or abatements.

A firm or other entity shall not perform or offer to perform an inspection, risk assessment, or abatement of target housing or a child-occupied facility unless the entity is certified by the Department as a firm that is qualified to perform the activity. An entity that performs an inspection, risk assessment, or abatement of target housing or a child-occupied facility shall not use an individual to perform the inspection, risk assessment, or abatement unless the individual is certified by the Department to perform the activity. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.05. Qualifications for certification of individuals and firms.

To be certified under this Article, a person must meet the qualification requirements set by the Commission. Qualification requirements include education, training, experience, the successful completion of an examination, and payment of any applicable fee. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.06. Renewal of certification.

A certification of an individual or a firm issued under this Article expires on the last day of the 12th month after the certification is issued. A certification may be renewed by paying the renewal fee and meeting any standards for renewal, such as refresher training, established by the Commission. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.07. Accreditation of training courses and training providers.

Completion of a training course on inspection, risk assessment, or abatement does not satisfy a training requirement that is a condition for certification under this Article unless both the course provider and the course have been accredited by the Department. The Commission shall establish the procedure and standards for a course provider and a course to be accredited. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.08. Certification and accreditation fee schedule.

(a) The Commission shall establish fees for the items listed in the table below. A fee for an item may not exceed the maximum amount set in the table. The fees for examination and certification apply to each category in which a person is examined for certification or is certified.

Item	Maximum Fee
Examination for certification	$75
Certification as worker	50
Certification in any category other than worker	150
Course provider accreditation	150
Initial course accreditation	2,000
Renewal course accreditation	750.

(b) Use. — The fees imposed under this section are departmental receipts and shall be used by the Department to administer this Article.

(c) Exemptions. — The examination and certification fees imposed under this section do not apply to governmental regulatory personnel who perform inspections, risk assessments, or abatements solely for the purpose of determining compliance with applicable statutes or rules. The course provider fees imposed under this section do not apply to the State, a unit of local government, or a nonprofit entity. The course accreditation fees imposed under this section do not apply to a course offered by the State, a unit of local government, or a nonprofit entity. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.09. Abatement permits.

(a) Requirement. — No person shall conduct an abatement of target housing or a child-occupied facility unless the person has obtained a permit for the abatement from the Department. The Commission shall establish the procedure for obtaining a permit.

(b) Permit Fee. — An applicant for an abatement permit must pay an application fee to the Department. The fee is two percent (2%) of the contracted price for the corrective action to be performed in the abatement, not to exceed five hundred dollars ($500.00). The fee imposed under this section is a departmental receipt and shall be used by the Department to administer this Article.

(c) Exemption. — An individual who owns a single-family dwelling, conducts an abatement on the dwelling, and will reside in the dwelling after the abatement is completed is not required to obtain a permit to conduct the abatement, unless the dwelling is occupied by a person or persons other than the owner or the owner's immediate family while the abatement is being performed, or a child residing in the building has been identified as having an elevated blood lead level. If a permit is required, an individual who performs an abatement of a residential dwelling that the individual owns and occupies as a residence is not required to pay a fee for the permit. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.10. Standards to ensure elimination of hazards; consumer information.

(a) Standards. — The Commission shall establish standards to ensure that inspections, risk assessments, and abatements performed under this Article result in the elimination of lead-based paint hazards. An inspection, risk assessment, or abatement performed under this Article must be performed in accordance with these standards.

(b) Information. — The Department shall prepare a fact sheet on abatement for distribution to consumers. The sheet shall list the various measures for abatement of a child-occupied facility or target housing and give the relative cost of each measure. A person who is certified under this Article shall give a copy of the sheet to a person for whom the certified person performs an abatement. (1997-523, s. 1.)

Editor's Note. — For effective date, see Editor's note under G.S. 130A-453.01.

§ 130A-453.11. Commission to adopt rules.

The Commission shall adopt rules to implement this Article. (1997-523, s. 1.)

§ 130A-454: Reserved for future codification purposes.

ARTICLE 20.

Occupational Health.

§ 130A-455. Reportable diseases, illnesses, and injuries.

The Commission shall adopt rules establishing a list of serious and preventable occupational injuries that occur while working on a farm, and serious and preventable occupational diseases and illnesses to be reported to the Department. Occupational diseases and illnesses are defined as those diseases and illnesses which result from exposure to a health hazard in the workplace. The Commission shall adopt rules establishing the specific information to be submitted when making a report required by this Article, time limits for reporting, and the form of the report. The rules adopted by the Commission shall avoid duplication of reporting and minimize the cost to the physicians, medical facilities, laboratories, or other persons reporting under this act. (1993, c. 486, s. 1.)

§ 130A-456. Physicians to report.

A physician licensed to practice medicine in this State who treats a person for an occupational injury that occurred while working on a farm or an occupational disease, illness, declared by the Commission to be reportable, shall report the information required by the Commission to the Department. (1993, c. 486, s. 1.)

§ 130A-457. Medical facilities to report.

A medical facility in which there is a patient who has an occupational injury that occurred while working on a farm, or an occupational disease, illness, declared by the Commission to be reportable, may report information specified by the Commission to the Department. (1993, c. 486, s. 1.)

§ 130A-458. Persons in charge of laboratories to report.

A person in charge of a laboratory providing diagnostic service in this State shall report to the Department laboratory findings related to occupational diseases and illnesses for which laboratory reporting is required by the Commission. (1993, c. 486, s. 1; 2001-28, s. 3.)

§ 130A-459. Immunity of persons who report.

A person who in good faith makes a report pursuant to the provisions of this Article shall be immune from any civil liability that might otherwise be incurred or imposed as a result of making the report. (1993, c. 486, s. 1.)

§ 130A-460. Report to Department of Labor.

(a) Each report to the Department pursuant to the Article shall be evaluated for its potential indication of an exposure to a health hazard. If an on-site visit is deemed necessary, a copy of the report for work sites for which the Department of Labor has jurisdiction for the enforcement of occupational health laws shall be forwarded to the Department of Labor. The Department of Labor and the Department may exchange information regarding specific workplaces and conditions and such information shall retain the same confidentiality provided by the originating agency.

(b) If the Department of Labor determines that an on-site visit is necessary for enforcement purposes, the Department of Labor shall inform the Department within 30 days of the receipt of the report, and a representative of the Department may participate in the visit. The Department shall not contact or otherwise notify any employer of a pending investigation prior to the determination by the Department of Labor regarding the necessity of an on-site visit and shall not give advance notice of a visit if one is necessary.

(c) Subsection (b) shall not apply to inspections conducted for the Industrial Commission pursuant to G.S. 97-76 and shall not affect the allocation of responsibilities set forth in G.S. 74-24.4(c). (1993, c. 486, s. 1.)

§§ 130A-461 through 130A-464: Reserved for future codification purposes.

ARTICLE 21.

Advance Health Care Directive Registry.

§ 130A-465. Advance Health Care Directive Registry establishment.

The Secretary of State shall establish and maintain a statewide, on-line, central registry for advance health care directives. The registry shall be accessible over the Internet through a site maintained by the Secretary of State. (2001-455, s. 1; 2001-513, s. 30(b).)

§ 130A-466. Filing requirements.

(a) A person may submit any of the following documents and the revocations of these documents to the Secretary of State for filing in the Advance Health Care Directive Registry established pursuant to this Article:

(1) A health care power of attorney under Article 3 of Chapter 32A of the General Statutes.

(2) A declaration of a desire for a natural death under Article 23 of Chapter 90 of the General Statutes.

(3) An advance instruction for mental health treatment under Part 2 of Article 3 of Chapter 122C of the General Statutes.
(4) A declaration of an anatomical gift under Part 3A of Article 16 of Chapter 130A of the General Statutes.

(b) Any document and any revocation of a document submitted for filing in the registry shall be notarized regardless of whether notarization is required for its validity. This subsection does not apply to a declaration of an anatomical gift described in subdivision (a)(4) of this section.

(c) The document may be submitted for filing only by the person who executed the document.

(d) The person who submits the document shall supply a return address.

(e) The document shall be accompanied by any fee required by this Article. (2001-455, s. 1; 2001-513, s. 30(b); 2003-70, s. 1; 2007-538, s. 10.)

Editor's Note. — Session Laws 2007-538, s. 11, provides: "The North Carolina Department of Transportation, Division of Motor Vehicles, in cooperation with the License to Give Trust Fund Commission, shall use available grant-in-aid funds from the State and federal governments and other sources to enhance online access such that donors and prospective donors may update, amend, or revoke information on the donor's or prospective donor's drivers license or donor card."

Effect of Amendments. — Session Laws 2007-538, s. 10, effective October 1, 2007, substituted "a declaration of an anatomical gift" for "the document" in the last sentence of subsection (b).

§ 130A-467. Validity of unregistered documents.

Failure to register a document with the registry maintained by the Secretary of State pursuant to this Article shall not affect the document's validity. Failure to notify the Secretary of State of the revocation of a document filed with the registry shall not affect the validity of a revocation that meets the statutory requirements for the revocation to be valid. (2001-455, s. 1; 2001-513, s. 30(b).)

§ 130A-468. Filing of documents with the registry.

(a) When the Secretary of State receives a document that may be filed with the registry pursuant to this Article, the Secretary shall create a digital reproduction of that document and enter the reproduced document into the registry database. The Secretary is not required to review a document to ensure that it complies with the particular statutory requirements applicable to the document. Each document entered into the registry database shall be assigned a unique file number and password.

(b) Upon entering the reproduced document into the registry database, the Secretary shall return the original document and a wallet-size card containing the document's file number and password to the person who submitted the document.

(c) When the Secretary of State receives a revocation of a document that is filed with the registry and that document's file number and password, or a request to remove that document from the registry without its revocation, the Secretary shall delete that document from the registry database.

(d) The Secretary of State's entry of a document into, or removal of a document from, the registry database does not do any of the following:
(1) Affect the validity of the document in whole or in part.
(2) Relate to the accuracy of information contained in the document.
(3) Create a presumption regarding the validity of the document, regarding the accuracy of information contained in the document, or that the statutory requirements for the document have been met. (2001-455, s. 1; 2001-513, s. 30(b); 2007-502, s. 16.)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 16, effective October 1, 2007, inserted "or a request to remove that document from the registry without its revocation" in subsection (c); inserted "or removal of a document from" in subsection (d).

§ 130A-469. Disclosure of information contained in the registry.

The registry shall be accessible only over the Internet. A document filed in the registry shall be accessible only if a person attempting to access the document enters both the file number and password of the document. Documents filed in the registry, file numbers, passwords, and any other information maintained by the Secretary of State under this Article shall not be subject to disclosure pursuant to Chapter 132 of the General Statutes. (2001-455, s. 1; 2001-513, s. 30(b).)

§ 130A-470. Fees for using the registry; other funds for the registry.

(a) The Secretary of State shall charge a fee of ten dollars ($10.00) for filing a document, other than a revocation, with the registry. The Secretary of State shall not charge a fee for filing a revocation with the registry. The fee shall be applied to the cost of maintaining the registry and to promoting public education and awareness of the registry.

(b) The Secretary of State, on behalf of the State, may accept gifts, donations, bequests, and other forms of voluntary contributions; may apply for grants from public and private sources; and may expend funds received under this subsection for the purpose of promoting public education and awareness of the registry.

(c) All fees, funds, and gifts received pursuant to this section shall be subject to audit by the State Auditor and shall be expended in conformity with Chapter 143C of the General Statutes. (2001-455, s. 1; 2001-513, s. 30(b); 2006-203, s. 70.)

Editor's Note. — Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws

2006-203, s. 70, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "Chapter 143C" for "Article 1 of Chapter 143" in subsection (c).

§ 130A-471. Limitation of liability.

The State of North Carolina, the Secretary of State, and any agent or person employed by the Secretary of State shall not be liable for any claims or demands arising out of the administration or operation of the registry authorized by this Article, except for acts of gross negligence, willful misconduct, or intentional wrongdoing. (2001-455, s. 1; 2001-513, s. 30(b).)

§§ 130A-472 through 130A-474: Reserved for future codification purposes.

Article 22.

A Terrorist Incident Using Nuclear, Biological, or Chemical Agents.

§ 130A-475. Suspected terrorist attack.

(a) If the State Health Director reasonably suspects that a public health threat may exist and that the threat may have been caused by a terrorist incident using nuclear, biological, or chemical agents, the State Health Director is authorized to order any of the following:

(1) Require any person or animal to submit to examinations and tests to determine possible exposure to the nuclear, biological, or chemical agents.

(2) Test any real or personal property necessary to determine the presence of nuclear, biological, or chemical agents.

(3) Evacuate or close any real property, including any building, structure, or land when necessary to investigate suspected contamination of the property. The period of closure during an investigation shall not exceed 10 calendar days. If the State Health Director determines that a longer period of closure is necessary to complete the investigation, the Director may institute an action in superior court to order the property to remain closed until the investigation is completed.

(4) Limit the freedom of movement or action of a person or animal that is contaminated with, or reasonably suspected of being contaminated with, a biological, chemical or nuclear agent that may be conveyed to other persons or animals.

(5) Limit access by any person or animal to an area or facility that is housing persons or animals whose movement or action has been limited under subdivision (4) of this subsection or to an area or facility that is contaminated with, or reasonably suspected of being contaminated with, a biological, chemical or nuclear agent that may be conveyed to other persons or animals. Nothing in this subdivision shall be construed to restrict the access of authorized health care, law enforcement, or emergency medical services personnel to quarantine or isolation premises as necessary in conducting their duties.

(b) The authority under subsection (a) of this section shall be exercised only when and so long as a public health threat may exist, all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists. Before applying the authority under subdivision (4) or (5) of subsection (a) of this section to livestock or poultry for the purpose of preventing the direct or indirect conveyance of a biological, chemical or nuclear agent to persons, the State Health Director shall consult with the State Veterinarian in the Department of Agriculture and Consumer Services.

The period of limited freedom of movement or access under subdivisions (4) and (5) of subsection (a) of this section shall not exceed 30 calendar days. Any person substantially affected by that limitation may institute, in superior court in Wake County or in the county in which the limitation is imposed, an action to review the limitation. The State Health Director shall give the persons known by the State Health Director to be substantially affected by the limitation reasonable notice under the circumstances of the right to institute an action to review the limitation. If a person or a person's representative requests a hearing, the hearing shall be held within 72 hours of the filing of the request, excluding Saturdays and Sundays. The person substantially affected by that limitation is entitled to be represented by counsel of the person's own choice or if the person is indigent, the person shall be represented by counsel appointed in accordance with Article 36 of Chapter 7A of the General Statutes and the rules adopted by the Office of Indigent Defense Services. The court shall reduce or terminate the limitation unless it determines, by the preponderance of the evidence, that the limitation is reasonably necessary to prevent or limit the conveyance of biological, chemical or nuclear agents to others, and may apply such conditions to the limitation as the court deems reasonable and necessary.

If the State Health Director determines that a 30-calendar-day limitation on freedom of movement or access is not adequate to protect the public health, the State Health Director must institute in superior court in the county in which the limitation is imposed, an action to obtain an order extending the period limiting the freedom of movement or access. If the person substantially affected by the limitation has already instituted an action in superior court in Wake County, the State Health Director must institute the action in superior court in Wake County or as a counterclaim in the pending case. The court shall continue the limitation for a period not to exceed 30 days, subject to conditions it deems reasonable and necessary, if it determines by the preponderance of the evidence, that additional limitation is reasonably necessary to prevent or limit the conveyance of biological, chemical, or nuclear agents to others. The court order shall specify the period of time the limitation is to be continued and shall provide for automatic termination of the order upon written determination by the State Health Director or local health director that the limitation on freedom of movement or access is no longer necessary to protect the public health. In addition, where the petitioner can prove by a preponderance of the evidence that the limitation on freedom of movement or access was not or is no longer needed for protection of the public health, the person so limited may move the trial court to reconsider its order extending the limitation on freedom of movement or access before the time for the order otherwise expires and may seek immediate or expedited termination of the order. Before the expiration of an order issued under this section, the State Health Director may move to continue the order for additional periods not to exceed 30 days each.

(c) If the State Health Director reasonably suspects that there exists a public health threat that may have been caused by a terrorist incident using nuclear, biological, or chemical agents, the State Health Director shall notify the Governor and the Secretary of Crime Control and Public Safety. If the Secretary of Crime Control and Public Safety reasonably suspects that a public health threat may exist and that the threat may have been caused by a terrorist incident using nuclear, biological, or chemical agents, the Secretary shall notify the Governor and the State Health Director.

(d) For the purpose of this Article, the term "public health threat" means a situation that is likely to cause an immediate risk to human life, an immediate risk of serious physical injury or illness, or an immediate risk of serious adverse health effects.

(e) Nothing in this section shall limit any authority otherwise granted to local or State public health officials under this Chapter. (2002-179, s. 1; 2004-80, s. 3; 2004-199, s. 33.)

Cross References. — As to detention of an individual arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145, see G.S. 15A-401(b)(4), 15A-534.5. As to entitlement to counsel of indigent person in a proceeding involving limitation of freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145, see G.S. 7A-451(a)(17).

§ 130A-476. Access to health information.

(a) Notwithstanding any other provision of law, a health care provider, a person in charge of a health care facility, or a unit of State or local government may report to the State Health Director or a local health director any events that may indicate the existence of a case or outbreak of an illness, condition, or health hazard that may have been caused by a terrorist incident using nuclear, biological, or chemical agents. Events that may be reported include unusual types or numbers of symptoms or illnesses presented to the provider, unusual trends in health care visits, or unusual trends in prescriptions or purchases of over-the-counter pharmaceuticals. To the extent practicable, a person who makes a report under this subsection shall not disclose personally identifiable information. A person disclosing or not disclosing information pursuant to this subsection is immune from any civil or criminal liability that might otherwise be incurred or imposed based on the disclosure or lack of disclosure provided that the health care provider was acting in good faith and without malice. In any proceeding involving liability, good faith and lack of malice are presumed. Notwithstanding the foregoing, if a health care provider or unit of State or local government willfully does not disclose information pursuant to this subsection, the immunity from civil or criminal liability provided under this subsection shall not be available if the person had actual knowledge that a condition or illness was caused by use of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21(c).

(b) The State Health Director may issue a temporary order requiring health care providers to report symptoms, diseases, conditions, trends in use of health care services, or other health-related information when necessary to conduct a public health investigation or surveillance of an illness, condition, or health hazard that may have been caused by a terrorist incident using nuclear, biological, or chemical agents. The order shall specify which health care providers must report, what information is to be reported, and the period of time for which reporting is required. The period of time for which reporting is required pursuant to a temporary order shall not exceed 90 days. The Commission may adopt rules to continue the reporting requirement when necessary to protect the public health.

(c) Health care providers and persons in charge of health care facilities or laboratories shall, upon request and proper identification, permit the State Health Director or a local health director to examine, review, and obtain a copy of records containing confidential or protected health information, or a summary of pertinent portions of those records, (i) that pertain to a report authorized by subsection (a) or required by subsection (b) of this section, or (ii) that, in the opinion of the State Health Director or local health director, are necessary for an investigation of a case or outbreak of an illness, condition, or health hazard that may have been caused by a terrorist incident using nuclear, biological, or chemical agents.

(d) A person who makes a report pursuant to subsection (b) of this section or permits examination, review, or copying of medical records pursuant to subsection (c) of this section is immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of complying with those subsections.

(e) Confidential or protected health information received by the State Health Director or a local health director pursuant to this section shall be confidential and shall not be released, except when the release is:

(1) Made pursuant to any other provision of law;

(2) To another federal, state, or local public health agency for the purpose of preventing or controlling a public health threat; or

(3) To a court or law enforcement official or law enforcement officer for the purpose of enforcing the provisions of this Chapter or for the purpose of investigating a terrorist incident using nuclear, biological, or chemical agents. A court or law enforcement official or law enforcement officer who receives the information shall not disclose it further, except (i) when necessary to conduct an investigation of a terrorist incident using nuclear, biological, or chemical agents, or (ii) when the State Health Director or a local health director seeks the assistance of the court or law enforcement official or law enforcement officer in preventing or controlling the public health threat and expressly authorizes the disclosure as necessary for that purpose.

(f) Repealed by Session Laws 2004-124, s. 10.34(a), effective January 1, 2005.

(g) In this section the following terms shall include:

(1) "Health care provider" includes a physician licensed to practice medicine in North Carolina or a person who is licensed, certified, or credentialed to practice or provide health care services, including, but not limited to, pharmacists, dentists, physician assistants, registered nurses, licensed practical nurses, advanced practice nurses, chiropractors, respiratory care therapists, and emergency medical technicians; and

(2) "Health care facility" includes hospitals, skilled nursing facilities, intermediate care facilities, psychiatric facilities, rehabilitation facilities, home health agencies, ambulatory surgical facilities, or any other health care related facility, whether publicly or privately owned. (2002-179, s. 1; 2004-80, s. 7; 2004-124, s. 10.34(a).)

§ 130A-477. Abatement of public health threat.

If it is determined that a public health threat may exist because of the contamination of property caused by a terrorist incident using nuclear, biological, or chemical agents, the State Health Director may order any action to abate that public health threat. To the extent that any owner, lessee, operator, or other person in control of the property is innocent of culpability in the creation of the public health threat, that person shall not be responsible for the costs of abating the public health threat. (2002-179, s. 1.)

§ 130A-478. Tort liability.

Article 31 of Chapter 143 applies to negligent acts committed by any officer, employee, involuntary servant or agent of the State acting pursuant to this Article. (2002-179, s. 1.)

§ 130A-479. Biological agents registry; rules; penalties.

(a) The Department shall establish and administer a program for the registration of biological agents. The biological agents registry shall identify the biological agents possessed and maintained by any person in this State and shall contain other information required under rules adopted by the Commission.

(b) The following definitions apply in this section:

(1) "Biological agent" means:

a. Any select agent that is a microorganism, virus, bacterium, fungus, rickettsia, or toxin listed in Appendix A of Part 72 of Title 42 of the Code of Federal Regulations.

b. Any genetically modified microorganisms or genetic elements from an organism on Appendix A of Part 72 of Title 42 of the Code of Federal Regulations, shown to produce or encode for a factor associated with a disease.

c. Any genetically modified microorganisms or genetic elements that contain nucleic acid sequences coding for any of the toxins listed on Appendix A of Part 72 of Title 42 of the Code of Federal Regulations, or their toxic submits.

(2) "Person" means any association, business, corporation, facility, firm, individual, institution of higher education, organization, partnership, society, State agency, or other legal entity.

(c) The Commission shall adopt rules for the implementation of the registry program, as follows:

(1) Determining and listing the biological agents required to be reported under this section.

(2) Designating persons required to make reports and specific information required to be reported including time limits for reporting, form of reports, and to whom reports shall be submitted.

(3) Providing for the release of information in the registry to State and federal law enforcement agencies and the United States Centers for Disease Control and Prevention pursuant to a communicable disease investigation commenced or conducted by the Department, the Commission, or other state or federal law enforcement agency having investigatory authority, or in connection with any investigation involving release, theft, or loss of biological agents.

(4) Establishing a system of safeguards that requires persons possessing and maintaining biological agents subject to this section to comply with the same federal standards that apply to persons registered to possess the same agents under federal law.

(5) Establishing a process for persons that possess and maintain biological agents to alert appropriate authorities of unauthorized possession or attempted possession of biological agents. The rules shall designate appropriate authorities for receipt of alerts from these persons.

(d) Any person that possesses and maintains any biological agent required to be reported under this section shall report to the Department the information required by the Commission for inclusion in the biological agent registry.

(e) Except as otherwise provided in this section, information prepared for or maintained in the registry under this section shall be confidential and shall not be a public record under G.S. 132-1. The Department may, in accordance with rules adopted by the Commission, release information contained in the biological agent registry for the purpose of conducting or aiding in a communicable disease investigation. The Department shall cooperate with and may share information contained in the biological agent registry with the United States Centers for Disease Control and Prevention, and state and federal law enforcement agencies in any investigation involving the release, theft, or loss of a biological agent required to be reported under this section. Release of information from the registry as authorized under this subsection shall not render the information released a public record under G.S. 132-1. Release of information from the registry as authorized under this subsection also shall not render the information prepared for or maintained in the registry a public record under G.S. 132-1.

(f) The Department shall impose a civil penalty for a willful or knowing violation of this section in the amount of up to one thousand dollars ($1,000). Each day of a continuing violation shall be a separate offense. Any person wishing to contest a penalty shall be entitled to an administrative hearing in accordance with Chapter 150B of the General Statutes. (2001-469, s. 1; 2002-179, s. 2(a).)

Editor's Note. — Session Laws 2002-179, s. 2(a), effective October 1, 2002, recodified former G.S. 130A-149 as G.S. 130A-479.

§ 130A-480. Emergency department data reporting.

(a) For the purpose of ensuring the protection of the public health, the State Health Director shall develop a syndromic surveillance program for hospital emergency departments in order to detect and investigate public health threats that may result from (i) a terrorist incident using nuclear, biological, or chemical agents or (ii) an epidemic or infectious, communicable, or other disease. The State Health Director shall specify the data to be reported by hospitals pursuant to this program, subject to the following:

(1) Each hospital shall submit electronically available emergency department data as specified by rule by the Commission. The Commission, in consultation with hospitals, shall establish by rule a schedule for the implementation of full electronic reporting capability of all data elements by all hospitals. The schedule shall take into consideration the number of data elements already reported by the hospital, the hospital's capacity to electronically maintain the remaining elements, available funding, and other relevant factors.

(2) None of the following data for patients or their relatives, employers, or household members may be collected by the State Health Director: names; postal or street address information, other than town or city, county, state, and the first five digits of the zip code; geocode information; telephone numbers; fax numbers; electronic mail addresses; social security numbers; health plan beneficiary numbers; account numbers; certificate or license numbers; vehicle identifiers and serial numbers, including license plate numbers; device identifiers and serial numbers; web universal resource locators (URLs); Internet protocol (IP) address numbers; biometric identifiers, including finger and voice prints; and full face photographic images and any comparable images.

(b) The following are not public records under Chapter 132 of the General Statutes and are privileged and confidential:

(1) Data reported to the State Health Director pursuant to this section.

(2) Data collected or maintained by any entity with whom the State Health Director contracts for the reporting, collection, or analysis of data pursuant to this section.

The State Health Director shall maintain the confidentiality of the data reported pursuant to this section and shall ensure that adequate measures are taken to provide system security for all data and information. The State Health Director may share data with local health departments and the Centers for Disease Control and Prevention (CDC) for public health purposes. Local health departments are bound by the confidentiality provisions of this section. The Department shall enter into an agreement with the CDC to ensure that the CDC complies with the confidentiality provisions of this section. The State Health Director shall not allow information that it receives pursuant to this section to be used for commercial purposes and shall not release data except as authorized by other provisions of law.

(c) A person is immune from liability for actions arising from the required submission of data under this Article.

(d) For purposes of this section, "hospital" means a hospital, as defined in G.S. 131E-214.1(3), that operates an emergency room on a 24-hour basis. The term does not include a psychiatric hospital that operates an emergency room.

(e) Administrative emergency department data shall be reported by hospitals under Article 11A of Chapter 131E of the General Statutes. (2004-124, s. 10.34(b); 2006-264, s. 64(a); 2007-8, s. 1.)

Effect of Amendments. — Session Laws 2006-264, s. 64(a), effective August 27, 2006, substituted "that operates an emergency room" for "subject to Article 2 of Chapter 122C of the General Statutes" at the end of subsection (d).

Session Laws 2007-8, s. 1, effective April 4, 2007, in the second paragraph of subsection (b), substituted "and the Centers for Disease Control and Prevention (CDC) for public health purposes. Local" for "for public health purposes, and the local," and added the fourth sentence.

§ 130A-481. Food defense.

The Department of Agriculture and Consumer Services, Department of Environment and Natural Resources, and Department of Health and Human Services shall jointly develop a plan to protect the food supply from intentional contamination. The plan shall address protection of the food supply from production to consumption, including, but not limited to, the protection of plants, crops, and livestock. (2006-80, s. 2.)

Editor's Note. — Session Laws 2006-80, s. 3, made this section effective July 10, 2006.

§§ 130A-482 through 130A-484: Reserved for future codification purposes.

§ 130A-485. Vaccination program established; definitions.

(a) The Department and local health departments shall offer a vaccination program for first responders who may be exposed to infectious diseases when deployed to disaster locations. The vaccinations shall include, but are not limited to, hepatitis A vaccination, hepatitis B vaccination, diphtheria-tetanus vaccination, influenza vaccination, pneumococcal vaccination, and other vaccinations when recommended by the United States Public Health Service and in accordance with Federal Emergency Management Directors Policy. Immune globulin will be made available when necessary, as determined by the State Health Director.

(b) Participation in the vaccination program is voluntary by the first responders, except for first responders who are classified as having "occupational exposure" to bloodborne pathogens as defined by the Occupational Safety and Health Administration Standard contained at 29 C.F.R. § 1910.10300 who shall be required to take the designated vaccinations or otherwise required by law.

(c) Nothing in this section shall require first responders, except first responders for whom the vaccination program is not voluntary as set forth in subsection (b) of this section, who present a written statement from a licensed physician indicating that a vaccine is medically contraindicated for the first responder or who sign a written statement that the administration of a vaccination conflicts with the first responder's religious tenets, to receive a vaccine.

(d) In the event of a vaccine shortage, the State Public Health Director, in consultation with the Centers for Disease Control and Prevention, shall give priority for vaccination to first responders deployed to a disaster location.

(e) The Department shall notify first responders of the availability of the vaccination program and shall provide educational materials on ways to prevent exposure to infectious diseases.

(f) As used in this section, unless the context clearly requires otherwise, the term:

(1) "Bioterrorism" means the intentional use of any microorganism, virus, infectious substance, biological product, or biological agent as defined in G.S. 130A-479 that may be engineered as a result of biotechnology or any naturally occurring or bioengineered component of any microorganism, virus, infectious substance, or biological product to cause or attempt to cause death, disease, or other biological malfunction in any living organism.

(2) "Disaster location" means any geographical location where a bioterrorism attack, terrorist incident, catastrophic or natural disaster, or emergency occurs.

(3) "First responders" means State and local law enforcement personnel, fire department personnel, and emergency medical personnel who will be deployed to bioterrorism attacks, terrorist attacks, catastrophic or natural disasters, or emergencies. (2003-227, s. 1.)

Editor's Note. — Session Laws 2003-227, s. 2, provides: "Nothing in this act obligates the General Assembly to appropriate State funds for the implementation of this act. The Department of Health and Human Services shall work with local employers to access, when available, federal funds to implement a vaccination program for first responders as enacted in Section 1 of this act."

§§ 130A-486 through 130A-490: Reserved for future codification purposes.

Article 23.

Smoking in Public Places.

Part 1. Smoking in State Government Buildings.

§ 130A-491. Legislative intent.

It is the intent of the General Assembly to protect the health of individuals working in or visiting State government buildings from the risks related to secondhand smoke. (2007-193, s. 1.)

Editor's Note. — Session Laws 2007-193, s. 1, made this Article effective January 1, 2008.

Session Laws 2007-193, provides, in the preamble: "Whereas, secondhand smoke has been proven to cause cancer, heart disease, and asthma in both smokers and nonsmokers; and

"Whereas, the 2006 Surgeon General's Report on the health consequences of involuntary exposure to tobacco smoke states that the scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke; and

"Whereas, the 2006 Surgeon General's Report documents that separating smokers from nonsmokers, cleaning the air, and ventilating smoke cannot eliminate exposure to secondhand smoke; and

"Whereas, the Centers for Disease Control and Prevention (CDC) advises that all individuals with coronary heart disease or known risk factors for coronary heart disease should avoid all indoor environments that permit smoking; and

"Whereas, exposure to secondhand smoke is costly, costing the nation $10 billion per year, $5 billion in direct medical care costs, and $5 billion in indirect costs according to the 2005 Society of Actuaries; and

"Whereas, the vast majority of North Carolinians (77.4% of adults) do not smoke; and

"Whereas, the 2006 Surgeon General's Report documents that eliminating indoor smoking fully protects nonsmokers from exposure to secondhand smoke; and

"Whereas, North Carolina's General Assembly buildings are smoke-free; Now, therefore, The General Assembly of North Carolina enacts:"

§ 130A-492. Definitions.

The following definitions apply in this Article:

(1) "Smoking". — The use or possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product.

(2) "State government". — The political unit for the State of North Carolina, including all agencies of the executive, judicial, and legislative branches of government.

(3) "State government building". — A building owned, leased as lessor, or the area leased as lessee and occupied by State government. (2007-193, s. 1.)

§ 130A-493. Smoking in State government buildings prohibited.

(a) Notwithstanding Article 64 of Chapter 143 of the General Statutes pertaining to State-controlled buildings, smoking is prohibited inside State government buildings as provided in this section. As to smoking rooms in residence halls that were permitted by G.S. 143-597(a)(6), this Article becomes effective beginning with the 2008-2009 academic year.

(b) Smoking is permitted inside State government buildings that are used for medical or scientific research to the extent that smoking is an integral part of the research. Smoking permitted under this subsection shall be confined to the area where the research is being conducted.

(c) The individual in charge of the State government building or the individual's designee shall post signs in conspicuous areas of the building. The signs shall state that "smoking is prohibited" and may include the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it. In addition, in any State psychiatric hospital, the person who owns, manages, operates, or otherwise controls the hospital shall:

(1) Direct any person who is smoking inside the facility to extinguish the lighted smoking product.

(2) Provide written notice to individuals upon admittance that smoking is prohibited inside the facility and obtain the signature of the individual or the individual's representative acknowledging receipt of the notice.

(d) Notwithstanding G.S. 130A-25, a violation of Article 23 of this Chapter shall not be punishable as a criminal violation. (2007-193, s. 1; 2007-459, s. 4.1.)

Editor's Note. — Session Laws 2007-459, s. 5, provides, in part: "G.S. 130A-493(c)(2), as enacted by this act, applies to individuals admitted to the hospital on or after January 1, 2008."

Effect of Amendments. — Session Laws 2007-459, s. 4.1, effective October 1, 2007, and applicable to violations committed on or after that date, added the last sentence in the introductory paragraph of subsection (c); and added subdivisions (c)(1) and (c)(2).

§ 130A-494. Other prohibitions.

Nothing in this Article repeals any other law prohibiting smoking, nor does it limit any law allowing regulation or prohibition of smoking on walkways or on the grounds of buildings. (2007-193, ss. 1, 3.2.)

Editor's Note. — Session Laws 2007-193, s. 1, enacted this section as G.S. 130A-493.1. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2007-193, s. 3.2, amends the section, effective January 1, 2008, provided that Senate Bill 862, 2007 Regular Session becomes law. Senate Bill 862, 2007 Regular Session, was enacted as Session Laws 2007-114.

Effect of Amendments. — Session Laws 2007-193, s. 3.2, effective January 1, 2008, inserted "walkways or on" near the end of the section.

§ 130A-495. Rules.

The Commission shall adopt rules to implement this Part. (2007-193, s. 1.)

Editor's Note. — Session Laws 2007-193, s. 1, enacted this section as G.S. 130A-494. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 130A-496, 130A-497: Reserved for future codification purposes.

Part 2. Local Government Regulation of Smoking.

§ 130A-498. Local governments may restrict smoking in public places.

(a) Notwithstanding any other provision of Article 64 of Chapter 143 of the General Statutes to the contrary, a local government may adopt an ordinance, law, or rule restricting smoking in accordance with subsection (b) of this section.

(b) Any local ordinance, law, or rule authorized under this section may restrict smoking only in:

(1) Buildings owned, leased as lessor, or the area leased as lessee and occupied by local government;

(2) Building and grounds wherein local health departments and departments of social services are housed;

(3) **(Repealed effective August 1, 2008)** Public schools, school facilities, on school campuses, at school-related or school-sponsored events, in or on other school property, public school buses, or at day care centers. Such restrictions may be imposed by local school boards having ownership or jurisdiction over the building, campus, event, property, or vehicle; and

(4) Any place on a public transportation vehicle owned or leased by local government and used by the public.

(c) As used in this Part, "local government" means any local political subdivision of this State, any airport authority, or any authority or body created by any ordinance, joint resolution, or rules of any such entity.

(d) As used in this Part, 'grounds' means the area located within 50 linear feet of a building wherein a local health department or a local department of social services is housed.

(e) A county ordinance adopted under this section is subject to the provisions of G.S. 153A-122. (2007-193, ss. 2, 3.1; 2007-484, s. 31.7.)

Editor's Note. — Session Laws 2007-193, s. 2, made this Part effective January 1, 2008.

Session Laws 2007-193, s. 3.1, repeals G.S. 130A-498(b)(3), effective August 1, 2008, provided that Senate Bill 1086, 2007 Regular Session, becomes law. Senate Bill 1086, 2007 Regular Session, was enacted as S.L. 2007-236.

Effect of Amendments. — Session Laws 2007-193, s. 3.1, effective August 1, 2008, repeals subdivision (b)(3), regarding smoking restrictions at schools.

Session Laws 2007-484, s. 31.7, effective August 30, 2007, inserted "joint resolution" in subsection (c).

Chapter 130B.

Hazardous Waste Management Commission.

§§ **130B-1 through 130B-24:** Repealed by Session Laws 2001-474, s. 1, effective November 29, 2001.

Chapter 131.

Public Hospitals.

§§ 131-1 through 131-188: Repealed by Session Laws 1983, c. 775, s. 1.

Cross References. — As to health care facilities and services, see now Chapter 131E.

Editor's Note. — Session Laws 1983, c. 775, s. 3, provides: "Sec. 3. Notwithstanding the foregoing, any unit of government, or units of government acting jointly, that as of December 31, 1983, is operating a hospital or hospitals pursuant to Articles 2 or 2A of Chapter 131 of the General Statutes may continue to operate pursuant to the provisions of those Articles as they existed on December 31, 1983, to the extent that those Articles are inconsistent with this Chapter. However, a unit of government that has been operating a hospital pursuant to those Articles may choose to continue operations under the provisions of one of the Parts of Article 2 of this Chapter by adopting an appropriate resolution and by satisfying all other requirements of the relevant Part of Article 2 of this Chapter."

Session Laws 1989, c. 283, effective June 12, 1989, amends G.S. 131-7. Session Laws 1989, c. 283, ss. 1 and 2 provide:

"Section 1. G.S. 131-7, as it applies to hospitals continuing to operate under Article 2, Chapter 131 of the North Carolina General Statutes pursuant to Section 3, Chapter 775 of the 1983 Session Laws, is amended by rewriting the first sentence to read: 'Should a majority of the qualified voters upon the question be in favor of establishing such county, township, or town hospital, the governing body shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, township or town, who shall constitute a board of trustees for such public hospital.'

"Sec. 2. G.S. 131-7 is amended by deleting the phrase 'No practicing physician may serve as a trustee.', and substituting 'One practicing physician may serve as a trustee'."

Session Laws 1999-377, s. 1, effective August 4, 1999, amends G.S. 131-4 as it applies to hospitals continuing to operate under Article 2, Chapter 131 of the North Carolina General Statutes pursuant to Section 3, Chapter 775 of the 1983 Session Laws, by adding a new subdivision to read:

"(4) Extension of Tax Levy. Prior to or following the expiration of the tax levy specified in subdivision (3) of this section, a new petition may be presented to the governing body of any county in which a township is located, signed by 200 resident freeholders of such township asking that an annual tax continue to be levied for the maintenance, operation, and improvement of the public hospital, after the expiration of the tax levy specified in subdivision (3). The procedure for submitting the petition and holding an election on the issue of continuing the tax levy shall be the same as the procedure for the petition and election for establishment of the initial tax levy, provided that the requirement that 150 of the 200 petitioners not be residents of the city, town, or village where the hospital is to be located shall not apply. The tax to be levied under such new election shall not exceed one twenty-fifth of one cent (1/25 of 1 cent) on the dollar ($1.00) for a period of time not exceeding 30 years and shall be for the issue of county or township bonds to provide funds for the maintenance and improvement of the public hospital."

Session Laws 1999-377, s. 2, amends G.S. 131-5 by adding a sentence providing that the procedure for submission of the issue of continuation of the tax levy is to be the same as set forth previously in G.S. 131-5, so long as the tax is not to exceed one twenty-fifth of one cent on the dollar, and by providing the statement to be used on ballots when the issue is submitted.

Session Laws 1999-377, s. 3, provides that all hospitals which continue to operate under Article 2 of Chapter 131, of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws, shall, in addition to the powers granted in that article have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

Session Laws 1999-377, s. 4, provides that any hospital continuing to operate under Article 2 of Chapter 131, pursuant to Section 3 of Chapter 775 of the 1983 Session Laws, shall be considered a "public hospital" within the meaning of G.S. 159-39 and a "unit of local government" within the meaning of G.S. 160A-20.

Chapter 131A.

Health Care Facilities Finance Act.

Sec.
131A-1. Short title.
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§ 131A-1. Short title.

This Chapter shall be known, and may be cited, as the "Health Care Facilities Finance Act." (1975, c. 766, s. 1.)

Editor's Note. — Session Laws 1975, c. 766, s. 3, provided that the act would become effective upon certification by the State Board of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with the transactions of the type contemplated by the act had been approved. Such an amendment was proposed by Session Laws 1975, c. 641, and adopted by vote of the People at the election held March 23, 1976. See N.C. Const., Art. V, § 8.

CASE NOTES

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981).

§ 131A-2. Legislative findings.

It is hereby declared to be the policy of the State of North Carolina to promote the public health and welfare by providing means for financing, refinancing, acquiring, constructing, equipping and providing of health care facilities to serve the people of the State and to make accessible to them modern and efficient health care facilities.

The General Assembly hereby finds and declares that:

(1) There is a need to overcome existing and anticipated physical and technical obsolescence of existing health care facilities and to provide additional modern and efficient health care facilities in the State; and

(2) Unless measures are adopted to alleviate such need, the shortage of such facilities will become increasingly more urgent and serious; and

(3) In order to meet such shortage and thereby promote the public health and welfare of the people of the State, it is necessary for the State to assist in the providing of adequate modern and efficient health care facilities in the State so that health and hospital care and services may be expanded, improved and fostered to the fullest extent practicable.

The General Assembly hereby further finds and declares that the financing, refinancing, acquiring, constructing, equipping and providing of health care facilities are public uses and public purposes and that enactment of this Chapter is necessary and proper for effectuating the purposes hereof. (1975, c. 766, s. 1; 1993, c. 553, s. 42.)

§ 131A-3. Definitions.

As used or referred to in this Chapter, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

(1) "Bonds" or "notes" means the revenue bonds or bond anticipation notes, respectively, authorized to be issued by the Commission under this Chapter;

(2) "Commission" means the North Carolina Medical Care Commission, created by Part 10 of Article 3 of Chapter 143B of the General Statutes, or, should said Commission be abolished or otherwise divested of its functions under this Chapter, the public body succeeding it in its principal functions, or upon which are conferred by law the rights, powers and duties given by this Chapter to the Commission;

(3) "Cost" as applied to any health care facilities means the cost of construction or acquisition; the cost of acquisition of property, including rights in land and other property, both real and personal and improved and unimproved; the cost of demolishing, removing or relocating any buildings or structures on land so acquired, including the cost of acquiring any land to which such buildings or structures may be moved or relocated; the cost of all machinery, fixed and movable equipment and furnishings; financing charges, interest prior to and during construction and, if deemed advisable by the Commission, for a period not exceeding two years after the estimated date of completion of construction, the cost of engineering and architectural surveys, plans and specifications; the cost of consulting and legal services and other expenses necessary or incident to determining the feasibility or practicability of constructing or acquiring such health care facilities; the cost of administrative and other expenses necessary or incident to the construction or acquisition of such health care facilities, and the financing of the construction or acquisition thereof, including reasonable provision for working capital and a reserve for debt service; the cost of reimbursing any public or nonprofit agency for any payments made for any cost described above or the refinancing of any cost described above, provided that no payment shall be reimbursed or any cost be refinanced if such payment was made or such cost was incurred earlier than two years prior to the effective date of this Chapter; provided further, that it is the intent that any costs described above shall be payable solely from the revenues of the health care facilities;

(4) "Health care facilities" means any one or more buildings, structures, additions, extensions, improvements or other facilities, whether or not located on the same site or sites, machinery, equipment, furnishings or other real or personal property suitable for health care or medical care; and includes, without limitation: general hospitals, chronic diseases, maternity, mental, tuberculosis and other specialized hospitals; facilities for intensive care and self-care; nursing homes, including skilled nursing facilities and intermediate care facilities; facilities for continuing care of the elderly and infirm; clinics and outpatient facilities; clinical, pathological and other laboratories; health care research facilities; laundries; training facilities for nurses, interns,

physicians and other staff members; food preparation and food service facilities; administration buildings, central service and other administrative facilities; communication, computer; and other electronic facilities, fire-fighting facilities, pharmaceutical facilities and recreational facilities; storage space, X-ray, laser, radiotherapy and other apparatus and equipment; dispensaries; utilities; vehicular parking lots and garages; office facilities for health care facilities staff members and physicians; and such other health care facilities customarily under the jurisdiction of or provided by hospitals, or any combination of the foregoing, with all necessary, convenient or related interests in land, machinery, apparatus, appliances, equipment, furnishings, appurtenances, site preparation, landscaping and physical amenities;

(5) "Non-profit agency" means any nonprofit corporation existing or hereafter created and empowered to acquire, by lease or otherwise, operate or maintain health care facilities;

(6) "Public agency" means any county, city, town, hospital district or other political subdivision of the State existing or hereafter created pursuant to the laws of the State authorized to acquire, by lease or otherwise, operate or maintain health care facilities;

(7) "State" means the State of North Carolina;

(8) "Federally guaranteed security" means any security, investment or evidence of indebtedness issued pursuant to any provision of federal law for the purpose of financing or refinancing the cost of any health care facilities which is insured or guaranteed, directly or indirectly, in whole or in part as to the repayment of principal or interest by the United States of America or any instrumentality thereof;

(9) "Federally insured mortgage note" means any loan secured by a mortgage or deed of trust on any health care facilities owned or leased by any public or nonprofit agency which is insured or guaranteed, directly or indirectly, in whole or in part as to the repayment of principal and interest by the United States of America or any instrumentality thereof, or any commitment by the United States of America or any instrumentality thereof to so insure or guarantee such a loan secured by a mortgage or a deed of trust.

(10) "Continuing care" means the furnishing, pursuant to a continuing care agreement, of shelter, food, and nursing care to an individual not related by consanguinity or affinity to the provider furnishing such care. Other personal services provided shall be designated in the continuing care agreement. Continuing care shall include only life care, care for life, or care for a term of years;

(11) "Life care" or "care for life" means a life lease, life membership, life estate, or similar agreement between an individual and a provider by which the individual pays a fee for the right to occupy a space in the continuing care facility and to receive continuing care for life; and

(12) "Care for a term of years" means an agreement between an individual and a provider whereby the individual pays a fee for the right to occupy space in a continuing care facility, and to receive continuing care, for at least one year, but for less than the life of the member. (1975, c. 766, s. 1; 1979, c. 54, s. 1; 1981, c. 64; c. 867, ss. 1, 2; 2005-238, s. 13.)

Cross References. — As to the definition of "Long-term care facility" in the Long-Term Care Ombudsman Program, see G.S. 143B-181.16.

Editor's Note. — As to the effective date of this Chapter, see the Editor's note under G.S. 131A-1.

Session Laws 2005-238, s. 15, provides: "The General Assembly finds that the provisions of this act are necessary for the health and welfare of the State and as such finds that the act shall be construed liberally to effect its purposes."

Session Laws 2005-238, s. 16, is a severability clause.

§ 131A-4. Additional powers.

The Commission shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Chapter, including, but without limiting the generality of the foregoing, the power:

(1) To make and execute contracts and agreements necessary or incidental to the exercise of its powers and duties under this Chapter, including loan agreements and agreements of sale or leases with and mortgages and conveyances to public and nonprofit agencies, persons, firms, corporations, governmental agencies and others;

(2) To acquire by purchase, the exercise of the power of eminent domain but only in connection with a financing for a public agency, lease, gift or otherwise, or to obtain options for the acquisition of, any property, real or personal, improved or unimproved, including interests in land in fee or less than fee for any health care facilities, upon such terms and at such cost as shall be agreed upon by the owner and the Commission;

(3) To arrange or contract with any county, city, town or other political subdivision or instrumentality of the State for the opening or closing of streets or for the furnishing of utility or other services to any health care facilities;

(4) To sell, convey, lease as lessor, mortgage, exchange, transfer, or otherwise dispose of, or to grant options for any such purposes with respect to, any real or personal property or interest therein;

(5) To pledge or assign any money, purchase price payments, rents, loan repayments, charges, fees or other revenues, including any federally guaranteed security and moneys received therefrom whether such securities are initially acquired by the Commission or a public or nonprofit agency, and any proceeds derived by the Commission from sales of property, insurance, condemnation awards or other sources;

(6) To pledge or assign the revenues and receipts from any health care facilities and any agreement of sale or lease or the purchase price payments, rent and income received thereunder;

(7) To borrow money as herein provided to carry out and effectuate its corporate purposes and to issue in evidence thereof bonds and notes for the purpose of providing funds to pay all or any part of the cost of any health care facilities, to lend money to any public or nonprofit agency to pay all or any part of the cost of health care facilities, to acquire any federally guaranteed security or any federally insured mortgage note, to lend money to any public or nonprofit agency for the acquisition of any federally guaranteed security and to issue revenue refunding bonds;

(8) To finance, acquire, construct, equip, provide, operate, own, repair, maintain, extend, improve, rehabilitate, renovate and furnish any health care facilities and to pay all or any part of the cost thereof from the proceeds of bonds or notes or from any contribution, gift or donation or other funds available to the Commission for such purpose;

(9) To fix, revise, charge and collect or cause to be fixed, revised, charged and collected purchase price payments, rents, loan repayments, fees, professional contracts and charges for the use of, or services rendered by, any health care facilities;

(10) To employ fiscal consultants, consulting engineers, architects, attorneys, health care consultants, appraisers and such other consultants

and employees as may be required in the judgment of the Commission and to fix and pay their compensation from funds available to the Commission therefor and to select and retain subject to approval of the Local Government Commission the financial consultants, underwriters and bond attorneys to be associated with the issuance of any bonds and to pay for services rendered by underwriters, financial consultants or bond attorneys out of the proceeds of any such issue with regard to which the services were performed;

(11) To conduct studies and surveys respecting the need for health care facilities and their location, financing and construction;

(12) To apply for, accept, receive and agree to and comply with the terms and conditions governing grants, loans, advances, contributions, interest subsidies and other aid with respect to health care facilities from federal and State agencies or instrumentalities and to accept, receive and agree to and comply with the terms and conditions governing payments under any health insurance programs;

(13) To sue and be sued in its own name, plead and be impleaded;

(14) To acquire and enter into commitments to acquire any federally guaranteed security or federally insured mortgage note and to pledge or otherwise use any such federally guaranteed security or federally insured mortgage note in such manner as the Commission deems in its best interest to secure or otherwise provide a source of repayment on any of its bonds or notes issued on behalf of any public or nonprofit agency to finance or refinance the cost of any health care facilities.

Any power granted to the Commission under the provisions of this Chapter may be exercised by the executive committee of the Commission when the Commission is not in session, except that the executive committee may not overrule, reverse or disregard any action of the full Commission. The chairman of the Commission may call meetings of the executive committee at any time. (1975, c. 766, s. 1; 1977, c. 267; 1979, c. 54, ss. 2-6; 1985, c. 723, s. 4.)

§ 131A-5. Criteria and requirements.

In undertaking any health care facilities pursuant to this Chapter, the Commission shall be guided by and shall observe the following criteria and requirements; provided that the determination of the Commission as to its compliance with such criteria and requirements shall be final and conclusive:

(1) There is a need for the health care facilities in the area in which the health care facilities are to be located;

(2) No health care facilities shall be sold or leased nor any loan made to any public or nonprofit agency which is not financially responsible and capable of fulfilling its obligations, including its obligations under an agreement of sale or lease or a loan agreement to make purchase price payments, to pay rent, to operate, repair and maintain at its own expense the health care facilities and to discharge such other responsibilities as may be imposed under the agreement of sale or lease or loan agreement;

(3) Adequate provision shall be made for the payment of the principal of and the interest on the bonds and any necessary reserves therefor and for the operation, repair and maintenance of the health care facilities at the expense of the public or nonprofit agency; and

(4) The public facilities, including utilities, and public services necessary for the health care facilities will be made available. (1975, c. 766, s. 1; 1979, c. 54, s. 7.)

§ 131A-6. Additional powers of public agencies.

For the purposes of this Chapter, public agencies are authorized and empowered to enter into contracts and agreements, including loan agreements and agreements of sale or lease, with the Commission to facilitate the financing or refinancing, acquiring, constructing, equipping, providing, operating and maintaining of health care facilities and pursuant to any such loan agreement or agreement of sale or lease to operate, repair and maintain any health care facilities and, subject to the provisions of G.S. 131A-8, to pay the cost thereof and the loan repayments, purchase price payments or rent therefor from any funds available for such purposes. In addition, public agencies may mortgage, pledge, assign, grant a security interest in, or otherwise encumber a health care facility, whether owned or leased, to secure obligations under a loan agreement or similar debt instrument in connection with the issuance of bonds or notes by the Commission under this Chapter. Property subject to a mortgage, deed of trust, security interest, or similar lien pursuant to this section may be sold at foreclosure in any manner permitted by the instrument creating the encumbrance, without compliance with any other provision of law regarding the disposition of publicly owned property. The granting of a lien on, or security interest in, a health care facility and the conveyance of this property pursuant to the provisions of the lien or security interest are not subject to the provisions of G.S. 131E-8, 131E-13, or 131E-14. (1975, c. 766, s. 1; 1979, c. 54, s. 8; 2005-238, s. 14.)

Editor's Note. — Session Laws 2005-238, s. 15, provides: "The General Assembly finds that the provisions of this act are necessary for the health and welfare of the State and as such finds that the act shall be construed liberally to effect its purposes."

Session Laws 2005-238, s. 16, is a severability clause.

§ 131A-7. Procedural requirements.

In addition to health care facilities initiated by the Commission, any public or nonprofit agency may submit to the Commission, and the Commission may consider, a proposal for financing health care facilities using such forms and following such instructions as may be prescribed by the Commission. Such proposal shall set forth the type and location of the health care facilities and may include other information and data available to the public or nonprofit agency respecting the health care facilities and the extent to which such health care facilities conform to the criteria and requirements set forth in this Chapter. The Commission may request the public or nonprofit agency to provide additional information and data respecting the health care facilities. The Commission is authorized to make or cause to be made such investigations, surveys, studies, reports and reviews as in its judgment are necessary and desirable to determine the feasibility and desirability of the health care facilities, the extent to which the health care facilities will contribute to the health and welfare of the area in which they will be located, the powers, experience, background, financial condition, record of service and capability of the management of the public or nonprofit agency, the extent to which the health care facilities otherwise conform to the criteria and requirements of this Chapter, and such other factors as may be deemed relevant or convenient in carrying out the purposes of this Chapter. (1975, c. 766, s. 1.)

§ 131A-8. Operation of health care facilities; loan agreements; agreements of sale or lease; conveyance of interest in health care facilities.

All health care facilities shall be operated to serve and benefit the public and there shall be no discrimination against any person based on race, creed, color or national origin.

The Commission may sell or lease any health care facilities to a public or nonprofit agency for operation and maintenance or lend money to any public or nonprofit agency in such manner as shall effectuate the purposes of this Chapter, under a loan agreement or an agreement of sale or lease in form and substance not inconsistent herewith. Any such loan agreement or agreement of sale or lease may include provisions that:

(1) The public or nonprofit agency shall, at its own expense, operate, repair and maintain the health care facilities covered by such agreement;

(2) The purchase price payments to be made under the agreement of sale, the rent payable under the agreement of lease or the loan repayments under the loan agreement shall in the aggregate be not less than an amount sufficient to pay all of the interest, principal and any redemption premium on the bonds or notes issued by the Commission to pay the cost of the health care facilities sold or leased thereunder or to make the loan with respect thereto;

(3) The public or nonprofit agency shall pay all other costs incurred by the Commission in connection with the providing of the health care facilities covered by any such agreement, except such costs as may be paid out of the proceeds of bonds or notes or otherwise, including, but without limitation, insurance costs, the cost of administering the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes and the fees and expenses of trustees, paying agents, attorneys, consultants and others;

(4) The loan agreement or the agreement of sale or lease shall terminate not earlier than the date on which all such bonds and all other obligations incurred by the Commission in connection with the health care facilities covered by any such agreement shall be retired or provision for such retirement shall be made; and

(5) The obligation of the public or nonprofit agency to make loan repayments or purchase price payments or to pay rent shall not be subject to cancellation, termination or abatement by the public or nonprofit agency until the bonds have been retired or provision has been made for such retirement.

All obligations payable by a public agency under a loan agreement or an agreement of sale or lease, including the obligation to make loan repayments or purchase price payments or to pay rent and to pay the costs of operating, repairing and maintaining health care facilities, shall be payable solely from the revenues of the health care facilities being purchased or leased or with respect to which a loan is made or other health care facilities of the health care facilities of the public agency or from any federally guaranteed security and moneys received therefrom and shall not be payable from or charged upon any funds of the public agency other than the revenues pledged to such payment; provided, however, that nothing herein shall restrict the power of any county, city, town or other political subdivision of the State or any hospital district created pursuant to Article 13C of Chapter 131 of the General Statutes to submit to its qualified voters a health care facility maintenance tax under Article 13B of said Chapter 131 for the purposes of financing the cost of operation, equipment and maintenance of any health care facility financed for any public agency under this Chapter and all health care facilities authorized to be financed under this Chapter and leased to public agencies are hereby declared to be included within the definition "hospital facility" as used in said Article 13B.

Where the Commission has acquired a possessory or ownership interest in any health care facilities which it has undertaken on behalf of a public or nonprofit agency it shall promptly convey, without the payment of any consideration, all its right, title and interest in such health care facilities to such public or nonprofit agency upon the retirement or provision for the retirement of all bonds or notes issued and obligations incurred by the Commission in connection with such health care facilities. (1975, c. 766, s. 1; 1979, c. 54, s. 9.)

Editor's Note. — Chapter 131, including Articles 13B and 13C, referred to in this section, was repealed by Session Laws 1983, c. 775, s. 1. See now Chapter 131E.

CASE NOTES

Construction with Other Law. — While G.S. 131A-15 permits "any holder of bonds or notes issued under the provisions of this Chapter" to bring suit to enforce his contractual rights under the bond, this provision does not authorize a private enforcement action against a hospital that has discriminated in violation of this section. Williams v. United States, 242 F.3d 169, 2001 U.S. App. LEXIS 3126 (4th Cir. 2001).

§ 131A-9. Construction contracts.

Contracts for the construction of any health care facilities on behalf of a public agency shall be awarded by the Commission in accordance with Article 8 of Chapter 143 of the General Statutes. If the Commission shall determine that the purposes of this Chapter will be more effectively served, the Commission in its discretion may award or cause to be awarded contracts for the construction of any health care facilities on behalf of a nonprofit agency upon a negotiated basis as determined by the Commission. The Commission shall prescribe such bid security requirements and other procedures in connection with the award of such contracts as in its judgment shall protect the public interest. The Commission may by written contract engage the services of the public or nonprofit agency in the construction of such health care facilities and may provide in such contract that such public or nonprofit agency, subject to such conditions and requirements consistent with the provisions of this Chapter as shall be prescribed in such contract, may act as an agent of, or an independent contractor for, the Commission for the performance of the functions described therein, including the acquisition of the site and other real property for such health care facilities, the preparation of plans, specifications and contract documents, the award of construction and other contracts upon a competitive or negotiated basis, the construction of such health care facilities directly by such public or nonprofit agency, the inspection and supervision of construction, the employment of engineers, architects, builders and other contractors and the provision of money to pay the cost thereof pending reimbursement by the Commission. Any such contract may provide that the Commission may, out of proceeds of bonds or notes, make advances to or reimburse the public or nonprofit agency for its costs incurred in the performance of such functions, and shall set forth the supporting documents required to be submitted to the Commission and the reviews, examinations and audits that shall be required in connection therewith to assure compliance with the provisions of this Chapter and such contract. (1975, c. 766, s. 1.)

§ 131A-10. Credit of State not pledged.

Bonds or notes issued under the provisions of this Chapter shall not be secured by a pledge of the faith and credit of the State or of any political subdivision thereof or be deemed to create an indebtedness of the State, or of any such political subdivision thereof, requiring any voter approval, but shall be payable solely from the revenues and other funds provided therefor. Each bond or note issued under this Chapter shall contain on the face thereof a statement to the effect that the Commission shall not be obligated to pay the same nor the interest thereon except from the revenues and other funds pledged therefor and that neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged as security for the payment of the principal of or the interest on such bond or note.

Expenses incurred by the Commission in carrying out the provisions of this Chapter may be made payable from funds provided pursuant to, or made available for use under, this Chapter and no liability shall be incurred by the Commission hereunder beyond the extent to which moneys shall have been so provided. (1975, c. 766, s. 1.)

§ 131A-11. Bonds and notes.

The Commission is hereby authorized to provide for the issuance, at one time or from time to time, of bonds, or notes in anticipation of the issuance of bonds, of the Commission to carry out and effectuate its corporate purposes. The principal of and the interest on such bonds or notes shall be payable solely from funds provided under this Chapter for such payment. Any such notes may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, such notes may be paid from any available revenues or other funds provided therefor. The bonds or notes of each issue shall be dated and may be made redeemable before maturity at the option of the Commission at such price or prices and upon such terms and conditions as may be determined by the Commission. Any such bonds or notes shall bear interest at such rate or rates as may be determined by the Local Government Commission of North Carolina with the approval of the Commission. Notes shall mature at such time or times not exceeding 10 years from their date or dates and bonds shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the Commission. The Commission shall determine the form and manner of execution of the bonds or notes, including any interest coupons to be attached thereto, and shall fix the denomination or denominations and the place or places of payment of principal and interest, which may be any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or notes or coupons attached thereto shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. The Commission may also provide for the authentication of the bonds or notes by a trustee or fiscal agent. The bonds or notes may be issued in coupon or in registered form, or both, as the Commission may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes. No bonds or notes may be issued by the Commission under this Chapter unless the issuance thereof is approved by the Local Government Commission of North Carolina.

The Commission shall file with the Secretary of the Local Government Commission an application requesting approval of the issuance of such bonds or notes which shall contain such information and have attached to it such documents concerning the proposed financing and prospective borrower, vendee or lessee as the Secretary may require.

In determining whether a proposed bond or note issue should be approved, the Local Government Commission may consider, in addition to the criteria and requirements mentioned in G.S. 131A-5, the effect of the proposed financing upon any scheduled or proposed sale of tax-exempt obligations by the State or any of its agencies or departments or by any unit of local government in the State.

The Local Government Commission shall approve the issuance of such bonds or notes if, upon the information and evidence it receives, it finds and determines that the proposed financing will effectuate the purposes of this Chapter.

Upon the filing with the Local Government Commission of a resolution of the Commission requesting that its bonds or notes be sold, such bonds or notes may be sold in such manner, either at public or private sale, and for such price as the Local Government Commission shall determine to be for the best interests of the Commission and effectuate best the purposes of this Chapter, provided that such sale shall be approved by the Commission.

The proceeds of any bonds or notes shall be used solely for the purposes for which issued and shall be disbursed in such manner and under such restrictions, if any, as the Commission may provide in the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes.

Prior to the preparation of definitive bonds, the Commission may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds, when such bonds shall have been executed and are available for delivery. The Commission may also provide for the replacement of any bonds or notes which shall become mutilated or shall be destroyed or lost.

Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes. (1975, c. 766, s. 1; 1979, c. 54, s. 10.)

§ 131A-12. Trust agreement or resolution.

In the discretion of the Commission any bonds or notes issued under the provisions of this Chapter may be secured by a trust agreement by and between the Commission and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the State. Such trust agreement or the resolution authorizing the issuance of such bonds or notes may pledge or assign all or any part of the revenues of the Commission received pursuant to this Chapter, including, without limitation, fees, loan repayments, purchase price payments, rents, charges, insurance proceeds, condemnation awards and any other revenues and funds received in connection with any health care facilities and may mortgage any health care facilities. Such trust agreement or resolution may contain such provisions for protecting and enforcing the rights and remedies of the holders of any such bonds or notes as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Commission in relation to the purposes to which bond or note proceeds may be applied, the disposition or pledging of the revenues of the Commission, including any payments in respect of any federally guaranteed security or any federally insured mortgage note, the duties of the Commission with respect to the acquisition, construction, maintenance, repair and operation of any health care facilities, the fees, loan repayments, purchase price payments, rents and charges to be fixed and collected in connection therewith, the terms and conditions for the issuance of additional bonds or notes, and the custody, safeguarding and application of all moneys. All bonds issued under this Chapter shall be equally and ratably secured by a pledge, charge, and lien upon revenues provided for in such trust agreement or resolution, without priority by reason of number, or of dates of bonds, execution, or delivery, in accordance with the provisions of this Chapter and of such trust agreement or resolution; except that the Commission may provide in such trust agreement or resolution that bonds issued pursuant thereto shall to the extent and in the manner prescribed in such trust agreement or resolution be subordinated and junior in standing, with respect to the payment of principal and interest and the security thereof, to any other bonds. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depositary of the proceeds of bonds or notes, revenues or other money hereunder to furnish such indemnifying bonds or to pledge such securities as may be required by the Commission. Any such trust agreement or resolution may set off the rights and remedies, including foreclosure of any mortgage, of the holders of any bonds or notes and of the trustee, and may restrict the individual right of action by any such holders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the Commission may deem reasonable and proper for the security of the holders of any bonds or notes. Expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of any health care facilities or paid from the revenues pledged or assigned to the payment of the principal of and the interest on bonds or notes or from any other funds available to the Commission. (1975, c. 766, s. 1; 1979, c. 54, s. 11.)

§ 131A-13. Revenues; pledges of revenues.

(a) The Commission is hereby authorized to fix and to collect fees, loan repayments, purchase price payments, rents and charges for the use of any health care facilities, and any part or section thereof, and to contract with any public or nonprofit agency for the use thereof. The Commission may require that the public or nonprofit agency shall operate, repair or maintain such facilities and shall bear the cost thereof and other costs of the Commission in connection therewith, subject to the provisions of G.S. 131A-8 with respect to a public agency, as may be provided in the agreement of sale or lease or other contract with the Commission, in addition to other obligations imposed under such agreement or contract.

(b) The fees, purchase price payments, rents and charges shall be fixed so as to provide a fund sufficient, with such other funds as may be made available therefor, (i) to pay the costs of operating, repairing and maintaining the health care facilities, to the extent that adequate provision for the payment of such costs has not otherwise been provided for, (ii) to pay the principal of and the interest on all bonds or notes as the same shall become due and payable and (iii) to create and maintain any reserves provided for in the resolution authorizing the issuance of, or any trust agreement securing, such bonds; and such fees, purchase price payments, rents and charges may be applied or pledged to the payment of debt service on the bonds prior to the payment of the costs of operating, repairing and maintaining the health care facilities.

(c) All pledges of fees, loan repayments, purchase price payments, rents, charges and other revenues under the provisions of this Chapter shall be valid and binding from the time when such pledges are made. All such revenues so pledged and thereafter received by the Commission shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Commission, irrespective of whether such parties have notice thereof. The resolution or any trust agreement by which a pledge is created or any loan agreement, agreement of sale or lease need not be filed or recorded except in the records of the Commission.

(d) The State of North Carolina does pledge to and agree with the holders of any bonds or notes issued by the Commission that so long as any of such bonds or notes are outstanding and unpaid the State will not limit or alter the rights vested in the Commission at the time of issuance of the bonds or notes to fix, revise, charge, and collect or cause to be fixed, revised, charged and collected loan repayments, purchase price payments, rents, fees and charges for the use of or services rendered by any health care facilities in connection with which the bonds or notes were issued, so as to provide a fund sufficient, with such other funds as may be made available therefor, to pay the costs of operating, repairing and maintaining the health care facilities, to pay the principal of and the interest on all bonds and notes as the same shall become due and payable and to create and maintain any reserves provided therefor and to fulfill the terms of any agreements made with the bondholders or noteholders, nor will the State in any way impair the rights and remedies of the bondholders or noteholders until the bonds or notes and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders or noteholders, are fully paid, met and discharged. (1975, c. 766, s. 1; 1979, c. 54, s. 12.)

§ 131A-14. Trust funds.

Notwithstanding any other provisions of law to the contrary, all moneys received pursuant to the authority of this Chapter, including, without limitation, fees, loan repayments, purchase price payments, rents, charges, insurance proceeds, condemnation awards and any other revenues and funds received in connection with any health care facilities, shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. The resolution authorizing the issuance of, or any trust agreement securing, any bonds or notes may provide that any of such moneys may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes of this Chapter, subject to such regulations as this Chapter and such resolution or trust agreement may provide. Any such moneys may be invested as provided in G.S. 159-30, as it may be amended from time to time. (1975, c. 766, s. 1; 1979, c. 54, s. 13.)

§ 131A-15. Remedies.

Any holder of bonds or notes issued under the provisions of this Chapter or any coupons appertaining thereto, and the trustee under any trust agreement or resolution authorizing the issuance of such bonds or notes, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the State or granted hereunder or under such trust agreement or resolution, or under any other contract executed by the Commission pursuant to this Chapter, and may enforce and compel the performance of all duties required by this Chapter or by such trust agreement or resolution to be performed by the Commission or by any officer thereof. (1975, c. 766, s. 1.)

CASE NOTES

This provision does not authorize a private enforcement action against a hospital that has discriminated in violation of G.S. 131A-8, although it does permit "any holder of bonds or notes issued under the provisions of this Chapter" to bring suit to enforce his contractual rights under the bond. Williams v. United States, 242 F.3d 169, 2001 U.S. App. LEXIS 3126 (4th Cir. 2001).

§ 131A-16. Negotiable instruments.

All bonds and interest coupons appertaining thereto issued under this Chapter are hereby made investment securities within the meaning of and for all the purposes of Article 8 of the Uniform Commercial Code as enacted in this State, whether or not they are of such form and character as to be investment securities under said Article 8, subject only to the provisions of the bonds pertaining to registration. (1975, c. 766, s. 1.)

§ 131A-17. Bonds or notes eligible for investment.

Bonds or notes issued under the provisions of this Chapter are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds or notes are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State is now or may hereafter be authorized by law. (1975, c. 766, s. 1.)

§ 131A-18. Refunding bonds or notes.

The Commission is hereby authorized to provide for the issuance of refunding bonds or notes for the purpose of refunding any bonds or notes then outstanding which shall have been issued under the provisions of this Chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds or notes and, if deemed advisable by the Commission, for any corporate purpose of the Commission, including, without limitation:

(1) Constructing improvements, additions, extensions or enlargements of the health care facilities in connection with which the bonds or notes to be refunded shall have been issued, and

(2) Paying all or any part of the cost of any additional health care facilities.

The issuance of such bonds or notes, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Commission in respect of the same shall be governed by the provisions of this Chapter which relate to the issuance of bonds or notes, insofar as such provisions may be appropriate therefor.

Refunding bonds or notes may be sold or exchanged for outstanding bonds or notes issued under this Chapter and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such refunding bonds or notes, with any other available funds, to the payment of the principal, accrued interest and any redemption premium on the bonds or notes being refunded, and, if so provided or permitted in the resolution authorizing the issuance of, or in the trust agreement securing, such bonds or notes, to the payment of any interest on such refunding bonds or notes and any expenses in connection with such refunding, such proceeds may be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America which shall mature or which shall be subject to redemption by the holders thereof, at the option of such holders, not later than the respective dates when the proceeds, together with the interest accruing thereon, will be required for the purposes intended. (1975, c. 766, s. 1.)

§ 131A-19. Annual report.

The Commission shall, promptly following the close of each fiscal year, submit an annual report of its activities under this Chapter for the preceding year to the Governor, the State Auditor, the Secretary of Health and Human Services, the General Assembly, and the Local Government Commission. The Commission shall cause an audit of its books and accounts relating to its activities under this Chapter to be made at least once in each year by an independent certified public accountant and the cost thereof may be paid from any available moneys of the Commission. (1975, c. 766, s. 1; 1997-443, s. 11A.118(a); 2006-203, s. 71.)

Editor's Note. — Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 71, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted "the Advisory Budget Commission" following "the General Assembly" in the first sentence.

§ 131A-20. Officers not liable.

No member or officer of the Commission shall be subject to any personal liability or accountability by reason of his execution of any bonds or notes or the issuance thereof. (1975, c. 766, s. 1.)

§ 131A-21. Tax exemption.

The exercise of the powers granted by this Chapter will be in all respects for the benefit of the people of the State and will promote their health and welfare. If bonds or notes are issued by the Commission to provide or improve a health care facility, then until the bonds or notes are retired, the facility for which bonds or notes are issued is exempt from property taxes to the extent provided in this section. If refunding bonds or notes are issued to refund bonds or notes issued to provide or improve a health care facility, the facility will continue to be exempt from property taxes as provided in this section until such time as the refunding bonds or notes are retired, provided that the final maturity of the refunding bonds or notes does not extend beyond the final maturity of the original bonds or notes.

Property may be exempt from property taxes as provided in this section if a timely application for the exemption is filed with the assessor of the county in which the property is located as required under G.S. 105-282.1. The property tax exemption under this section shall not exceed the lesser of the original principal amount of the bonds or notes or the assessed value for ad valorem tax purposes of the facility. If bonds or notes are issued to finance more than one health care facility, only that portion of the principal amount of the bonds or notes used to provide or improve the particular facility, including any allocable reserves and financing costs, may be considered for the purpose of determining the amount of the exemption allowable under this section. The exemption authorized by this section shall begin with the first full tax year of the taxpayer following the issuance of the bonds and notes. This section does not affect a health care facility's eligibility for a property tax exemption under Subchapter II of Chapter 105 of the General Statutes.

Any bonds or notes issued by the Commission under the provisions of this Chapter shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance, estate, or gift taxes, income taxes on the gain from the transfer of the bonds and notes, and franchise taxes. The interest on the bonds and notes is not subject to taxation as income. (1975, c. 766, s. 1; 1995, c. 46, s. 12; 2000-20, s. 1; 2001-139, s. 10.)

§ 131A-22. Conflict of interest.

If any member, officer or employee of the Commission shall be interested either directly or indirectly, or shall be an officer or employee of or have an ownership interest in any firm or corporation interested directly or indirectly, in any contract with the Commission, such interest shall be disclosed to the Commission and shall be set forth in the minutes of the Commission, and the member, officer or employee having such interest therein shall not participate on behalf of the Commission in the authorization of any such contract. (1975, c. 766, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Purchase of Revenue Bonds by Commission Members. — Although this section does not prohibit the purchase by Commission members of revenue bonds issued by the Commission, it is recommended that Commission members refrain from such purchases to avoid the appearance of impropriety and possible criminal penalty under G.S. 14-234. See opinion of Attorney General to Mr. I.O. Wilkerson, Department of Human Resources, 46 N.C.A.G. 219 (1977).

§ 131A-23. Additional method.

The foregoing sections of this Chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing; provided, however, that the issuance of bonds or notes under the provisions of this Chapter need not comply with the requirements of any other law applicable to the issuance of bonds or notes. (1975, c. 766, s. 1.)

§ 131A-24. Liberal construction.

This Chapter, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect the purposes thereof. (1975, c. 766, s. 1.)

§ 131A-25. Inconsistent laws inapplicable.

Insofar as the provisions of this Chapter are inconsistent with the provisions of any general or special laws, or parts thereof, the provisions of this Chapter shall be controlling. (1975, c. 766, s. 1.)

Chapter 131B.

Licensing of Ambulatory Surgical Facilities.

§§ 131B-1 through 131B-9: Repealed by Session Laws 1983, c. 775, s. 1.

Chapter 131C.

Charitable Solicitation Licensure Act.

§§ 131C-1 through 131C-22: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 759, s. 1.

Cross References. — As to solicitation of contributions, see now G.S. 131F-1 et seq.

Editor's Note. — Session Laws 1994 Extra Session, c. 24, s. 14(c), effective October 1, 1994, amended the effective date of the amendment to G.S. 131C-22 made by 1993 Session Laws, c. 539, s. 952.

Session Laws 1989, c. 566, s. 4 repealed former G.S. 131C-17.2 effective October 1, 1989.

G.S. 131C-22 would have been repealed by Session Laws 1993 (Reg. Sess., 1994), c. 759, s. 1, effective January 1, 1995.

Chapter 131D.

Inspection and Licensing of Facilities.

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Licensing of Facilities.

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131D-2. Licensing of adult care homes for the aged and disabled.
131D-3, 131D-4. [Repealed.]
131D-4.1. Adult care homes; legislative intent.
131D-4.2. Adult care homes; family care homes; annual cost reports; exemptions; enforcement.
131D-4.3. Adult care home rules.
131D-4.4. Adult care home minimum safety requirements; smoking prohibited inside long-term care facilities; penalty.
131D-4.5. Rules adopted by Medical Care Commission.
131D-4.6. Licensure of special care units.
131D-4.7. Adult care home specialist fund.
131D-5. [Repealed.]
131D-6. Certification of adult day care programs; purpose; definition; penalty.
131D-7. Waiver of rules for certain adult care homes providing shelter or services during disaster or emergency.
131D-8. Adult care home special care units; disclosure of information required.
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131D-11. Inspection.
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131D-31. Adult care home community advisory committees.
131D-32. Functions of adult care home community advisory committees.
131D-33. [Repealed.]
131D-34. Penalties; remedies.
131D-34.1. Report of death of resident.

Article 4.

Temporary Management of Adult Care Homes.

131D-35. Temporary management of adult care homes.
131D-36 through 131D-39. [Reserved.]

Article 5.

Miscellaneous Provisions.

131D-40. Criminal history record checks required for certain applicants for employment.
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131D-42. Report on use of restraint.

ARTICLE 1.

Licensing of Facilities.

§ 131D-1. Licensing of maternity homes.

(a) The Department of Health and Human Services shall inspect and license all maternity homes established in the State under rules adopted by the Social Services Commission. The Commission shall adopt rules establishing educational requirements for executive directors and staff employed in maternity homes.

(b) Facilities subject to the provisions of this section shall include:

(1) Institutions or homes maintained for the purpose of receiving pregnant women for care before, during, and after delivery, and

(2) Institutions or lying-in homes maintained for the purpose of receiving pregnant women for care before and after delivery, when delivery takes place in a licensed hospital. (1868-9, c. 170, s. 3; Code, ss. 2332, 2333; Rev., ss. 3914, 3915; 1917, c. 170, s. 1; 1919, c. 46, ss. 1, 2; C.S., s. 5006; 1925, c. 90, ss. 1, 2; 1927, c. 65; 1931, c. 175; 1937, c. 319, s. 2; c. 436, ss. 3, 5; 1941, c. 270, s. 1; 1945, c. 185; 1951, c. 103; c. 1098, s. 2; 1953, c. 117; 1955, c. 269; 1957, c. 100, s. 1; c. 541, s. 7; 1959, c. 684; 1961, c. 51, s. 2; 1965, cc. 391, 1175; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 2; 1997-443, s. 11A.118(a); 2007-30, s. 1.)

Cross References. — As to criminal provisions for patient abuse and neglect, see G.S. 14-32.2.

Editor's Note. — This Article is Part 2 of Article 3 of Chapter 108, as recodified pursuant to Session Laws 1981, c. 275, s. 2, effective Oct. 1, 1981.

Effect of Amendments. — Session Laws 2007-30, s. 1, effective April 28, 2007, in subsection (a), substituted "rules adopted by the Social Services Commission" for "such rules and regulations as the Social Services Commission may adopt" in the first sentence and added the second sentence.

§ 131D-2. Licensing of adult care homes for the aged and disabled.

(a) The following definitions will apply in the interpretation of this section:

(1) "Abuse" means the willful or grossly negligent infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful or grossly negligent deprivation by the administrator or staff of an adult care home of services which are necessary to maintain mental and physical health.

(1a) "Administrator" means a person approved by the Department of Health and Human Services who has the responsibility for the total operation of a licensed domiciliary home.

(1b) "Adult care home" is an assisted living residence in which the housing management provides 24-hour scheduled and unscheduled personal care services to two or more residents, either directly or, for scheduled needs, through formal written agreement with licensed home care or hospice agencies. Some licensed adult care homes provide supervision to persons with cognitive impairments whose decisions, if made independently, may jeopardize the safety or well-being of themselves or others and therefore require supervision. Medication in an adult care home may be administered by designated, trained staff. Adult care homes that provide care to two to six unrelated residents are commonly called family care homes.

(1c) "Amenities" means services such as meals, housekeeping, transportation, and grocery shopping that do not involve hands-on personal care.

(1d) "Assisted living residence" means any group housing and services program for two or more unrelated adults, by whatever name it is called, that makes available, at a minimum, one meal a day and housekeeping services and provides personal care services directly or through a formal written agreement with one or more licensed home care or hospice agencies. The Department may allow nursing service exceptions on a case-by-case basis. Settings in which services are delivered may include self-contained apartment units or single or shared room units with private or area baths. Assisted living residences are to be distinguished from nursing homes subject to provisions of G.S. 131E-102. Effective October 1, 2005, there are two types of assisted living residences: adult care homes and adult care homes that serve only elderly persons. As used in this section, "elderly person" means:

a. Any person who has attained the age of 55 years or older and requires assistance with activities of daily living, housing, and services, or

b. Any adult who has a primary diagnosis of Alzheimer's disease or other form of dementia who requires assistance with activities of daily living, housing, and services provided by a licensed Alzheimer's and dementia care unit.

Effective July 1, 1996, there is a third type, multiunit assisted housing with services.

(1e) "Compensatory agent" means a spouse, relative, or other caretaker who lives with a resident and provides care to a resident.

(1f) "Department" means the Department of Health and Human Services unless some other meaning is clearly indicated from the context.

(2) Repealed by Session Laws 2001-209, s. 1(a), effective June 15, 2001.

(3) Repealed by Session Laws 1995, c. 535, s. 8.

(4) "Exploitation" means the illegal or improper use of an aged or disabled resident or his resources for another's profit or advantage.

(5) "Family care home" means an adult care home having two to six residents. The structure of a family care home may be no more than two stories high and none of the aged or physically disabled persons being served there may be housed in the upper story without provision for two direct exterior ground-level accesses to the upper story.

(6) Repealed by Session Laws 2001-209, s. 1(b), effective June 15, 2001.

(7) Repealed by Session Laws 1995, c. 535, s. 8.

(7a) Effective July 1, 1996, "multiunit assisted housing with services" means an assisted living residence in which hands-on personal care services and nursing services which are arranged by housing management are provided by a licensed home care or hospice agency, through an individualized written care plan. The housing management has a financial interest or financial affiliation or formal written agreement which makes personal care services accessible and available through at least one licensed home care or hospice agency. The resident has a choice of any provider, and the housing management may not combine charges for housing and personal care services. All residents, or their compensatory agents, must be capable, through informed consent, of entering into a contract and must not be in need of 24-hour supervision. Assistance with self-administration of medications may be provided by appropriately trained staff when delegated by a licensed nurse according to the home care agency's established plan of care. Multiunit assisted housing with services programs are required to register with the Division of Health Service Regulation and to provide a disclosure statement. The disclosure statement is required to be a part of the annual rental contract that includes a description of the following requirements:

a. Emergency response system;
b. Charges for services offered;
c. Limitations of tenancy;
d. Limitations of services;
e. Resident responsibilities;
f. Financial/legal relationship between housing management and home care or hospice agencies;
g. A listing of all home care or hospice agencies and other community services in the area;
h. An appeals process; and
i. Procedures for required initial and annual resident screening and referrals for services.

Continuing care retirement communities, subject to regulation by the Department of Insurance under Chapter 58 of the General Statutes, are exempt from the regulatory requirements for multiunit assisted housing with services programs.

(8) "Neglect" means the failure to provide the services necessary to maintain a resident's physical or mental health.

(9) "Personal care services" means any hands-on services allowed to be performed by In-Home Aides II or III as outlined in Department rules.

(10) "Registration" means the submission by a multiunit assisted housing with services provider of a disclosure statement containing all the information as outlined in subdivision (7a) of this subsection.

(11) "Resident" means a person living in an assisted living residence for the purpose of obtaining access to housing and services provided or made available by housing management.

(12) "Secretary" means the Secretary of Health and Human Services unless some other meaning is clearly indicated from the context.

(a1) Persons not to be cared for in adult care homes. — Except when a physician certifies that appropriate care can be provided on a temporary basis to meet the resident's needs and prevent unnecessary relocation, adult care homes shall not care for individuals with any of the following conditions or care needs:

(1) Ventilator dependency;
(2) Individuals requiring continuous licensed nursing care;
(3) Individuals whose physician certifies that placement is no longer appropriate;
(4) Individuals whose health needs cannot be met in the specific adult care home as determined by the residence; and
(5) Such other medical and functional care needs as the Medical Care Commission determines cannot be properly met in an adult care home.

(a2) Persons not to be cared for in multiunit assisted housing with services. — Except when a physician certifies that appropriate care can be provided on a temporary basis to meet the resident's needs and prevent unnecessary relocation, multiunit assisted housing with services shall not care for individuals with any of the following conditions or care needs:

(1) Ventilator dependency;
(2) Dermal ulcers III and IV, except those stage III ulcers which are determined by an independent physician to be healing;
(3) Intravenous therapy or injections directly into the vein, except for intermittent intravenous therapy managed by a home care or hospice agency licensed in this State;

(4) Airborne infectious disease in a communicable state that requires isolation of the individual or requires special precautions by the caretaker to prevent transmission of the disease, including diseases such as tuberculosis and excluding infections such as the common cold;

(5) Psychotropic medications without appropriate diagnosis and treatment plans;

(6) Nasogastric tubes;

(7) Gastric tubes except when the individual is capable of independently feeding himself and caring for the tube, or as managed by a home care or hospice agency licensed in this State;

(8) Individuals requiring continuous licensed nursing care;

(9) Individuals whose physician certifies that placement is no longer appropriate;

(10) Unless the individual's independent physician determines otherwise, individuals who require maximum physical assistance as documented by a uniform assessment instrument and who meet Medicaid nursing facility level-of-care criteria as defined in the State Plan for Medical Assistance. Maximum physical assistance means that an individual has a rating of total dependence in four or more of the seven activities of daily living as documented on a uniform assessment instrument;

(11) Individuals whose health needs cannot be met in the specific multiunit assisted housing with services as determined by the residence; and

(12) Such other medical and functional care needs as the Medical Care Commission determines cannot be properly met in multiunit assisted housing with services.

(a3) Hospice care. — At the request of the resident, hospice care may be provided in an assisted living residence under the same requirements for hospice programs as described in Article 10 of Chapter 131E of the General Statutes.

(b) Licensure; inspections. —

(1) The Department of Health and Human Services shall inspect and license, under rules adopted by the Medical Care Commission, all adult care homes for persons who are aged or mentally or physically disabled except those exempt in subsection (c) of this section. Licenses issued under the authority of this section shall be valid for one year from the date of issuance unless revoked earlier by the Secretary for failure to comply with any part of this section or any rules adopted hereunder. Licenses shall be renewed annually upon filing and the Department's approval of the renewal application. The Department shall charge each adult care home with six or fewer beds a nonrefundable annual license fee in the amount of two hundred fifty dollars ($250.00). The Department shall charge each adult care home with more than six beds a nonrefundable annual license fee in the amount of three hundred fifty dollars ($350.00) plus a nonrefundable annual per-bed fee of twelve dollars and fifty cents ($12.50). A license shall not be renewed nor a new license issued for a change of ownership of an adult care home if outstanding fees, fines, and penalties imposed by the State against the home have not been paid. Fines and penalties for which an appeal is pending are exempt from consideration. The renewal application shall contain all necessary and reasonable information that the Department may by rule require. Except as otherwise provided in this subdivision, the Department may amend a license by reducing it from a full license to a provisional license for a period of not more than 90 days whenever the Department finds that:

a. The licensee has substantially failed to comply with the provisions of Articles 1 and 3 of Chapter 131D of the General Statutes and the rules adopted pursuant to these Articles;
b. There is a reasonable probability that the licensee can remedy the licensure deficiencies within a reasonable length of time; and
c. There is a reasonable probability that the licensee will be able thereafter to remain in compliance with the licensure rules for the foreseeable future.

The Department may extend a provisional license for not more than one additional 90-day period upon finding that the licensee has made substantial progress toward remedying the licensure deficiencies that caused the license to be reduced to provisional status.

The Department may revoke a license whenever:
a. The Department finds that:
    1. The licensee has substantially failed to comply with the provisions of Articles 1 and 3 of Chapter 131D of the General Statutes and the rules adopted pursuant to these Articles; and
    2. It is not reasonably probable that the licensee can remedy the licensure deficiencies within a reasonable length of time; or
b. The Department finds that:
    1. The licensee has substantially failed to comply with the provisions of Articles 1 and 3 of Chapter 131D of the General Statutes and the rules adopted pursuant to these Articles; and
    2. Although the licensee may be able to remedy the deficiencies within a reasonable time, it is not reasonably probable that the licensee will be able to remain in compliance with licensure rules for the foreseeable future; or
c. The Department finds that the licensee has failed to comply with the provisions of Articles 1 and 3 of Chapter 131D of the General Statutes and the rules adopted pursuant to these Articles, and the failure to comply endangered the health, safety, or welfare of the patients in the facility.

The Department may also issue a provisional license to a facility, pursuant to rules adopted by the Medical Care Commission, for substantial failure to comply with the provisions of this section or rules adopted pursuant to this section. Any facility wishing to contest the issuance of a provisional license shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department mails written notice of the issuance of the provisional license.

(1a) In addition to the licensing and inspection requirements mandated by subdivision (1) of this subsection:
a. The Department shall ensure that adult care homes required to be licensed by this Article are monitored for licensure compliance on a regular basis. All facilities licensed under this Article and adult care units in nursing homes are subject to inspections at all times by the Secretary. The Division of Health Service Regulation shall inspect all adult care homes and adult care units in nursing homes on an annual basis, effective July 1, 2007, and thereafter. In addition, the Department shall ensure that adult care homes are inspected every two years to determine compliance with physical plant and life-safety requirements.
b. The Department shall work with county departments of social services to do the routine monitoring in adult care homes to

ensure compliance with State and federal laws, rules, and regulations in accordance with policy and procedures established by the Division of Health Service Regulation and to have the Division of Health Service Regulation oversee this monitoring and perform any required follow-up inspection. The county departments of social services shall document in a written report all on-site visits, including monitoring visits, revisits, and complaint investigations. The county departments of social services shall submit to the Division of Health Service Regulation written reports of each facility visit within 20 working days of the visit.

c. The Division of Health Service Regulation shall conduct and document annual reviews of the county departments of social services' performance. When monitoring is not done timely or there is failure to identify or document noncompliance, the Department may intervene in the particular service in question. Department intervention shall include one or more of the following activities:

1. Sending staff of the Department to the county departments of social services to provide technical assistance and to monitor the services being provided by the facility.
2. Advising county personnel as to appropriate policies and procedures.
3. Establishing a plan of action to correct county performance.

The Secretary may determine that the Department shall assume the county's regulatory responsibility for the county's adult care homes.

d. The county departments of social services' adult home specialists and their supervisors shall complete:

1. Eight hours of prebasic training within 60 days of employment;
2. Thirty-two hours of basic training within six months of employment;
3. Twenty-four hours of postbasic training within six months of the basic training program;
4. A minimum of eight hours of complaint investigation training within six months of employment; and
5. A minimum of 16 hours of statewide training annually by the Division of Health Service Regulation.

e. The Department shall monitor regularly the enforcement of rules pertaining to air circulation, ventilation, and room temperature in resident living quarters. These rules shall include the requirement that air conditioning or at least one fan per resident bedroom and living and dining areas be provided when the temperature in the main center corridor exceeds 80 degrees Fahrenheit.

f. The Department shall keep an up-to-date directory of all persons who are administrators as defined in subdivision (1a) of subsection (a) of this section.

(1b) No new license shall be issued for any adult care home to an applicant for licensure who:

a. Was the owner, principal, or affiliate of a licensable facility under Chapter 122C, Chapter 131D, or Article 7 of Chapter 110 that had its license revoked until one full year after the date of revocation;

b. Is the owner, principal, or affiliate of an adult care home that was assessed a penalty for a Type A or Type B violation until the earlier of one year from the date the penalty was assessed or until the home has substantially complied with the correction plan established pursuant to G.S. 131D-34 and substantial compliance has been certified by the Department; or

c. Is the owner, principal, or affiliate of an adult care home that had its license summarily suspended or downgraded to provisional status as a result of Type A or B violations until six months from the date of reinstatement of the license, restoration from provisional to full licensure, or termination of the provisional license, as applicable.

d. Is the owner, principal, or affiliate of a licensable facility that had its license summarily suspended or downgraded to provisional status as a result of violations under Chapter 122C, or Article 1 of Chapter 131D, or had its license summarily suspended or denied under Article 7 of Chapter 110 until six months from the date of the reinstatement of the license, restoration from provisional to full licensure, or termination of the provisional license, as applicable.

An applicant for new licensure may appeal a denial of certification of substantial compliance under subparagraph b. of this subdivision by filing with the Department a request for review by the Secretary within 10 days of the date of denial of the certification. Within 10 days of receipt of the request for review the Secretary shall issue to the applicant a written determination that either denies certification of substantial compliance or certifies substantial compliance. The decision of the Secretary is final.

(2) Any individual or corporation that establishes, conducts, manages, or operates a facility subject to licensure under this section without a license is guilty of a Class 3 misdemeanor, and upon conviction shall be punishable only by a fine of not more than fifty dollars ($50.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. Each day of a continuing violation after conviction shall be considered a separate offense.

(3) In addition, the Department may summarily suspend a license pursuant to G.S. 150B-3(c) whenever it finds substantial evidence of abuse, neglect, exploitation or any condition which presents an imminent danger to the health and safety of any resident of the home. Any facility wishing to contest summary suspension of a license shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 20 days after the Department mails a notice of summary suspension to the licensee.

(4) Notwithstanding G.S. 8-53 or any other law relating to confidentiality of communications between physician and patient, in the course of an inspection conducted under subsection (b):

a. Department representatives may review any writing or other record concerning the admission, discharge, medication, care, medical condition, or history of any person who is or has been a resident of the facility being inspected, and

b. Any person involved in giving care or treatment at or through the facility may disclose information to Department representatives;

unless the resident objects in writing to review of his records or disclosure of such information.

The facility, its employees and any other person interviewed in the course of an inspection shall be immune from liability for damages resulting from disclosure of any information to the Department.

The Department shall not disclose:

a. Any confidential or privileged information obtained under this subsection unless the resident or his legal representative authorizes disclosure in writing or unless a court of competent jurisdiction orders disclosure, or

b. The name of anyone who has furnished information concerning a facility without that person's consent.

The Department shall institute appropriate policies and procedures to ensure that unauthorized disclosure does not occur. All confidential or privileged information obtained under this section and the names of persons providing such information shall be exempt from Chapter 132 of the General Statutes.

(5) Notwithstanding any law to the contrary, Chapter 132 of the General Statutes, the Public Records Law, applies to all records of the State Division of Social Services of the Department of Health and Human Services and of any county department of social services regarding inspections of domiciliary care facilities except for information in the records that is confidential or privileged, including medical records, or that contains the names of residents or complainants.

(6) Prior to issuing a new license or renewing an existing license, the Department shall conduct a compliance history review of the facility and its principals and affiliates. The Department may refuse to license a facility when the compliance history review shows a pattern of noncompliance with State law by the facility or its principals or affiliates, or otherwise demonstrates disregard for the health, safety, and welfare of residents in current or past facilities. The Department shall require compliance history information and make its determination according to rules adopted by the Medical Care Commission.

(c) The following are excluded from the provisions of this section and are not required to be registered or obtain licensure under this section:

(1) Facilities licensed under Chapter 122C or Chapter 131E of the General Statutes;

(2) Persons subject to rules of the Division of Vocational Rehabilitation Services;

(3) Facilities that care for no more than four persons, all of whom are under the supervision of the United States Veterans Administration;

(4) Facilities that make no charges for housing, amenities, or personal care service, either directly or indirectly; and

(5) Institutions that are maintained or operated by a unit of government and that were established, maintained, or operated by a unit of government and exempt from licensure by the Department on September 30, 1995.

(c1) Although the contract obligation still remains to pay the housing management for any services covered by the contract between the resident and housing management, the resident of an assisted living facility has the right to obtain services not at the expense of the housing management, from providers other than the housing management.

(c2) The Medical Care Commission shall adopt rules necessary to carry out this section. The Commission has the authority, in adopting rules, to specify the limitation of nursing services provided by assisted living residences. In developing rules, the Commission shall consider the need to ensure comparable quality of services provided to residents, whether these services are provided directly by a licensed assisted living provider, licensed home care agency, or hospice. In adult care homes, living arrangements where residents require supervision due to cognitive impairments, rules shall be promulgated to ensure that supervision is appropriate and adequate to meet the special needs of these residents.

(c3) Nothing in this section shall be construed to supersede any federal or State antitrust, antikickback, or safe harbor laws or regulations.

(c4) Housing programs for two or more unrelated adults that target their services to elderly or disabled persons in which the only services provided by the housing management, either directly or through an agreement or other arrangements, are amenities that include, at a minimum, one meal a day and housekeeping services, are exempt from licensure, but are required to be listed with the Division of Aging, providing information on their location and number of units operated. This type of housing is not considered assisted living.

(d) Repealed by Session Laws 1995, c. 535, s. 8.

(e) The Department shall ensure that facilities conduct and complete an assessment of each resident within seventy-two hours of admitting the resident and annually thereafter. In conducting the assessment, the facility shall use an assessment instrument approved by the Secretary upon the advice of the Director of the Division of Aging. The Department shall provide ongoing training for facility personnel in the use of the approved assessment instrument.

The facility shall use the assessment to develop appropriate and comprehensive service plans and care plans and to determine the level and type of facility staff that is needed to meet the needs of residents. The assessment shall determine a resident's level of functioning and shall include, but not be limited to, cognitive status and physical functioning in activities of daily living. Activities of daily living are personal functions essential for the health and well-being of the resident. The assessment shall not serve as the basis for medical care. The assessment shall indicate if the resident requires referral to the resident's physician or other appropriate licensed health care professional or community resource.

The Department as part of its inspection and licensing of adult care homes shall review assessments and related service plans and care plans for a selected number of residents. In conducting this review, the Department shall determine:

(1) Whether the appropriate assessment instrument was administered and interpreted correctly;
(2) Whether the facility is capable of providing the necessary services;
(3) Whether the service plan or care plan conforms to the results of an appropriately administered and interpreted assessment; and
(4) Whether the service plans or care plans are being implemented fully and in accordance with an appropriately administered and interpreted assessment.

If the Department finds that the facility is not carrying out its assessment responsibilities in accordance with this section, the Department shall notify the facility and require the facility to implement a corrective action plan. The Department shall also notify the resident of the results of its review of the assessment, service plans, and care plans developed for the resident. In addition to administrative penalties, the Secretary may suspend the admission of any new residents to the facility. The suspension shall be for the period determined by the Secretary and shall remain in effect until the Secretary is satisfied that conditions or circumstances merit removing the suspension.

(f) If any provisions of this section or the application of it to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(g) In order for an adult care home to maintain its license, it shall not hinder or interfere with the proper performance of duty of a lawfully appointed community advisory committee, as defined by G.S. 131D-31 and G.S. 131D-32.

(h) Suspension of admissions to adult care home:

(1) In addition to the administrative penalties described in subsection (b), the Secretary may suspend the admission of any new residents to an adult care home, where the conditions of the adult care home are detrimental to the health or safety of the residents. This suspension shall be for the period determined by the Secretary and shall remain in effect until the Secretary is satisfied that conditions or circumstances merit removing the suspension.

(2) In imposing a suspension under this subsection, the Secretary shall consider the following factors:

a. The degree of sanctions necessary to ensure compliance with this section and rules adopted hereunder; and

b. The character and degree of impact of the conditions at the home on the health or safety of its residents.

(3) The Secretary of Health and Human Services shall adopt rules to implement this subsection.

(4) Any facility wishing to contest a suspension of admissions shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 20 days after the Department mails a notice of suspension of admissions to the licensee.

(i) Notwithstanding the existence or pursuit of any other remedy, the Department of Health and Human Services may, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person to restrain or prevent the establishment, conduct, management or operation of an adult care home without a license. Such action shall be instituted in the superior court of the county in which any unlicensed activity has occurred or is occurring.

If any person shall hinder the proper performance of duty of the Secretary or his representative in carrying out this section, the Secretary may institute an action in the superior court of the county in which the hindrance has occurred for injunctive relief against the continued hindrance, irrespective of all other remedies at law.

Actions under this subsection shall be in accordance with Article 37 of Chapter 1 of the General Statutes and Rule 65 of the Rules of Civil Procedure.

(j) Adult care homes shall post the Division of Health Service Regulation's complaint hotline number conspicuously in a public place in the facility. (1868-9, c. 170, s. 3; Code, ss. 2332, 2333; Rev., ss. 3914, 3915; 1917, c. 170, s. 1; 1919, c. 46, ss. 1, 2; C.S., s. 5006; 1925, c. 90, ss. 1, 2; 1927, c. 65; 1931, c. 175; 1937, c. 319, s. 2; c. 436, ss. 3, 5; 1941, c. 270, s. 1; 1945, c. 185; 1951, c. 103; c. 1098, s. 2; 1953, c. 117; 1955, c. 269; 1957, c. 100, s. 1; c. 541, s. 7; 1959, c. 684; 1961, c. 51, s. 2; 1965, cc. 391, 1175; 1969, c. 546, s. 1; 1973, c. 476, ss. 128, 138; 1975, c. 729; 1981, c. 275, s. 2; c. 544, s. 1; 1983, c. 824, ss. 1-12; 1987, c. 827, ss. 1, 241; 1991, c. 572, ss. 1, 2; 1993, c. 321, s. 242; c. 530, s. 2; c. 539, s. 953; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 280, s. 1; c. 535, s. 8; 1997-443, s. 11A.118(a); 1997-456, s. 20; 1997-522, s. 1; 1999-113, ss. 1, 2; 1999-193, s. 1; 1999-334, ss. 1.2-1.5, 1.7, 1.14, 1.15, 3.3, 3.4; 1999-443, s. 2; 2000-140, s. 30; 2001-209, ss. 1(a), (b); 2001-487, s. 31; 2003-284, s. 34.1(a); 2003-294, s. 3; 2005-66, s. 1; 2005-276, ss. 10.40A(i), (j), (k), 41.2(a); 2007-182, s. 1; 2007-444, s. 5(a).)

Cross References. — As to joint training of Division of Facility Services [now the Division of Health Service Regulation] Consultants, County DSS adult home specialists, and adult care home providers, see G.S. 143B-5A.

Editor's Note. — The subsection (a)(1c), (a)(1d) and (a)(1e) designations were assigned by the Revisor of Statutes, the designations in Session Laws 1995, c. 535, s. 8, having been (a)(1b), (a)(1c) and (a)(1d), respectively.

Session Laws 2001-209, s. 2, provides: "The licensure of a group home for developmentally disabled adults pursuant to Article 1 of Chapter 131D of the General Statutes shall be transferred to licensure as a supervised living facility for developmentally disabled adults under G.S. 122C-3(14)e. A supervised living facility for developmentally disabled adults licensed under this section [s. 2 of Session Laws 2001-209] shall:

"(1) Except as otherwise provided in this section [s. 2 of Session Laws 2001-209], comply with licensure requirements of Article 2 of Chapter 122C of the General Statutes;

"(2) Within 12 months of the effective date of this act [June 15, 2001], comply with building code requirements for smoke detectors;

"(3) Comply either with categories of existing rules applicable to group homes for developmentally disabled adults adopted under Article 1 of Chapter 131D of the General Statutes, or with categories of existing rules applicable under G.S. 122C-3(14)e., at the option of the supervised living facility; and

"(4) Be subject to adverse action on a license under G.S. 122C-24 for failure to comply with applicable statutes or rules.

"A group home for developmentally disabled adults licensed under Article 1 of Chapter 131D of the General Statutes and transferred to licensure under G.S. 122C-3(14)e. shall be deemed to have met the building code requirements for licensure as a supervised living facility.

"The Department of Health and Human Services' Division of Facility Services [now the Division of Health Service Regulation] and Division of Mental Health, Developmental Disabilities, and Substance Abuse Services shall designate the categories of existing rules applicable to the supervised living facility option under this section [s. 2 of Session Laws 2001-209]."

Session Laws 2001-385, ss. 1(d) through (h), provide that the Department of Health and Human Services shall (i) develop an Adult Care Home Quality Improvement Consultation Program to assist providers in the development of quality improvement plans for each facility, (ii) explore alternatives to existing oversight and survey practices that will ensure quality in adult care homes, and identify rules that impede the direct care of residents or prohibit resident choice and develop a proposal for repeal of those rules, (iii) study the cost to the State of reducing the county share of State/County Special Assistance from fifty percent (50%) to twenty-five percent (25%), phased in over a five-year period, (iv) study alternative ways to reimburse adult care homes for the costs of residents residing in special care units, taking into account the particular needs of those residents, and (v) study and make recommendations on statutory changes that would be necessary in order to delineate the various populations in facilities currently regulated as adult care homes according to the particular needs of those populations. The Department shall report its findings and recommendations to the North Carolina Study Commission on Aging not later than March 1, 2002.

Session Laws 2001-482, ss. 1 and 2, effective December 6, 2001, provide: "1. The Department of Health and Human Services shall develop an assessment instrument that will enable residents of adult care homes, and their families, to determine the extent to which the facility provides quality care. The assessment shall be conducted by the State or local government. The instrument shall address discreet areas of care, services, and physical plant amenities and conditions. The Department shall consult with industry representatives, advocacy and research organizations, and consumers in developing the assessment instrument.

"2. The Department of Health and Human Services shall report on the development of the assessment instrument to the North Carolina Study Commission on Aging on or before April 1, 2002. The report shall include a recommendation on whether the assessment should be conducted by the State or by local government. The Department may conduct a pilot test of the assessment in selected adult care homes that have agreed to participate. If a pilot test is conducted, the Department shall report the results of the pilot test to the North Carolina Study Commission on Aging not later than November 1, 2002."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, is a severability clause.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 10.8E, effective July 1, 2003, provides: "Notwithstanding any other provision of law to the contrary, the requirements of G.S. 131E-265 for nursing homes to conduct national criminal history record checks for employment positions other than those involving direct patient care shall become effective no earlier than January 1, 2005. Notwithstanding any other provision of law to the contrary, the requirements of G.S. 131D-2 for adult care homes to conduct national criminal records checks for all staff positions shall become effective no earlier than January 1, 2005. For similar provision setting an effective date of no earlier than January 1, 2004, see Session Laws 2002-126, s. 10.10C."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2005-23, s. 1, provides: "The Department of Health and Human Services, Adult Protective Services Task Force, shall collaborate with stakeholders and other persons interested in improving adult protective services and report its findings and recommendations to the North Carolina Study Commission on Aging and to the Legislative Study Commission on State Guardianship Laws on or before April 1, 2006."

Session Laws 2005-66, s. 2, provides: "The Medical Care Commission shall adopt rules to implement this act."

Session Laws 2005-276, s. 10.40A(p), effective July 1, 2005, as amended by Session Laws 2006-66, s. 10.1, provides: "The Department's Division of Aging and Adult Services shall develop a Quality Improvement Consultation Program for Adult Care Homes. The purpose of the Program is to promote better care and improve quality of life in a safe environment for residents in adult care homes through consultation and assistance with adult care home providers. The county departments of social services shall be responsible for implementation of the Program with all adult care homes located in the respective county, based on a timetable for statewide implementation.

"The Division of Aging and Adult Services shall consult with adult care home providers, county departments of social services, consumer advocates, and other interested stakeholders and parties in the development of the Quality Improvement Consultation Program for Adult Care Homes.

"The Department shall submit a progress report to the North Carolina Study Commission on Aging and to the Senate Appropriations Committee on Health and Human Services and to the House of Representatives Subcommittee on Health and Human Services on or before January 1, 2007.

"The report will address the following topics:

"(1) Principles and philosophies that are resident-centered and promote independence, dignity, and choice for residents;

"(2) Approaches to develop continuous quality improvement with a focus on resident satisfaction and optimal outcomes;

"(3) Dissemination of best practice models that have been used successfully elsewhere;

"(4) A determination of the availability of standardized instruments, and their use to the extent possible, to assess and measure adult care home performance according to quality of life indicators;

"(5) Utilization of quality improvement plans for adult care homes that identify and resolve issues that adversely affect quality of care and services to residents. The plans include agreed upon time frames for completion of improvements and identification of needed resources;

"(6) Training required to equip county departments of social services' staff to implement the Program;

"(7) A distinction of roles between the regulatory role of the Department's Division of Facility Services [now the Division of Health Service Regulation] and the quality improvement consultation and monitoring responsibilities of the county departments of social services; and

"(8) Identification of staffing and other resources needed to implement the Program.

"The Division of Aging and Adult Services shall conduct a pilot of the Quality Improvement Consultation Program for Adult Care Homes. No more than four county departments of social services shall participate in the pilot. The Division of Aging and Adult Services shall consider geographic balance and size in carrying out the pilot. At the conclusion of the pilot, the Division of Aging and Adult Services shall make recommendations regarding the effectiveness of the Quality Improvement Consultation Program for Adult Care Homes. If the Division recommends expansion of the pilot to other counties or statewide implementation of the Program, its report shall include the cost and a proposed timetable for implementing these recommendations, including the identification of any necessary statutory and administrative rule changes. The recommendations shall be made to the Secretary of the Department of Health and Human Services, the North Carolina Study Commission on Aging, the Senate Appropriations Committee on Health and Human Services, and the House of Representatives Subcommittee on Health and Human Services."

Session Laws 2005-276, s. 10.40A(r) provides: "G.S. 122C-25 and G.S. 131D-2(b)(1), as amended in subsections (g), (h), and (i) of this section, become effective July 1, 2007, except that the Division may conduct inspections more frequently than annually prior to July 1, 2007, as funds and personnel permit. G.S. 131D-2(b)(1a)d., as enacted by subsection (j) of this section, becomes effective July 1, 2006. Adult home specialists and their supervisors employed on or before July 1, 2006, must complete the required training components or those portions of the training components they have not completed prior to the effective date within 12 months."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 10.12, provides: "The Department's Division of Aging and Adult Services shall develop a Quality Improvement Consultation Program for Adult Care Homes. The purpose of the Program is to promote better care and improve quality of life in a safe environment for residents in adult care homes through consultation and assistance with adult care home providers. The county departments of social services shall be responsible for implementation of the Program with all adult care homes located in the respective county, based on a timetable for statewide implementation.

"The Division of Aging and Adult Services shall consult with adult care home providers, county departments of social services, consumer advocates, and other interested stakeholders and parties in the development of the Quality Improvement Consultation Program for Adult Care Homes.

"The Program will address the following topics:

"(1) Principles and philosophies that are resident-centered and promote independence, dignity, and choice for residents;

"(2) Approaches to develop continuous quality improvement with a focus on resident satisfaction and optimal outcomes;

"(3) Dissemination of best practice models that have been used successfully elsewhere;

"(4) A determination of the availability of standardized instruments, and their use to the extent possible, to assess and measure adult care home performance according to quality of life indicators;

"(5) Utilization of quality improvement plans for adult care homes that identify and resolve issues that adversely affect quality of care and services to residents. The plans include agreed upon time frames for completion of improvements and identification of needed resources;

"(6) Training required to equip county departments of social services' staff to implement the Program;

"(7) A distinction of roles between the regulatory role of the Department's Division of Health Service Regulation and the quality improvement consultation and monitoring responsibilities of the county departments of social services; and

"(8) Identification of staffing and other resources needed to implement the Program.

"The Division of Aging and Adult Services shall conduct a pilot of the Quality Improvement Consultation Program for Adult Care Homes. No more than four county departments of social services shall participate in the pilot. The Division of Aging and Adult Services shall consider geographic balance and size in carrying out the pilot. At the conclusion of the pilot, the Division of Aging and Adult Services shall make recommendations regarding the effectiveness of the Quality Improvement Consultation Program for Adult Care Homes. If the Division recommends expansion of the pilot to other counties or statewide implementation of the Program, its report shall include the cost and a proposed timetable for implementing these recommendations, including the identification of any necessary statutory and administrative rule changes. The recommendations shall be made to the Secretary of the Department of Health and Human Services, the North Carolina Study Commission on Aging, the Senate Appropriations Committee on Health and Human Services, and the House of Representatives Subcommittee on Health and Human Services.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 10.40A(i), effective July 1, 2007, in subdivision (b)(1), in the introductory paragraph, added the second sentence, and in the third sentence, substituted "renewed" for "issued" and "renewal" for "issuance."

Session Laws 2005-276, s. 10.40A(j), effective July 1, 2005, rewrote the introductory paragraph to subdivision (b)(1a), subdivisions (b)(1a)a. through c., (b)(1a)e. and (b)(1a)f. Effective July 1, 2006, it rewrote subdivision (b)(1a)d.

Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" throughout the section.

Session Laws 2007-444, s. 5(a), effective August 23, 2007, inserted "nor a new license issued for a change of ownership of an adult care home" in the sixth sentence of subdivision (b)(1).

CASE NOTES

Licensing regulation must bear a reasonable relationship to the legitimate state objective of promoting the safety and welfare of the aged or infirm. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975), decided under former § 108-77.

As to validity of regulation prohibiting use of an attic for sleeping, see Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975), decided under former G.S. 108-77.

Applied in Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

§ 131D-3: Repealed by Session Laws 1995, c. 449, s. 1.

§ 131D-4: Repealed by Session Laws 1995, c. 449, s. 2.

§ 131D-4.1. Adult care homes; legislative intent.

The General Assembly finds and declares that the ability to exercise personal control over one's life is fundamental to human dignity and quality of life and that dependence on others for some assistance with daily life activities should not require surrendering personal control of informed decision making or risk taking in all areas of one's life.

The General Assembly intends to ensure that adult care homes provide services that assist the residents in such a way as to assure quality of life and maximum flexibility in meeting individual needs and preserving individual autonomy. (1995, c. 449, s. 3; c. 535, s. 9.)

Cross References. — For Department of Health and Human Services provision for joint training, see G.S. 143B-5A.

Editor's Note. — Session Laws 2001-424, ss. 21.7(a) and (b), provide: "(a) The Department of Health and Human Services shall consider the findings and recommendations in the March 1, 2001, performance audit report, 'Adult Care Home Reimbursement Rates,' conducted by the Office of the State Auditor. The Department shall implement all of the following recommendations:

"(1) Identify alternative payment procedures that could have a more direct affect on quality of care, and continue current efforts to obtain a federal waiver to pay adult care homes directly for client services.

"(2) Designate a division within the Department responsible for detailed review of submitted reports.

"(3) Develop a plan to phase-in electronic filing of cost reports.

"(4) Require related party disclosure in cost reports and modify the audit procedures to assure that related party transactions are identified.

"The Department shall report on the implementation of these recommendations to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2002. The Department may not implement an alternative payment procedure unless and until the procedure has been approved by the General Assembly.

"(b) The Fiscal Research Division, through the Legislative Services Office, in consultation with the Department of Health and Human Services, may issue a Request For Proposal (RFP) for an independent consultant with extensive expertise in rate-setting for public and private entities to develop a new rate methodology for establishing reimbursements for adult care homes. The final report of the independent consultant shall be presented to the General Assembly not later than June 1, 2002."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-482, ss. 1 and 2, effective December 6, 2001, provide: "1. The Department of Health and Human Services shall develop an assessment instrument that will enable residents of adult care homes, and their families, to determine the extent to which the facility provides quality care. The assessment shall be conducted by the State or local government. The instrument shall address discreet areas of care, services, and physical plant amenities and conditions. The Department shall consult with industry representatives, advocacy and research organizations, and consumers in developing the assessment instrument.

"2. The Department of Health and Human Services shall report on the development of the assessment instrument to the North Carolina Study Commission on Aging on or before April 1, 2002. The report shall include a recommendation on whether the assessment should be conducted by the State or by local government. The Department may conduct a pilot test of the assessment in selected adult care homes that have agreed to participate. If a pilot test is conducted, the Department shall report the results of the pilot test to the North Carolina Study Commission on Aging not later than November 1, 2002."

Session Laws 2005-23, s. 1, provides: "The Department of Health and Human Services, Adult Protective Services Task Force, shall collaborate with stakeholders and other persons interested in improving adult protective services and report its findings and recommendations to the North Carolina Study Commission on Aging and to the Legislative Study Commission on State Guardianship Laws on or before April 1, 2006."

§ 131D-4.2. Adult care homes; family care homes; annual cost reports; exemptions; enforcement.

(a) Except for family care homes, adult care homes with a licensed capacity of seven to twenty beds, which are licensed pursuant to this Chapter, to Chapter 122C of the General Statutes, and to Chapter 131E of the General Statutes, shall submit audited reports of actual costs to the Department at least every two years in accordance with rules adopted by the Department under G.S. 143B-10. For years in which an audited report of actual costs is not required, an annual cost report shall be submitted to the Department in accordance with rules adopted by the Department under G.S. 143B-10. Adult care homes licensed under Chapter 131D of the General Statutes that have special care units shall include in reports required under this subsection cost reports specific to the special care unit and shall not average special care costs with other costs of the adult care home.

(b) Except for family care homes, adult care homes with a licensed capacity of twenty-one beds or more, which are licensed pursuant to this Chapter, to Chapter 122C of the General Statutes, and to Chapter 131E of the General Statutes, shall submit annual audited reports of actual costs to the Department of Health and Human Services, in accordance with rules adopted by the Department under G.S. 143B-10. Adult care homes licensed under Chapter 131D of the General Statutes that have special care units shall include in the reports required under this subsection cost reports specific to the special care unit and shall not average special care costs with other costs of the adult care home.

(c) Repealed by Session Laws 1999-334, s. 3.1, effective July 1, 1999.

(d) Facilities that do not receive State/County Special Assistance or Medicaid personal care are exempt from the reporting requirements of this section.

(e) Except as otherwise provided in this subsection, the annual reporting period for facilities licensed pursuant to this Chapter or Chapter 131E of the General Statutes shall be October 1 through September 30, with the annual report due by the following December 31, unless the Department determines there is good cause for delay. The annual report for combination facilities and free-standing adult care home facilities owned and operated by a hospital shall be due 15 days after the hospital's Medicare cost report is due. The annual report for combination facilities not owned and operated by a hospital shall be due 15 days after the nursing facility's Medicaid cost report is due. The annual reporting period for facilities licensed pursuant to Chapter 122C of the General Statutes shall be July 1 through June 30, with the annual report due by the following December 31, unless the Department determines there is good cause for delay. Under this subsection, good cause is an action that is uncontrollable by the provider. If the Department finds good cause for delay, it may extend the deadline for filing a report for up to an additional 30 days.

(f) The Department shall have the authority to conduct audits and review audits submitted pursuant to subsections (a), (b), and (c) above.

(g) The Department shall suspend admissions to facilities that fail to submit annual reports by December 31, or by the date established by the Department when good cause for delay is found pursuant to G.S. 131D-4.2(e). Suspension of admissions shall remain in effect until reports are submitted or licenses are suspended or revoked under subdivision (2) of this subsection. The Department may take either or both of the following actions to enforce compliance by a facility with this section, or to punish noncompliance:

(1) Seek a court order to enforce compliance;
(2) Suspend or revoke the facility's license, subject to the provisions of Chapter 150B of the General Statutes.

(h) The report documentation shall be used to adjust the adult care home rate annually, an adjustment that is in addition to the annual standard adjustment for inflation as determined by the Office of State Budget and Management. Rates for family care homes shall be based on market rate data. The Secretary of Health and Human Services shall adopt rules for the rate-setting methodology and audited cost reports in accordance with G.S. 143B-10. (1995, c. 449, s. 3; c. 535, s. 10; 1997-73, ss. 1, 2; 1997-443, s. 11A.118(a); 1998-212, s. 12.1A; 1999-334, ss. 3.1, 3.2; 2000-140, s. 93.1(a); 2001-157, s. 1; 2001-424, s. 12.2(b).)

Editor's Note. — The preamble to Session Laws 2001-157 reads as follows: "Whereas, the number of individuals diagnosed with Alzheimer's disease or related dementia and mental health disabilities is increasing; and

"Whereas, family members must often seek out-of-home care for these individuals in special care units; and

"Whereas, separate licensure and operational policies are required for special care units that advertise themselves as such; and

"Whereas, current reimbursement systems do not adequately address the total cost of care being provided for persons diagnosed with Alzheimer's disease or related dementia or mental health disabilities in licensed adult care home special care units, and this inadequacy creates a barrier to access for the public assistance population; Now, therefore,"

Session Laws 2001-157, s. 2, provides: "Based upon the data obtained from cost reports, the Department of Health and Human Services shall develop a designated reimbursement system for residents residing in special care units in adult care homes taking into account the costs determined and funding available from both State/County Special Assistance and Medicaid payments. The Department shall not implement the designated reimbursement system until the General Assembly has reviewed the system pursuant to Section 3 of this act."

§ 131D-4.3. Adult care home rules.

(a) Pursuant to G.S. 143B-165, the North Carolina Medical Care Commission shall adopt rules to ensure at a minimum, but shall not be limited to, the provision of the following by adult care homes:

(1) Repealed by Session Laws 2000-111, s. 1.

(2) A minimum of 75 hours of training for personal care aides performing heavy care tasks and a minimum of 40 hours of training for all personal care aides. The training for aides providing heavy care tasks shall be comparable to State-approved Certified Nurse Aide I training. For those aides meeting the 40-hour requirement, at least 20 hours shall be classroom training to include at a minimum:

a. Basic nursing skills;
b. Personal care skills;
c. Cognitive, behavioral, and social care;
d. Basic restorative services;
e. Residents' rights.

A minimum of 20 hours of training shall be provided for aides in family care homes that do not have heavy care residents. Persons who either pass a competency examination developed by the Department of Health and Human Services, have been employed as personal care aides for a period of time as established by the Department, or meet minimum requirements of a combination of training, testing, and experience as established by the Department shall be exempt from the training requirements of this subdivision;

(3) Monitoring and supervision of residents;

(4) Oversight and quality of care as stated in G.S. 131D-4.1; and

(5) Adult care homes shall comply with all of the following staffing requirements:

a. First shift (morning): 0.4 hours of aide duty for each resident (licensed capacity or resident census), or 8.0 hours of aide duty per each 20 residents (licensed capacity or resident census) plus 3.0 hours for all other residents, whichever is greater;
b. Second shift (afternoon): 0.4 hours of aide duty for each resident (licensed capacity or resident census), or 8.0 hours of aide duty per each 20 residents plus 3.0 hours for all other residents (licensed capacity or resident census), whichever is greater;
c. Third shift (evening): 8.0 hours of aide duty per 30 or fewer residents (licensed capacity or resident census).

In addition to these requirements, the facility shall provide staff to meet the needs of the facility's heavy care residents equal to the amount of time reimbursed by Medicaid. As used in this subdivision, the term "heavy care resident" means an individual residing in an adult care home who is defined "heavy care" by Medicaid and for which the facility is receiving enhanced Medicaid payments for such needs. Each facility shall post in a conspicuous place information about required staffing that enables residents and their families to ascertain each day the number of direct care staff and supervisors that are required by law to be on duty for each shift for that day.

(b) Rules to implement this section shall be adopted as emergency rules in accordance with Chapter 150B of the General Statutes.

(c) The Department may suspend or revoke a facility's license, subject to the provisions of Chapter 150B, to enforce compliance by a facility with this section or to punish noncompliance. (1995, c. 449, s. 3; c. 535, s. 10; 1997-443, s. 11A.118(a); 1998-212, s. 12.16B(a); 2000-111, s. 1; 2001-85, s. 1; 2001-487, s. 85(a).)

Cross References. — As to posting of information indicating number of nursing home staff on duty, see G.S. 131E-114.1.

§ 131D-4.4. Adult care home minimum safety requirements; smoking prohibited inside long-term care facilities; penalty.

(a) In addition to other requirements established by this Article or by rules adopted pursuant to this Article or other provisions of law, every adult care home shall provide to each resident the care, safety, and services necessary to enable the resident to attain and maintain the highest practicable level of physical, emotional, and social well-being in accordance with:

(1) The resident's individual assessment and plan of care; and
(2) Rules and standards relating to quality of care and safety adopted under this Chapter.

(b) Smoking is prohibited inside long-term care facilities. As used in this section:

(1) "Long-term care facilities" include adult care homes, nursing homes, skilled nursing facilities, facilities licensed under Chapter 122C of the General Statutes, and other licensed facilities that provide long-term care services.
(2) "Smoking" means the use or possession of any lighted cigar, cigarette, pipe, or other lighted smoking product.
(3) "Inside" means a fully enclosed area.

(c) The person who owns, manages, operates, or otherwise controls a long-term care facility where smoking is prohibited under this section shall:

(1) Conspicuously post signs clearly stating that smoking is prohibited inside the facility. The signs may include the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.
(2) Direct any person who is smoking inside the facility to extinguish the lighted smoking product.
(3) Provide written notice to individuals upon admittance that smoking is prohibited inside the facility and obtain the signature of the individual or the individual's representative acknowledging receipt of the notice.

(d) The Department may impose an administrative penalty not to exceed two hundred dollars ($200.00) for each violation on any person who owns, manages, operates, or otherwise controls the long-term care facility and fails to comply with subsection (c) of this section. A violation of this section constitutes a civil offense only and is not a crime. (1999-334, s. 1.1; 2007-459, s. 1.)

Editor's Note. — Session Laws 2001-482, ss. 1 and 2, effective December 6, 2001, provide: "1. The Department of Health and Human Services shall develop an assessment instrument that will enable residents of adult care homes, and their families, to determine the extent to which the facility provides quality care. The assessment shall be conducted by the State or local government. The instrument shall address discreet areas of care, services, and physical plant amenities and conditions. The Department shall consult with industry representatives, advocacy and research organizations, and consumers in developing the assessment instrument.

"2. The Department of Health and Human Services shall report on the development of the assessment instrument to the North Carolina Study Commission on Aging on or before April 1, 2002. The report shall include a recommendation on whether the assessment should be conducted by the State or by local government. The Department may conduct a pilot test of the assessment in selected adult care homes that have agreed to participate. If a pilot test is conducted, the Department shall report the results of the pilot test to the North Carolina Study Commission on Aging not later than November 1, 2002."

Session Laws 2007-459, s. 5, provides, in part: "G.S. 131D-4.4(c)(3), 131E-114.3(b)(3), and 122C-6(b)(3), as enacted by this act, apply to individuals admitted to the facility on or after October 1, 2007."

Effect of Amendments. — Session Laws 2007-459, s. 1, effective October 1, 2007, and applicable to violations committed on or after that date, inserted "smoking prohibited inside long-term care facilities; penalty" in the section heading; designated the previously existing provisions of the section as present subsection (a); added subsections (b) through (d).

§ 131D-4.5. Rules adopted by Medical Care Commission.

The Medical Care Commission shall adopt rules as follows:

(1) Establishing minimum medication administration standards for adult care homes. The rules shall include the minimum staffing and training requirements for medication aides and standards for professional supervision of adult care homes' medication controls. The requirements shall be designed to reduce the medication error rate in adult care homes to an acceptable level. The requirements shall include, but need not be limited to, all of the following:
  a. Training for medication aides, including periodic refresher training.
  b. Standards for management of complex medication regimens.
  c. Oversight by licensed professionals.
  d. Measures to ensure proper storage of medication.

(2) Establishing training requirements for adult care home staff in behavioral interventions. The training shall include appropriate responses to behavioral problems posed by adult care residents. The training shall emphasize safety and humane care and shall specifically include alternatives to the use of restraints.

(3) Establishing minimum training and education qualifications for supervisors in adult care homes and specifying the safety responsibilities of supervisors.

(4) Specifying the qualifications of staff who shall be on duty in adult care homes during various portions of the day in order to assure safe and quality care for the residents. The rules shall take into account varied resident needs and population mixes.

(5) Implementing the due process and appeal rights for discharge and transfer of residents in adult care homes afforded by G.S. 131D-21. The rules shall offer at least the same protections to residents as State and federal rules and regulations governing the transfer or discharge of residents from nursing homes.

(6) Establishing procedures for determining the compliance history of adult care homes' principals and affiliates. The rules shall include criteria for refusing to license facilities which have a history of, or have principals or affiliates with a history of, noncompliance with State law, or disregard for the health, safety, and welfare of residents.

(7) For the licensure of special care units in accordance with G.S. 131D-4.6, and for disclosures required to be made under G.S. 131D-8.

(8) For time limited provisional licenses and for granting extensions for provisional licenses.

(9) For the issuance of certificates to adult care homes as authorized under G.S. 131D-10. (1999-334, s. 1.1; 2000-111, s. 2; 2007-544, s. 3(a).)

Editor's Note. — G.S. 131D-8, referred to in subdivision (7) of this section, was originally enacted by Session Laws 1999-334, s. 2.1, as G.S. 131D-7. It was renumbered as G.S. 131D-8 by Session Laws 1999-456, s. 61(a), which provided that all references to "G.S. 131D-7" in Session Laws 1999-334, which amended this section, be rewritten to read "G.S. 131D-8."

Session Laws 1999-334, s. 3.10, provides that the Secretary of Health and Human Services shall adopt temporary rules in accordance with Chapter 150B of the General Statutes to implement G.S. 131D-4.5 as enacted by this act within 60 days of the date this act became law, July 22, 1999, and that the Secretary's authority to adopt temporary rules expires on the effective date of permanent rules adopted by the Medical Care Commission to implement G.S. 131D-4.5.

Session Laws 2007-544, s. 3(c), provides: "The Department of Health and Human Services shall provide a copy of emergency, temporary, and permanent rules adopted pursuant to this section to the North Carolina Study Commission on Aging at the same time the Department submits the adopted rules to the Rules Review Commission for its review under Chapter 150B of the General Statutes."

Session Laws 2007-544, s. 3(d), provides: "The Department of Health and Human Services, Divisions of Health Service Regulation, Aging and Adult Services, and Medical Assistance shall study the structure and cost of a system to reward adult care homes which receive high ratings. The Department shall report findings and recommendations on this study to the North Carolina Study Commission on Aging not later than March 1, 2008."

Session Laws 2007-544, s. 3(f), provides: "The Department of Health and Human Services, Division of Health Service Regulation and Division of Aging and Adult Services, shall study expanding the rated certificate system to other facilities and services licensed and certified by the Department. The Department shall report to the North Carolina Study Commission on Aging on the expansion of the rating system by October 1, 2009."

Session Laws 2007-544, s. 3(g), provides: "The Department of Health and Human Services, Division of Health Service Regulation, shall report on the implementation of the rated certificate system. The Department shall make an interim report to the North Carolina Study Commission on Aging not later than October 1, 2009, and a final report to the Commission not later than October 1, 2010."

Session Laws 2007-544, s. 4, provides in part that Certificates authorized under this section, as amended by Session Laws 2007-544, s. 3.(a), shall be issued beginning January 1, 2009.

Effect of Amendments. — Session Laws 2007-544, s. 3(a), effective August 31, 2007, added subsection (9).

§ 131D-4.6. Licensure of special care units.

(a) As used in this section, the term "special care unit" means a wing or hallway within an adult care home, or a program provided by an adult care home, that is designated especially for residents with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition as determined by the Medical Care Commission.

(b) An adult care home that holds itself out to the public as providing a special care unit shall be licensed as such and shall, in addition to other licensing requirements for adult care homes, meet the standards established under rules adopted by the Medical Care Commission.

(c) An adult care home that holds itself out to the public as providing a special care unit without being licensed as a special care unit is subject to licensure actions and penalties provided under G.S. 131D-2(b), as well as any other action permitted by law. (1999-334, s. 1.1.)

§ 131D-4.7. Adult care home specialist fund.

There is established the adult care home specialist fund. The fund shall be maintained in and by the Department for the purpose of assisting county departments of social services in paying salaries of adult care home specialists. (1999-334, s. 1.1.)

§ 131D-5: Repealed by Session Laws 1983, c. 637, s. 1.

§ 131D-6. Certification of adult day care programs; purpose; definition; penalty.

(a) It is the policy of this State to enable people who would otherwise need full-time care away from their own residences to remain in their residences as long as possible and to enjoy as much independence as possible. One of the programs that permits adults to remain in their residences and with their families is adult day care.

(b) As used in this section "adult day care program" means the provision of group care and supervision in a place other than their usual place of abode on a less than 24-hour basis to adults who may be physically or mentally disabled. The Department of Health and Human Services shall annually inspect and certify all adult day care programs, under rules adopted by the Social Services Commission. The Social Services Commission shall adopt rules to protect the health, safety, and welfare of persons in adult day care programs. These rules shall include minimum standards relating to management of the program, staffing requirements, building requirements, fire safety, sanitation, nutrition, and program activities. Adult day care programs are not required to provide transportation to participants; however, those programs that choose to provide transportation shall comply with rules adopted by the Commission for the health and safety of participants during transport.

The Department of Health and Human Services shall enforce the rules of the Social Services Commission.

(b1) An adult day care program that provides or that advertises, markets, or otherwise promotes itself as providing special care services for persons with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition shall provide the following written disclosures to the Department and to persons seeking adult day care program special care services:

(1) A statement of the overall philosophy and mission of the adult day care program and how it reflects the special needs of participants with dementia.
(2) The process and criteria for providing or discontinuing special care services.
(3) The process used for assessment and establishment of the plan of care and its implementation, including how the plan of care is responsive to changes in the participant's condition.
(4) Staffing ratios and how they meet the participant's need for increased special care and supervision.
(5) Staff training that is dementia-specific.
(6) Physical environment and design features that specifically address the needs of participants with Alzheimer's disease or other dementias.
(7) Frequency and type of participant activities provided.
(8) Involvement of families in special care and availability of family support programs.
(9) Additional costs and fees to the participant for special care.

(b2) As part of its certification renewal procedures and inspections, the Department shall examine for accuracy the written disclosure of each adult day care program subject to this section. Substantial changes to written disclosures shall be reported to the Department at the time the change is made.

(b3) Nothing in this section shall be construed as prohibiting an adult day care program that does not advertise, market, or otherwise promote itself as providing special care services for persons with Alzheimer's disease or other dementias from providing adult day care services to persons with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition.

(b4) As used in this section, the term "special care service" means a program, service, or activity designed especially for participants with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition as determined by the Medical Care Commission.

(c) The Secretary may impose a civil penalty not to exceed one hundred dollars ($100.00) for each violation on a person, firm, agency, or corporation who willfully violates any provision of this section or any rule adopted by the Social Services Commission pursuant to this section. Each day of a continuing violation constitutes a separate violation.

In determining the amount of the civil penalty, the Secretary shall consider the degree and extent of the harm or potential harm caused by the violation.

The Social Services Commission shall adopt rules concerning the imposition of civil penalties under this subsection.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c1) Any person, firm, agency, or corporation that harms or willfully neglects a person under its care is guilty of a Class 1 misdemeanor.

(d) The following programs are exempted from the provisions of this section:

(1) Those that care for three people or less;

(2) Those that care for two or more persons, all of whom are related by blood or marriage to the operator of the facility;

(3) Those that are required by other statutes to be licensed by the Department of Health and Human Services. (1985, c. 349, s. 1; 1993, c. 539, s. 954; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 1998-215, s. 77; 1999-334, s. 2.2; 2001-90, s. 1.)

Editor's Note. — Subsections (b2), (b3), and (b4) were originally enacted by S.L.1999-334, s. 2.2, as subsections (c), (d), and (e). The subsections have been renumbered at the direction of the Revisor of Statutes.

Session Laws 2006-108, s. 1(a), provides: "The Department of Health and Human Services, Division of Aging and Adult Services and the Division of Medical Assistance, shall provide education, and training if necessary, to ensure that Community Alternatives Program (CAP) case managers are aware of adult day health services and that this option is being considered in all situations appropriate for the client."

Session Laws 2006-108, s. 1(b), provides: "The Department of Health and Human Services, Division of Aging and Adult Services, shall report on the status of the Partners in Caregiving Study recommendations."

Session Laws 2006-108, s. 1(c), provides: "The Department shall report the status of its activities under this section to the North Carolina Study Commission on Aging not later than July 30, 2006."

§ 131D-7. Waiver of rules for certain adult care homes providing shelter or services during disaster or emergency.

(a) The Division of Health Service Regulation may temporarily waive, during disasters or emergencies declared in accordance with Article 1 of Chapter 166A of the General Statutes, any rules of the Commission pertaining to adult care homes to the extent necessary to allow the adult care home to provide temporary shelter and temporary services requested by the emergency management agency. The Division may identify, in advance of a declared disaster or emergency, rules that may be waived, and the extent the rules may be waived, upon a disaster or emergency being declared in accordance with Article 1 of Chapter 166A of the General Statutes. The Division may also waive rules under this subsection during a declared disaster or emergency upon the request of an emergency management agency and may rescind the waiver if, after investigation, the Division determines the waiver poses an unreasonable risk to the health, safety, or welfare of any of the persons occupying the adult care home. The emergency management agency requesting temporary shelter or temporary services shall notify the Division within 72 hours of the time the preapproved waivers are deemed by the emergency management agency to apply.

(b) As used in this section, "emergency management agency" is as defined in G.S. 166A-4(2). (1999-307, s. 2; 2007-182, s. 1.)

Editor's Note. — Pursuant to Session Laws 1999-456, s. 61(a), the section originally enacted as G.S. 131D-7 by Session Laws 1999-334, s. 2.1, has been renumbered as G.S. 131D-8.

Effect of Amendments. — Session Laws

2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" at the beginning of subsection (a).

§ 131D-8. Adult care home special care units; disclosure of information required.

(a) An adult care home licensed under this Part that provides care for persons in special care units as defined in G.S. 131D-4.6 shall disclose the form of care or treatment provided that distinguishes the special care unit as being especially designed for residents with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition. The disclosure shall be in writing and shall be made to all of the following:

(1) The Department as part of its licensing procedures.
(2) Each person seeking placement within a special care unit, or the person's authorized representative, prior to entering into an agreement with the person to provide special care.
(3) The Office of State Long-Term Care Ombudsman, annually, or more often if requested.

(b) Information that must be disclosed in writing shall include, but is not limited to, all of the following:

(1) A statement of the overall philosophy and mission of the licensed facility and how it reflects the special needs of residents with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition.
(2) The process and criteria for placement, transfer, or discharge to or from the special care unit.
(3) The process used for assessment and establishment of the plan of care and its implementation, including how the plan of care is responsive to changes in the resident's condition.
(4) Staffing ratios and how they meet the resident's need for increased care and supervision.
(5) Staff training that is dementia-specific.
(6) Physical environment and design features that specifically address the needs of residents with Alzheimer's disease or other dementias.
(7) Frequency and type of programs and activities for residents of the special care unit.
(8) Involvement of families in resident care, and availability of family support programs.
(9) Additional costs and fees to the resident for special care.

(c) As part of its license renewal procedures and inspections, the Department shall examine for accuracy the written disclosure of each adult care home subject to this section. Substantial changes to written disclosures shall be reported to the Department at the time the change is made.

(d) Nothing in this section shall be construed as prohibiting an adult care home that does not offer a special care unit from admitting a person with Alzheimer's disease or other dementias, a mental health disability, or other special needs disease or condition. The disclosures required under this section apply only to an adult care home that advertises, markets, or otherwise promotes itself as providing a special care unit for persons with Alzheimer's disease or other dementias.

(e) As used in this section, the term "special care unit" has the same meaning as applies under G.S. 131D-4.6. (1999-334, s. 2.1; 1999-456, s. 61(a).)

Editor's Note. — This section was originally enacted by Session Laws 1999-334, s. 2.1, as G.S. 131D-7. It has been renumbered as this section by Session Laws 1999-456, s. 61(a).

§ 131D-9. Immunization of employees and residents of adult care homes.

(a) Except as provided in subsection (e) of this section, an adult care home licensed under this Article shall require residents and employees to be immunized annually against influenza virus and shall require residents to also be immunized against pneumococcal disease.

(b) Upon admission, an adult care home shall notify the resident of the immunization requirements of this section and shall request that the resident agree to be immunized against influenza virus and pneumococcal disease.

(b1) An adult care home shall notify every employee of the immunization requirements of this section and shall request that the employee agree to be immunized against the influenza virus.

(c) An adult care home shall document the annual immunization against influenza virus and the immunization against pneumococcal disease for each resident and each employee, as required under this section. Upon finding that a resident is lacking one or both of these immunizations or that an employee has not been immunized against influenza virus, or if the adult care home is unable to verify that the individual has received the required immunization, the adult care home shall provide or arrange for immunization. The immunization and documentation required shall occur not later than November 30 of each year.

(d) For an individual who becomes a resident of or who is newly employed by the adult care home after November 30 but before March 30 of the following year, the adult care home shall determine the individual's status for the immunizations required under this section, and if found to be deficient, the adult care home shall provide the immunization.

(e) No individual shall be required to receive vaccine under this section if the vaccine is medically contraindicated, or if the vaccine is against the individual's religious beliefs, or if the individual refuses the vaccine after being fully informed of the health risks of not being immunized.

(f) Notwithstanding any other provision of law to the contrary, the Commission for Public Health shall have the authority to adopt rules to implement the immunization requirements of this section.

(g) As used in this section, "employee" means an individual who is a part-time or full-time employee of the adult care home. (2000-112, ss. 1, 2; 2007-182, s. 1.3.)

Editor's Note. — Session Laws 2000-112, s. 5, directs the Department of Health and Human Services to make available to nursing homes and adult care homes educational and informational materials pertaining to vaccinations required under the act.

Effect of Amendments. — Session Laws 2007-182, s. 1.3, effective July 5, 2007, substituted "Commission for Public Health" for "Health Services Commission" in subsection (f).

§ 131D-10. Adult care home rated certificates.

(a) Rules adopted by the North Carolina Medical Care Commission for issuance of certificates to adult care homes shall contain a rating based, at a minimum, on the following:

(1) Inspections and substantiated complaint investigations conducted by the Department to determine compliance with licensing statutes and rules. Specific areas to be reviewed include:
  a. Admission and discharge procedures.
  b. Medication management.
  c. Physical plant.
  d. Resident care and services, including food services, resident activities programs, and safety measures.
  e. Residents' rights.

f. Sanitation grade.
g. Special Care Units.
h. Use of physical restraints and alternatives.

(b) The initial ratings awarded to a facility pursuant to the rules adopted under this section shall be based on inspections, penalties imposed, and investigations of substantiated complaints that revealed noncompliance with statutes and rules, that occurred on or after the act becomes law.

(c) Type A penalties shall affect the rating for 24 months from the date the penalty is assessed. Type B penalties shall affect the rating for 12 months from the date the penalty is assessed.

(d) Adult care homes shall display the rating certificate in a location visible to the public. Certificates shall include the Web site address for the Department of Health and Human Services, Division of Health Service Regulation, which can be accessed for specific information regarding the basis of the facility rating. For access by the public on request, adult care homes shall also maintain on-site a copy of information provided by the Department of Health and Human Services, Division of Health Service Regulation, regarding the basis of the facility rating. In addition to information on the basis of the rating, the Department of Health and Human Services, Division of Health Service Regulation, shall make information available via its Web site and in the materials available on-site at the facility regarding quality improvement efforts undertaken by the facility including:

(1) Participation in any quality improvement programs approved by the Department.
(2) The facility's attainment of the North Carolina New Organizational Vision Award special licensure designation authorized in Article 5, Chapter 131E of the General Statutes. (2007-544, s. 3(b).)

Editor's Note. — Session Laws 2007-544, s. 4, made this section effective August 31, 2007.

Session Laws 2007-544, s. 3(c), provides: "The Department of Health and Human Services shall provide a copy of emergency, temporary, and permanent rules adopted pursuant to this section to the North Carolina Study Commission on Aging at the same time the Department submits the adopted rules to the Rules Review Commission for its review under Chapter 150B of the General Statutes."

Session Laws 2007-544, s. 3(d), provides: "The Department of Health and Human Services, Divisions of Health Service Regulation, Aging and Adult Services, and Medical Assistance shall study the structure and cost of a system to reward adult care homes which receive high ratings. The Department shall report findings and recommendations on this study to the North Carolina Study Commission on Aging not later than March 1, 2008."

Session Laws 2007-544, s. 3(f), provides: "The Department of Health and Human Services, Division of Health Service Regulation and Division of Aging and Adult Services, shall study expanding the rated certificate system to other facilities and services licensed and certified by the Department. The Department shall report to the North Carolina Study Commission on Aging on the expansion of the rating system by October 1, 2009."

Session Laws 2007-544, s. 3(g), provides: "The Department of Health and Human Services, Division of Health Service Regulation, shall report on the implementation of the rated certificate system. The Department shall make an interim report to the North Carolina Study Commission on Aging not later than October 1, 2009, and a final report to the Commission not later than October 1, 2010."

Session Laws 2007-544, s. 4, provides in part that Certificates authorized under this section, as amended by Session Laws 2007-544, s. 3.(a), shall be issued beginning January 1, 2009.

Article 1A.

Control over Child Placing and Child Care.

§ 131D-10.1. Purpose.

It is the policy of this State to strengthen and preserve the family as a unit. When a child requires care outside the family unit, it is the duty of the State to assure that the quality of substitute care is as close as possible to the care and nurturing that society expects of a family.

The purpose of this Article is to assign the authority to protect the health, safety and well-being of children separated from or being cared for away from their families. (1983, c. 637, s. 2.)

Legal Periodicals. — For comment, "Deshaney's Unfinished Business: The Foster Child's Due Process Right to Safety," see 69 N.C.L. Rev. 1 (1990).

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This section applies to a facility giving full-time care to neglected, dependent, abandoned, destitute, orphaned or delinquent children and operating as a school. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Department of Human Resources, 53 N.C.A.G. 48 (1985).

§ 131D-10.2. Definitions.

For purposes of this Article, unless the context clearly implies otherwise:

(1) "Adoption" means the act of creating a legal relationship between parent and child where it did not exist genetically.

(2) "Adoptive Home" means a family home approved by a child placing agency to accept a child for adoption.

(3) "Child" means an individual less than 18 years of age, who has not been emancipated under the provisions of Article 35 of Chapter 7B of the General Statutes.

(4) "Child Placing Agency" means a person authorized by statute or license under this Article to receive children for purposes of placement in residential group care, family foster homes or adoptive homes.

(5) "Children's Camp" means a residential child-care facility which provides foster care at either a permanent camp site or in a wilderness setting.

(6a) "Criminal History" means a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment of a crime for child abuse or neglect, spousal abuse, a crime against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, other than physical assault or battery; a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment for physical assault, battery, or a drug-related offense, if the offense was committed within the past five years; or similar crimes under federal law or under the laws of other states.

(7) "Department" means the Department of Health and Human Services.

(8) "Family Foster Home" means the private residence of one or more individuals who permanently reside as members of the household and who provide continuing full-time foster care for a child or children who are placed there by a child placing agency or who provide continuing full-time foster care for two or more children who are unrelated to the adult members of the household by blood, marriage, guardianship or adoption.

(9) "Foster Care" means the continuing provision of the essentials of daily living on a 24-hour basis for dependent, neglected, abused, abandoned, destitute, orphaned, undisciplined or delinquent children or other children who, due to similar problems of behavior or family conditions, are living apart from their parents, relatives, or guardians in a family foster home or residential child-care facility. The essentials

of daily living include but are not limited to shelter, meals, clothing, education, recreation, and individual attention and supervision.

(9a) "Foster Parent" means any individual who is 18 years of age or older who is licensed by the State to provide foster care.

(10) "Person" means an individual, partnership, joint-stock company, trust, voluntary association, corporation, agency, or other organization or enterprise doing business in this State, whether or not for profit.

(11) "Primarily Educational Institution" means any institution which operates one or more scholastic or vocational and technical education programs that can be offered in satisfaction of compulsory school attendance laws, in which the primary purpose of the housing and care of children is to meet their educational needs, provided such institution has complied with Article 39 of Chapter 115C of the General Statutes.

(12) "Provisional License" means a type of license granted by the Department to a person who is temporarily unable to comply with a rule or rules adopted under this Article.

(13) "Residential Child-Care Facility" means a staffed premise with paid or volunteer staff where children receive continuing full-time foster care. Residential child-care facility includes child-caring institutions, group homes, and children's camps which provide foster care.

(14) "Therapeutic Foster Home" means a family foster home where, in addition to the provision of foster care, foster parents who receive appropriate training provide a child with behavioral health treatment services under the supervision of a county department of social services, an area mental health program, or a licensed private agency and in compliance with licensing rules adopted by the Commission. (1983, c. 637, s. 2; 1993, c. 180, s. 5; 1995, c. 507, s. 23.26(a); 1997-140, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 13(hh); 2001-487, s. 84(b); 2007-276, s. 11.)

Effect of Amendments. — Session Laws 2007-276, s. 11 , effective October 1, 2007, rewrote subdivision (6a).

CASE NOTES

"Foster Care." — Trial court's custody review order did not comply with G.S. 7B-906(c)(3) and (4) because it did not address the goals of a child's foster care placement or the role her foster parents were to play in her future planning, because the foster parents were foster parents, as they were providing foster care, as defined by G.S. 131D-10.2(9). In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

§ 131D-10.3. Licensure required.

(a) No person shall operate, establish or provide foster care for children or receive and place children in residential care facilities, family foster homes, or adoptive homes without first applying for a license to the Department and submitting the required information on application forms provided by the Department.

(b) Persons licensed or seeking a license under this Article shall permit the Department access to premises and information required to determine whether the person is in compliance with licensing rules of the Commission.

(c) Persons licensed pursuant to this Article shall be periodically reviewed by the Department to determine whether they comply with Commission rules and whether licensure shall continue.

(d) This Article shall apply to all persons intending to organize, develop or provide foster care for children or receive and place children in residential child-care facilities, family foster homes or adoptive homes irrespective of such persons having applied for or obtained a certification, registration or permit to carry on work not controlled by this Article except persons exempted in G.S. 131D-10.4.

(e) Unless revoked or modified to a provisional or suspended status, the terms of a license issued by the Department shall be in force for a period not to exceed 24 months from the date of issuance under rules adopted by the Commission.

(f) Persons licensed or seeking a license who are temporarily unable to comply with a rule or rules may be granted a provisional license. The provisional license can be issued for a period not to exceed six months. The noncompliance with a rule or rules shall not present an immediate threat to the health and safety of the children, and the person shall have a plan approved by the Department to correct the area(s) of noncompliance within the provisional period. A provisional license for an additional period of time to meet the same area(s) of noncompliance shall not be issued.

(g) In accordance with Commission rules, a person may submit to the Department documentation of compliance with the standards of a nationally recognized accrediting body, and the Department on the basis of such accreditation may deem the person in compliance with one or more Commission licensing rules.

(h) Except as provided in subsection (i) of this section, the Secretary shall not enroll any new provider for Medicaid Home or Community Based services or other Medicaid services, as defined in 42 C.F.R. 440.90, 42 C.F.R. 440.130(d), and 42 C.F.R. 440.180, or issue a license for a new facility or a new service to any applicant meeting any of the following criteria:

- (1) The applicant was the owner, principal, or affiliate of a licensable facility under Chapter 122C, Chapter 131D, or Article 7 of Chapter 110 that had its license revoked until 60 months after the date of the revocation.
- (2) The applicant is the owner, principal, or affiliate of a licensable facility that was assessed a penalty for a Type A or Type B violation under Article 3 of Chapter 122C, or any combination thereof, and any one of the following conditions exist:
  - a. A single violation has been assessed in the six months prior to the application.
  - b. Two violations have been assessed in the 18 months prior to the application and 18 months have not passed from the date of the most recent violation.
  - c. Three violations have been assessed in the 36 months prior to the application and 36 months have not passed from the date of the most recent violation.
  - d. Four or more violations have been assessed in the 60 months prior to application and 60 months have not passed from the date of the most recent violation.
- (3) The applicant is the owner, principal, or affiliate of a licensable facility that had its license summarily suspended or downgraded to provisional status as a result of violations under G.S. 122C-24.1(a) until 60 months after the date of reinstatement or restoration of the license.
- (4) The applicant is the owner, principal, or affiliate of a licensable facility that had its license summarily suspended or downgraded to provisional status as a result of violations under Article 1A of Chapter 131D, or had its license summarily suspended or denied under Article 7 of Chapter 110 until 60 months after the date of reinstatement or restoration of the license.

(i) The Secretary may enroll a provider described in subsection (h) of this section if any of the following circumstances apply:

(1) The applicant is an area program or county program providing services under G.S. 122C-141, and there is no other provider of the service in the catchment area.

(2) The Secretary finds that the area program or county program has shown good cause by clear and convincing evidence why the enrollment should be allowed.

(j) For purposes of subdivision (h)(2) of this section, fines assessed prior to October 23, 2002, are not applicable to this provision. However, licensure or enrollment shall be denied if an applicant's history as a provider under Chapter 131D, Chapter 122C, or Article 7 of Chapter 110 is such that the Secretary has concluded the applicant will likely be unable to comply with licensing or enrollment statutes, rules, or regulations. In the event the Secretary denies licensure or enrollment under this subsection, the reasons for the denial and appeal rights pursuant to Article 3 of Chapter 150B shall be given to the provider in writing. (1983, c. 637, s. 2; 2002-164, s. 4.4; 2003-294, s. 4.)

Comprehensive Treatment Services Program. — Session Laws 2007-323, s. 10.10(a)-(h), (j), (k), provides: "(a) The Department of Health and Human Services shall continue the Comprehensive Treatment Services Program for children at risk for institutionalization or other out-of-home placement. The Program shall be implemented by the Department in consultation with the Department of Juvenile Justice and Delinquency Prevention, the Department of Public Instruction, and other affected State agencies. The purpose of the Program is to provide appropriate and medically necessary nonresidential and residential treatment alternatives for children at risk of institutionalization or other out-of-home placement. Program funds shall be targeted for non-Medicaid eligible children. Program funds may also be used to expand a system-of-care approach for services to children and their families statewide. The program shall include the following:

"(1) Behavioral health screening for all children at risk of institutionalization or other out-of-home placement.

"(2) Appropriate and medically necessary nonresidential and residential services for children within the child mental health deaf and hard of hearing target population.

"(3) Appropriate and medically necessary nonresidential and residential treatment services, including placements for sexually aggressive youth.

"(4) Appropriate and medically necessary nonresidential and residential treatment services, including placements for youth needing substance abuse treatment services and children with serious emotional disturbances.

"(5) Multidisciplinary case management services, as needed.

"(6) A system of utilization review specific to the nature and design of the Program.

"(7) Mechanisms to ensure that children are not placed in department of social services custody for the purpose of obtaining mental health residential treatment services.

"(8) Mechanisms to maximize current State and local funds and to expand use of Medicaid funds to accomplish the intent of this Program.

"(9) Other appropriate components to accomplish the Program's purpose.

"(10) The Secretary of the Department of Health and Human Services may enter into contracts with residential service providers.

"(11) A system of identifying and tracking children placed outside of the family unit in group homes, therapeutic foster care home settings, and other out-of-home placements.

"(12) The development of a strong infrastructure of interagency collaboration.

"(13) Individualized strengths-based care.

"(b) In order to ensure that children at risk for institutionalization or other out-of-home placement are appropriately served by the mental health, developmental disabilities, and substance abuse services system, the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, shall do the following with respect to services provided to these children:

"(1) Provide only those treatment services that are medically necessary.

"(2) Implement utilization review of services provided.

"(3) Adopt the following guiding principles for the provision of services:

"a. Service delivery system must be outcome-oriented and evaluation-based.

"b. Services should be delivered as close as possible to the child's home.

"c. Services selected should be those that are most efficient in terms of cost and effectiveness.

"d. Services should not be provided solely for the convenience of the provider or the client.

"e. Families and consumers should be involved in decision making throughout treatment planning and delivery.

"f. Services shall be specified, delivered, and monitored through a unified Child and Family Plan incorporating the principles of one-child-one-team-one-plan.

"g. Out-of-home placements for children shall be a last resort and shall include concrete plans to bring the children back to a stable, permanent home, their schools, and their community.

"(4) Implement all of the following cost-reduction strategies:

"a. Preauthorization for all services except emergency services.

"b. Levels of care to assist in the development of treatment plans.

"c. Clinically appropriate services.

"(c) The Department shall collaborate with other affected State agencies such as the Department of Juvenile Justice and Delinquency Prevention, the Department of Public Instruction, the Administrative Office of the Courts, and with local departments of social services, area mental health programs, and local education agencies to eliminate cost shifting and facilitate cost-sharing among these governmental agencies with respect to the treatment and placement services.

"(d) The Department shall not allocate funds appropriated for Program services until a Memorandum of Agreement has been executed between the Department of Health and Human Services, the Department of Public Instruction, and other affected State agencies. The Memorandum of Agreement shall address specifically the roles and responsibilities of the various departmental divisions and affected State agencies involved in the administration, financing, care, and placement of children at risk of institutionalization or other out-of-home placement. The Department shall not allocate funds appropriated in this act for the Program until the Memoranda of Agreement between local departments of social services, area mental health programs, local education agencies, the Administrative Office of the Courts, and the Department of Juvenile Justice and Delinquency Prevention, as appropriate, are executed to effectuate the purpose of the Program. The Memoranda of Agreement shall address issues pertinent to local implementation of the Program, including provision for the immediate availability of student records to a local school administrative unit receiving a child placed in a residential setting outside the child's home county.

"(e) Notwithstanding any other provision of law to the contrary, services under the Comprehensive Treatment Services Program are not an entitlement for non-Medicaid eligible children served by the Program.

"(f) Of the funds appropriated in this act for the Comprehensive Treatment Services Program, the Department of Health and Human Services shall establish a reserve of three percent (3%) to ensure availability of these funds to address specialized needs for children with unique or highly complex problems.

"(g) The Department of Health and Human Services, in conjunction with the Department of Juvenile Justice and Delinquency Prevention, the Department of Public Instruction, and other affected agencies, shall report on the following Program information:

"(1) The number and other demographic information of children served.

"(2) The amount and source of funds expended to implement the Program.

"(3) Information regarding the number of children screened, specific placement of children, including the placement of children in programs or facilities outside of the child's home county, and treatment needs of children served.

"(4) The average length of stay in residential treatment, transition, and return to home.

"(5) The number of children diverted from institutions or other out-of-home placements such as training schools and State psychiatric hospitals and a description of the services provided.

"(6) Recommendations on other areas of the Program that need to be improved.

"(7) Other information relevant to successful implementation of the Program.

"(h) The Department shall report on the following Program funding information:

"(1) The amount of Program funding allocated and expended by each LME.

"(2) The amount of Program funds each LME transferred out of the Program to serve purposes other than those outlined by this Program and an explanation of why LMEs transferred the funding.

"(3) Recommendations to improve the penetration rate of Program funds to serve the intended populations across the State.

"(j) Upon approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to assist in the work of the Task Force. Professional staff shall be those assigned to subject areas or agencies involving child-serving programs administered by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, the Administrative Office of the Courts, and the Department of Public Instruction. Clerical staff shall be furnished to the Task Force through the offices of the House of Representatives and Senate Directors of Legislative Assistants.

"(k) The Department shall report on April 1, 2008, and April 1, 2009, on the implementation of subsections (a) through (h) of this section. The reports required under this subsection shall be made to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, and the Fiscal Research Division."

For similar provisions, see Session Laws 2003-294, s. 6(a), and 2005-276, s. 10.25(a)-(g) and (m).

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 131D-10.3A. Mandatory criminal checks.

(a) Effective January 1, 1996, in order to ensure the safety and well-being of any child placed for foster care in a home, the Department shall ensure that the criminal histories of all foster parents, individuals applying for licensure as foster parents, and individuals 18 years of age or older who reside in a family foster home, are checked and, based on the criminal history check, a determination is made as to whether the foster parents, and other individuals required to be checked, are fit for a foster child to reside with them in the home. The Department shall ensure that, as of the effective date of this Article, all individuals required to be checked are checked for county, state, and federal criminal histories.

(b) The Department shall ensure that all individuals who are required to be checked pursuant to subsection (a) of this section are checked upon relicensure for county and State criminal histories.

(c) The Department shall prohibit an individual from providing foster care by denying or revoking the license to provide foster care if an individual required to submit to a criminal history check pursuant to subsection (a) of this section has a criminal history. The Department may prohibit an individual from providing foster care by denying or revoking the license to provide foster care if the Department determines that the safety and well being of a child placed in the home for foster care would be at risk based on other criminal convictions, whether felony or misdemeanor.

(d) The Department of Justice shall provide to the Department the criminal history of the individuals specified in subsection (a) of this section obtained from the State and National Repositories of Criminal Histories as requested by the Department. The Department shall provide to the Department of Justice, along with the request, the fingerprints of the individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of the individual to be checked shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(e) At the time of application, the individual whose criminal history is to be checked shall be furnished with a statement substantially similar to the following:

> “NOTICE
>
> MANDATORY CRIMINAL HISTORY CHECK
>
> NORTH CAROLINA LAW REQUIRES THAT A CRIMINAL HISTORY CHECK BE CONDUCTED ON ALL PERSONS 18 YEARS OF AGE OR OLDER WHO RESIDE IN A LICENSED FAMILY FOSTER HOME.
>
> “Criminal history” includes any county, State, and federal conviction of a felony by a court of competent jurisdiction or pending felony indictment of a crime for child abuse or neglect, spousal abuse, a crime against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, other than physical assault or battery; a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment for physical assault, battery, or a drug related offense, if the offense was committed within the past five years; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).
>
> If it is determined, based on your criminal history, that you are unfit to have a foster child reside with you, you shall have the opportunity to complete or challenge the accuracy of the information contained in the SBI or FBI identification records.
>
> If licensure is denied or the foster home license is revoked by the Department of Health and Human Services as a result of the criminal history check, if you are a foster parent, or are applying to become a foster parent, you may request a hearing pursuant to Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.
>
> Any person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor.”

Refusal to consent to a criminal history check is grounds for the Department to deny or revoke a license to provide foster care. Any person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor.

(f) The Department shall notify in writing the foster parent and any person applying to be licensed as a foster parent, and that individual’s supervising agency of the determination by the Department of whether the foster parent is qualified to provide foster care based on the criminal history of all individuals required to be checked. In accordance with the law regulating the dissemination of the contents of the criminal history file furnished by the Federal Bureau of Investigation, the Department shall not release nor disclose any portion of an individual’s criminal history to the foster parent or any other individual required to be checked. The Department shall also notify the individual of the individual’s right to review the criminal history information, the procedure for completing or challenging the accuracy of the criminal history, and the foster parent’s right to contest the Department’s determination.

A foster parent who disagrees with the Department’s decision may request a hearing pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(g) All the information that the Department receives through the checking of the criminal history is privileged information and is not a public record but is for the exclusive use of the Department and those persons authorized under this section to receive the information. The Department may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(h) There is no liability for negligence on the part of a supervising agency, or a State or local agency, or the employees of a State or local agency, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Article 31A of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Torts Claim Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(i) The Department of Justice shall perform the State and national criminal history checks on individuals required by this section and shall charge the Department a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. The Division of Social Services, Department of Health and Human Services, shall bear the costs of implementing this section. (1995, c. 507, s. 23.26(b); 1997-140, s. 2; 1997-443, ss. 11A.89, 11A.118(a); 2003-304, s. 4; 2007-276, ss. 12, 13.)

Effect of Amendments. — Session Laws 2007-276, ss. 12 and 13 , effective October 1, 2007, in subsection (c), inserted the first sentence and substituted "other criminal convictions, whether felony or misdemeanor" for "the criminal history of the individuals required to be checked pursuant to subsection (a) of this section" at the end; and rewrote the paragraph beginning with ""Criminal history"..." and ending with "...and the Federal Bureau of Investigation (FBI)" in subsection (e).

§ 131D-10.4. Exemptions.

This Article shall not apply to:

(1) Any residential child-care facility chartered by the laws of the State of North Carolina (or operating under charters of other states which have complied with the corporation laws of North Carolina) which has a plant and assets worth sixty thousand dollars ($60,000) or more and which is owned or operated by a religious denomination or fraternal order and which was in operation before July 1, 1977;

(2) State institutions for emotionally disturbed or delinquent children, the mentally ill, mentally retarded, and substance abusers;

(3) Secure detention facilities as specified in Article 12 of Chapter 143B of the General Statutes;

(4) Licensable facilities subject to the rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services as specified in Article 2 of Chapter 122C of the General Statutes;

(5) Persons authorized by statute to receive and place children for foster care and adoption in accordance with G.S. 108A-14;

(6) Primarily educational institutions as defined in G.S. 131D-10.2(11); or

(7) Individuals who are related by blood, marriage, or adoption to the child. (1983, c. 637, s. 2; 1985, c. 589, s. 39; 1991, c. 636, s. 19(b); 1998-202, s. 13(ii); 1999-423, s. 6; 2000-137, s. 4(gg).)

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Abuse Occurring in County Operated Secure Detention Facility. — The Department of Social Services has the authority to investigate an abuse complaint (involving a juvenile) that allegedly occurred in a county operated secure detention facility that is licensed by the North Carolina Office of Juvenile Justice. See Opinion of Attorney General to Mr.

Lowell L. Siler, Esq., Deputy County Attorney, County of Durham, 2000 N.C. AG LEXIS 17 (9/11/2000).

§ 131D-10.5. Powers and duties of the Commission.

In addition to other powers and duties prescribed by law, the Commission shall exercise the following powers and duties:

(1) Adopt, amend and repeal rules consistent with the laws of this State and the laws and regulations of the federal government to implement the provisions and purposes of this Article;

(2) Issue declaratory rulings as may be needed to implement the provisions and purposes of this Article;

(3) Adopt rules governing procedures to appeal Department decisions pursuant to this Article granting, denying, suspending or revoking licenses;

(4) Adopt criteria for waiver of licensing rules adopted pursuant to this Article;

(5) Adopt rules on documenting the use of physical restraint in residential child-care facilities; and

(6) Adopt rules establishing personnel and training requirements related to the use of physical restraints and time-out for staff employed in residential child-care facilities.

(7) Adopt rules establishing educational requirements for executive directors and staff employed by child placing agencies and residential child care facilities. (1983, c. 637, s. 2; 2000-129, s. 2(a); 2007-30, s. 2.)

Effect of Amendments. — Session Laws 2007-30, s. 2, effective April 28, 2007, added subdivision (7).

§ 131D-10.5A. Collection of data on use of restraints in residential child-care facilities.

A residential child-care facility that employs physical restraint of a child shall collect data on the use of the restraint. The data shall reflect for each incidence, the type of procedure used, the length of time employed, alternatives considered or employed, and the effectiveness of the procedure or alternative employed. The facility shall analyze the data on at least a quarterly basis to monitor effectiveness, determine trends, and take corrective action where necessary. The facility shall make the data available to the Department upon request. Nothing in this subsection abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department under this subsection. In reviewing data requested under this subsection, the Department shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this subsection. (2000-129, s. 2(b).)

§ 131D-10.6. Powers and duties of the Department.

In addition to other powers and duties prescribed by law, the Department shall exercise the following powers and duties:

(1) Investigate applicants for licensure to determine whether they are in compliance with licensing rules adopted by the Commission and the provisions of this Article.

(2) Grant a license when an investigation shows compliance with this Article and Commission rules. The license shall be valid for a period not to exceed 24 months as specified by Commission rules and may be revoked or placed in suspended or provisional status sooner if the Department finds that licensure rules are not being met or upon a finding that the health, safety or welfare of children is threatened.

(3) Administer and enforce the provisions of this Article and the rules of the Commission.

(4) Appoint hearing officers to conduct appeals pursuant to this Article.

(5) Prescribe the form in which application for licensure or a request for waiver of Commission rules shall be submitted.

(6) Inspect facilities and obtain records, documents and other information necessary to determine compliance with the provisions of this Article and Commission rules.

(7) Grant, deny, suspend or revoke a license or a provisional license, in accordance with Commission rules.

(8) Act to grant or deny a request for waiver of Commission rules within 10 business days after its receipt. Grant a waiver for good cause to Commission rules that do not affect the health, safety, or welfare of children in facilities subject to licensure under this Article, in accordance with Commission rules.

(9) Undertake a comprehensive study of the existing procedures for granting or denying an application for licensure or a request for waiver of Commission rules and report to the General Assembly on or before May 1, 1998, regarding its efforts to make the process more efficient and less time-consuming and its recommendations for any changes in the licensing laws or rules. The study shall include the development of a procedure that will ensure that the local Guardian Ad Litem Program is notified by the county department of social services of the request for a waiver if a guardian has been appointed for any child who may be affected by the waiver.

(10) Report annually on October 1 to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services the level of facility compliance with applicable State law governing the use of restraint and time-out in residential child-care facilities. The report shall also include the total number of facilities that reported deaths under this section, the number of deaths reported by each facility, the number of deaths investigated pursuant to this section, and the number found by the investigation to be related to the use of physical restraint or time-out. (1983, c. 637, s. 2; 1997-110, s. 1; 2000-129, s. 5(b); 2003-58, s. 3.)

§ 131D-10.6A. Training by the Division of Social Services required.

(a) The Division of Social Services, Department of Health and Human Services, shall require a minimum of 30 hours of preservice training for foster care parents either prior to licensure or within six months from the date a provisional license is issued pursuant to G.S.131D-10.3, and a mandated minimum of 10 hours of continuing education for all foster care parents annually after the year in which a license is obtained.

(b) The Division of Social Services shall establish minimum training requirements for child welfare services staff. The minimum training requirements established by the Division are as follows:

(1) Child welfare services workers shall complete a minimum of 72 hours of preservice training before assuming direct client contact responsi-

bilities. In completing this requirement, the Division of Social Services shall ensure that each child welfare worker receives training on family centered practices and State and federal law regarding the basic rights of individuals relevant to the provision of child welfare services, including the right to privacy, freedom from duress and coercion to induce cooperation, and the right to parent.

(2) Child protective services workers shall complete a minimum of 18 hours of additional training that the Division of Social Services determines is necessary to adequately meet training needs.

(3) Foster care and adoption workers shall complete a minimum of 39 hours of additional training that the Division of Social Services determines is necessary to adequately meet training needs.

(4) Child welfare services supervisors shall complete a minimum of 72 hours of preservice training before assuming supervisory responsibilities and a minimum of 54 hours of additional training that the Division of Social Services determines is necessary to adequately meet training needs.

(5) Child welfare services staff shall complete 24 hours of continuing education annually. In completing this requirement, the Division of Social Services shall provide each child welfare services staff member with annual update information on family centered practices and State and federal law regarding the basic rights of individuals relevant to the provision of child welfare services, including the right to privacy, freedom from duress and coercion to induce cooperation, and the right to parent.

The Division of Social Services may grant an exception in whole or in part to the requirement under subdivision (1) of this subsection to child welfare workers who satisfactorily complete or are enrolled in a masters or bachelors program after July 1, 1999, from a North Carolina social work program accredited pursuant to the Council on Social Work Education. The program's curricula must cover the specific preservice training requirements as established by the Division of Social Services.

The Division of Social Services shall ensure that training opportunities are available for county departments of social services and consolidated human service agencies to meet the training requirements of this subsection. (1995, c. 324, s. 23.25; 1997-390, s. 11.1; 1997-443, s. 11A.118(a); 2000-67, s. 11.14(c); 2003-304, s. 4.2.)

Editor's Note. — Session Laws 1995, c. 324, s. 23.25, was codified at the direction of the Revisor of Statutes as G.S. 131D-10.6A.

Session Laws 2003-304, s. 7.1, provides: "The Division of Social Services shall ensure that each currently employed child welfare worker receives training on family centered practices and State and federal law regarding the basic rights of individuals relevant to the provision of child welfare services, including the right to privacy, freedom from duress and coercion to induce cooperation, and the right to parent."

§ 131D-10.6B. Report of death.

(a) A facility licensed under this Article shall notify the Department immediately upon the death of any resident of the facility that occurs within seven days of physical restraint of the resident, and shall notify the Department within three days of the death of any resident of the facility resulting from violence, accident, suicide, or homicide. The Department may assess a civil penalty of not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000) against a facility that fails to notify the Department of a death and the circumstances surrounding the death known to the facility. Chapter 150B of the General Statutes governs the assessment of a penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Department or the Attorney General. The clear proceeds of the penalty shall be remitted to the State Treasurer for deposit in accordance with State law.

(b) Upon receipt of notification from a facility in accordance with subsection (a) of this section, the Department shall notify the State protection and advocacy agency designated under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402, that a person with a disability has died. The Department shall provide the agency access to the information about each death reported to the agency pursuant to subsection (a) of this section, including information resulting from any investigation of the death by the Department, and from reports received from the Chief Medical Examiner pursuant to G.S. 130A-385. The agency shall use the information in accordance with its powers and duties under applicable State and federal law and regulations.

(c) If the death of a resident of the facility occurs within seven days of the use of physical restraint, the Department shall initiate immediately an investigation of the death.

(d) Nothing in this section abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department or the agency. In carrying out the requirements of this section, the Department and the agency shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this section. A facility or provider that makes available confidential information in accordance with this section and with State and federal law is not liable for the release of the information.

(e) The Secretary shall establish a standard reporting format for reporting deaths pursuant to this section and shall provide to facilities subject to this section a form for the facility's use in complying with this section. (2000-129, s. 5(a); 2007-323, ss. 19.1(g), (h).)

Editor's Note. — Session Laws 2007-323, s. 19.1(b), provides: "Pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, the Governor shall redesignate the operation and function of the Governor's Advocacy Council for Persons with Disabilities from the Department of Administration to a nongovernmental entity. The Governor shall follow the federal statutory procedure for redesignation found at 45 C.F.R. § 1386.20, with a target transfer date of July 1, 2007."

Session Laws 2007-323, s. 19.1(*l*), provides: "This section is effective on the effective date of the redesignation and transfer of the operation and function of the Governor's Advocacy Council for Persons with Disabilities from the Department of Administration to a nongovernmental entity under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402. Any funds appropriated to the Governor's Advocacy Council for Persons with Disabilities revert to the General Fund on that date." The redesignation and transfer were effective July 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 19.1(g) and (h), effective July 1, 2007, substituted "agency" for "Council" in subsections (b) and (d); and in subsection (b), substituted "State protection and advocacy agency designated under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402," for "Governor's Advocacy Council for Persons With Disabilities" in the first sentence, and substituted "applicable State and" for "G.S. 1543B-403.1 and applicable" near the end of the last sentence.

§ 131D-10.6C. Maintaining a register of applicants by the Division of Social Services.

(a) The Division of Social Services shall keep a register of all family foster and therapeutic foster home applicants. The register shall contain the following information:

(1) The name, age, and address of each applicant.
(2) The date of the application.
(3) The applicant's supervising agency.
(4) Any mandated training completed by the applicant and the dates of training.
(5) Whether the applicant was licensed and the date of the initial licensure.
(6) The current licensing period.
(7) Any adverse licensing actions.
(8) Any other information deemed necessary by the Division of Social Services.

(b) The register shall be a public record under Chapter 132 of the General Statutes. Information not specified in subsection (a) of this section shall be considered confidential and not subject to disclosure. (2003-304, s. 5.)

§ 131D-10.7. Penalties.

Any person who establishes or provides foster care for children or who receives and places children in residential child-care facilities, family foster homes or adoptive homes without a license shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be punishable by a fine of not more than fifty dollars ($50.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. Each day of a continuing violation after conviction shall be considered a separate offense. (1983, c. 637, s. 2; 1993, c. 539, s. 955; 1994, Ex. Sess., c. 24, s. 14(c).)

OPINIONS OF ATTORNEY GENERAL

Meaning of "Places Children." — This section must be read in conjunction with Chapter 48 of the General Statutes which, among other things, prescribes procedures for adoptions; it is clear that placement for adoption has a much broader meaning than mere physical receipt or placement. See opinion of Attorney General to Mr. James B. Wood, President, Johnston Memorial Hospital, 59 N.C.A.G. 27 (1989).

The words "place" or "placement," when used in the context of adoptions, refer to greater involvement in the adoption process than the physical delivery of a child to his adoptive parents. See opinion of Attorney General to Mr. James B. Wood, President, Johnson Memorial Hospital, 59 N.C.A.G. 27 (1989).

Hospital's Discharge of Infant to Adoptive Parents. — Reading this section in the context of the chapter on licensing and inspection of child placing agencies leads to the conclusion that this section was not intended to address the situation in which a hospital employee, with no involvement in the arrangement of adoption, simply delivers an infant to adoptive parents. In addition, the language "in . . . adoptive homes" goes beyond what a hospital employee does when he releases a new born child to an adoptive parent; consequently, a hospital's discharge of an infant to adoptive parents does not constitute a violation of this section. See opinion of Attorney General to Mr. James B. Wood, President, Johnston Memorial Hospital, 59 N.C.A.G. 27 (1989).

§ 131D-10.8. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person to restrain or prevent the establishment, conduct, management or operation of a facility operating without a license or in a manner that threatens the health, safety or welfare of the individuals in the facility.

(b) If any person shall interfere with the proper performance or duty of the Department in carrying out this Article, the Department may institute an action in the superior court of the county in which the interference occurred for injunctive relief against the continued interference, irrespective of all other remedies at law. (1983, c. 637, s. 2.)

§ 131D-10.9. Administrative and judicial review.

All procedures arising out of this Article, including all notification, hearing and appeal procedures, shall be governed by the appropriate provisions of Chapter 150B of the Administrative Procedure Act. (1983, c. 637, s. 2; 1987, c. 827, s. 243.)

ARTICLE 2.

Local Confinement Facilities.

§ 131D-11. Inspection.

The Department of Health and Human Services shall, as authorized by G.S. 153-51, inspect regularly all local confinement facilities as defined by G.S. 153-50(4) to determine compliance with the minimum standards for local confinement facilities adopted by the Social Services Commission. (1868-9, c. 170, s. 5; Code, s. 2335; Rev., s. 3917; 1917, c. 170, s. 1; C.S., s. 5008; 1957, c. 86; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 2; 1997-443, s. 11A.118(a).)

Cross References. — As to detention of juveniles in holdover facilities inspected pursuant to this Part and G.S. 153A-222 where no juvenile detention home is available, see now G.S. 7B-505 and 7B-1905.

Editor's Note. — This Article is Part 3 of Article 3 of Chapter 108, as recodified pursuant to Session Laws 1981, c. 275, s. 2, effective Oct. 1, 1981.

G.S. 153-50 and 153-51, referred to in this section, were repealed by Session Laws 1973, c. 822.

CASE NOTES

Cited in Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs., 176 N.C. App. 278, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006).

§ 131D-12. Approval of new facilities.

The Department of Health and Human Services shall, as authorized by G.S. 153-51, approve the plans for the construction or major modification of any local confinement facility. (1868-9, c. 170, s. 5; Code, s. 2335; Rev., s. 3917; 1917, c. 170, s. 1; C.S., s. 5008; 1957, c. 86; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 2; 1997-443, s. 11A.118(a).)

Editor's Note. — G.S. 153-51, referred to in this section, was repealed by Session Laws 1973, c. 822.

§ 131D-13. Failure to provide information.

If the board of commissioners of any county, the chief of police of any municipality, or any officer or employee of any local confinement facility shall fail or refuse to furnish to the Department of Health and Human Services any information about any local confinement facility which is required by law to be furnished, or shall fail to allow the inspection of any such facility, such board or individual shall be guilty of a Class 1 misdemeanor. (1869-70, c. 154, s. 3; Code, s. 2341; 1891, c. 491, s. 2; Rev., s. 3566; C.S., s. 5013; 1957, c. 100, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 2; 1993, c. 539, s. 956; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a).)

CASE NOTES

Cited in Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs., 176 N.C. App. 278, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006).

§§ 131D-14 through 131D-18: Reserved for future codification purposes.

Article 3.

Adult Care Home Residents' Bill of Rights.

§ 131D-19. Legislative intent.

It is the intent of the General Assembly to promote the interests and well-being of the residents in adult care homes and assisted living residences licensed pursuant to G.S. 131D-2. It is the intent of the General Assembly that every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and that the facility shall encourage and assist the resident in the fullest possible exercise of these rights. It is the intent of the General Assembly that rules developed by the Social Services Commission to implement Article 1 and Article 3 of Chapter 131D of the General Statutes encourage every resident's quality of life, autonomy, privacy, independence, respect, and dignity and provide the following:

(1) Diverse and innovative housing models that provide choices of different lifestyles that are acceptable, cost-effective, and accessible to all consumers regardless of age, disability, or financial status;
(2) A residential environment free from abuse, neglect, and exploitation;
(3) Available, affordable personal service models and individualized plans of care that are mutually agreed upon by the resident, family, and providers and that include measurable goals and outcomes;
(4) Client assessment, evaluation, and independent case management that enhance quality of life by allowing individual risk-taking and responsibility by the resident for decisions affecting daily living to the greatest degree possible based on the individual's ability; and
(5) Oversight, monitoring, and supervision by State and county governments to ensure every resident's safety and dignity and to assure that every resident's needs, including nursing and medical care needs if and when needed, are being met. (1981, c. 923, s. 1; 1995, c. 535, s. 12.)

Editor's Note. — Session Laws 2005-276, s. 10.40A(p), effective July 1, 2005, as amended by Session Laws 2006-66, s. 10.1, provides: "The Department's Division of Aging and Adult

Services shall develop a Quality Improvement Consultation Program for Adult Care Homes. The purpose of the Program is to promote better care and improve quality of life in a safe environment for residents in adult care homes through consultation and assistance with adult care home providers. The county departments of social services shall be responsible for implementation of the Program with all adult care homes located in the respective county, based on a timetable for statewide implementation.

"The Division of Aging and Adult Services shall consult with adult care home providers, county departments of social services, consumer advocates, and other interested stakeholders and parties in the development of the Quality Improvement Consultation Program for Adult Care Homes.

"The Department shall submit a progress report to the North Carolina Study Commission on Aging and to the Senate Appropriations Committee on Health and Human Services and to the House of Representatives Subcommittee on Health and Human Services on or before January 1, 2007.

"The report will address the following topics:

"(1) Principles and philosophies that are resident-centered and promote independence, dignity, and choice for residents;

"(2) Approaches to develop continuous quality improvement with a focus on resident satisfaction and optimal outcomes;

"(3) Dissemination of best practice models that have been used successfully elsewhere;

"(4) A determination of the availability of standardized instruments, and their use to the extent possible, to assess and measure adult care home performance according to quality of life indicators;

"(5) Utilization of quality improvement plans for adult care homes that identify and resolve issues that adversely affect quality of care and services to residents. The plans include agreed upon time frames for completion of improvements and identification of needed resources;

"(6) Training required to equip county departments of social services' staff to implement the Program;

"(7) A distinction of roles between the regulatory role of the Department's Division of Facility Services [now the Division of Health Service Regulation] and the quality improvement consultation and monitoring responsibilities of the county departments of social services; and

"(8) Identification of staffing and other resources needed to implement the Program.

"The Division of Aging and Adult Services shall conduct a pilot of the Quality Improvement Consultation Program for Adult Care Homes. No more than four county departments of social services shall participate in the pilot. The Division of Aging and Adult Services shall consider geographic balance and size in carrying out the pilot. At the conclusion of the pilot, the Division of Aging and Adult Services shall make recommendations regarding the effectiveness of the Quality Improvement Consultation Program for Adult Care Homes. If the Division recommends expansion of the pilot to other counties or statewide implementation of the Program, its report shall include the cost and a proposed timetable for implementing these recommendations, including the identification of any necessary statutory and administrative rule changes. The recommendations shall be made to the Secretary of the Department of Health and Human Services, the North Carolina Study Commission on Aging, the Senate Appropriations Committee on Health and Human Services, and the House of Representatives Subcommittee on Health and Human Services."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

§ 131D-20. Definitions.

As used in this Article, the following terms have the meanings specified:

(1) "Abuse" means the willful or grossly negligent infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful or grossly negligent deprivation by the administrator or staff of

an adult care home of services which are necessary to maintain mental and physical health.

(2) Repealed by Session Laws 1995, c. 535, s. 13, effective October 1, 1995.

(2a) "Adult care home" is an assisted living residence in which the housing management provides 24-hour scheduled and unscheduled personal care services to two or more residents, either directly or, for scheduled needs, through formal written agreement with licensed home care or hospice agencies. Some licensed adult care homes provide supervision to persons with cognitive impairments whose decisions, if made independently, may jeopardize the safety or well-being of themselves or others and therefore require supervision. Medication in an adult care home may be administered by designated, trained staff. Adult care homes that provide care to two to six unrelated residents are commonly called family care homes. Adult care homes and family care homes are subject to licensure by the Division of Health Service Regulation.

(2b) "Assisted living residence" means any group housing and services program for two or more unrelated adults, by whatever name it is called, that makes available, at a minimum, one meal a day and housekeeping services and provides personal care services directly or through a formal written agreement with one or more licensed home care or hospice agencies. The Department may allow nursing service exceptions on a case-by-case basis. Settings in which services are delivered may include self-contained apartment units or single or shared room units with private or area baths. Assisted living residences are to be distinguished from nursing homes subject to provisions of G.S. 131E-102.

(3) "Exploitation" means the illegal or improper use of an aged or disabled resident or his resources for another's profit or advantage.

(4) "Facility" means an adult care home licensed pursuant to G.S. 131D-2.

(5) "Family care home" means an adult care home having two to six residents. The structure of a family care home may be no more than two stories high and none of the aged or physically disabled persons being served there may be housed in the upper story without provision for two direct exterior ground-level accesses to the upper story.

(6) Repealed by Session Laws 2001-209, s. 1(c), effective June 15, 2001.

(7) Repealed by Session Laws 1995, c. 535, s. 13.

(8) "Neglect" means the failure to provide the services necessary to maintain the physical or mental health of a resident.

(9) "Resident" means an aged or disabled person who has been admitted to a facility. (1981, c. 923, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 20.2C; 1983, c. 824, ss. 2, 3, 5, 7, 8; 1995, c. 535, s. 13; 1997-456, s. 21; 2001-209, s. 1(c); 2007-182, s. 1.)

Cross References. — As to the definition of 'Long-term care facility" in the Long-Term Care Ombudsman Program, see G.S. 143B-181.16.

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subdivision (2a).

§ 131D-21. Declaration of residents' rights.

Each facility shall treat its residents in accordance with the provisions of this Article. Every resident shall have the following rights:

(1) To be treated with respect, consideration, dignity, and full recognition of his or her individuality and right to privacy.

(2) To receive care and services which are adequate, appropriate, and in compliance with relevant federal and State laws and rules and regulations.

(3) To receive upon admission and during his or her stay a written statement of the services provided by the facility and the charges for these services.

(4) To be free of mental and physical abuse, neglect, and exploitation.

(5) Except in emergencies, to be free from chemical and physical restraint unless authorized for a specified period of time by a physician according to clear and indicated medical need.

(6) To have his or her personal and medical records kept confidential and not disclosed without the written consent of the individual or guardian, which consent shall specify to whom the disclosure may be made, except as required by applicable State or federal statute or regulation or by third party contract. It is not the intent of this section to prohibit access to medical records by the treating physician except when the individual objects in writing. Records may also be disclosed without the written consent of the individual to agencies, institutions or individuals which are providing emergency medical services to the individual. Disclosure of information shall be limited to that which is necessary to meet the emergency.

(7) To receive a reasonable response to his or her requests from the facility administrator and staff.

(8) To associate and communicate privately and without restriction with people and groups of his or her own choice on his or her own or their initiative at any reasonable hour.

(9) To have access at any reasonable hour to a telephone where he or she may speak privately.

(10) To send and receive mail promptly and unopened, unless the resident requests that someone open and read mail, and to have access at his or her expense to writing instruments, stationery, and postage.

(11) To be encouraged to exercise his or her rights as a resident and citizen, and to be permitted to make complaints and suggestions without fear of coercion or retaliation.

(12) To have and use his or her own possessions where reasonable and have an accessible, lockable space provided for security of personal valuables. This space shall be accessible only to the resident, the administrator, or supervisor-in-charge.

(13) To manage his or her personal needs funds unless such authority has been delegated to another. If authority to manage personal needs funds has been delegated to the facility, the resident has the right to examine the account at any time.

(14) To be notified when the facility is issued a provisional license or notice of revocation of license by the North Carolina Department of Health and Human Services and the basis on which the provisional license or notice of revocation of license was issued. The resident's responsible family member or guardian shall also be notified.

(15) To have freedom to participate by choice in accessible community activities and in social, political, medical, and religious resources and to have freedom to refuse such participation.

(16) To receive upon admission to the facility a copy of this section.

(17) To not be transferred or discharged from a facility except for medical reasons, the residents' own or other residents' welfare, nonpayment for the stay, or when the transfer is mandated under State or federal law. The resident shall be given at least 30 days' advance notice to ensure orderly transfer or discharge, except in the case of jeopardy to

the health or safety of the resident or others in the home. The resident has the right to appeal a facility's attempt to transfer or discharge the resident pursuant to rules adopted by the Medical Care Commission, and the resident shall be allowed to remain in the facility until resolution of the appeal unless otherwise provided by law. The Medical Care Commission shall adopt rules pertaining to the transfer and discharge of residents that offer at least the same protections to residents as State and federal rules and regulations governing the transfer or discharge of residents from nursing homes. (1981, c. 923, s. 1; 1983, c. 824, s. 13; 1983 (Reg. Sess., 1984), c. 1076; 1997-443, s. 11A.118(a); 1999-334, s. 1.6; 2000-111, s. 3.)

CASE NOTES

Applied in Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

Cited in Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 575 S.E.2d 46 (2003).

§ 131D-21.1. Peer review.

It is not a violation of G.S. 131D-21(6) for medical records to be disclosed to a private peer review committee if:

(1) The peer review committee has been approved by the Department;

(2) The purposes of the peer review committee are to:

  a. Survey facilities to verify a high level of quality care through evaluation and peer assistance;

  b. Resolve written complaints in a responsible and professional manner; and

  c. Develop a basic knowledge of care and standards useful in establishing a means of measuring quality of care; and

(3) The peer review committee keeps such records confidential. (1983, c. 816, s. 1.)

§ 131D-21.2. Quality assurance, medical, or peer review committees.

(a) A member of a duly appointed quality assurance, medical, or peer review committee shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee, if the committee member acts without malice or fraud, and if such peer review committee is approved and operates in accordance with G.S. 131D-21.1.

(b) The proceedings of a quality assurance, medical, or peer review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against an adult care home or a provider of professional health services that results from matters that are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings. (2004-149, s. 2.3; 2006-264, s. 65.)

Editor's Note. — The reference to "a nursing home" in the first sentence of subsection (b) is an apparent error; "an adult care home" was the intended reference. The bracketed language has been inserted at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2006-264, s. 65, effective August 27, 2006, substituted "an adult care" for "a nursing" in the first sentence of subsection (b).

§ 131D-22. Transfer of management responsibilities.

Any representative authorized in writing by a resident to manage his financial affairs, any resident's legal guardian as appointed by a court, or any resident's attorney-in-fact as specified in the power of attorney agreement may sign any documents required by this Article, perform any other act, and receive or furnish any information required by this Article. (1981, c. 923, s. 1; 1983, c. 824, s. 14.)

§ 131D-23. No waiver of rights.

No facility may require a resident to waive the rights specified in G.S. 131D-21. (1981, c. 923, s. 1.)

§ 131D-24. Notice to resident.

(a) A copy of the declaration of the residents' rights shall be posted conspicuously in a public place in all facilities. A copy of the declaration of residents' rights shall be furnished to the resident upon admittance to the facility, to all residents currently residing in the facility, to a representative payee of the resident, or to any person designated in G.S. 131D-22, and if requested to the resident's responsible family member or guardian. Receipts for the declaration of rights signed by these persons shall be retained in the facility's files. The declaration of rights shall be included as part of the facility's admission policies and procedures.

(b) The address and telephone number of the section in the Department of Health and Human Services responsible for the enforcement of the provisions of this Article shall be posted and distributed with copies of G.S. 131D-21. The address and telephone number of the county social services department, and the appropriate person or office of the Department of Health and Human Services shall also be posted and distributed. (1981, c. 923, s. 1; 1997-443, s. 11A.118(a).)

§ 131D-25. Implementation.

Responsibility for implementing the provisions of this Article shall rest with the administrator of the facility. Each facility shall provide appropriate training to staff to implement the declaration of residents' rights included in G.S. 131D-21. (1981, c. 923, s. 1.)

§ 131D-26. Enforcement and investigation.

(a) The Department of Health and Human Services shall be responsible for the enforcement of the provisions of this Article. Specifically, the department of social services in the county in which the facility is located and the Department of Health and Human Services, shall be responsible for enforcing the provisions of the declaration of the residents' rights. The director of the county department of social services shall monitor the implementation of the declaration of the residents' rights and shall also investigate any complaints or grievances pertaining to violations of the declaration of rights.

(a1) When the department of social services in the county in which a facility is located receives a complaint alleging a violation of the provisions of this Article pertaining to patient care or patient safety, the department of social services shall initiate an investigation as follows:

(1) Immediately upon receipt of the complaint if the complaint alleges a life-threatening situation.
(2) Within 24 hours if the complaint alleges abuse of a resident as defined by G.S. 131D-20(1).
(3) Within 48 hours if the complaint alleges neglect of a resident as defined by G.S. 131D-20(8).
(4) Within two weeks in all other situations.

The investigation shall be completed within 60 days. The requirements of this section are in addition to and not in lieu of any investigatory requirements for adult protective services pursuant to Article 6 of Chapter 108A of the General Statutes.

(b) If upon investigation, it is found that any of the provisions of the declaration of rights has been violated, the director of the county department of social services or a designee must orally inform the administrator immediately of the specific violations, what must be done to correct them, and set a date by which the violations must be corrected. This same information must be confirmed in writing to the administrator by the county director or a designee within 10 working days following the investigation. A copy of the letter shall be sent to the Department of Health and Human Services.

(c) Upon receiving requests for assistance in resolving complaints from the county department of social services, the Department of Health and Human Services shall ensure compliance with the provisions of this Article.

(d) The county director of social services shall annually make a report to the Department of Health and Human Services about the number of substantiated violations of G.S. 131D-21, the nature of the violations, and the number of violations referred to the Department of Health and Human Services for resolution. (1981, c. 923, s. 1; 1983, c. 824, ss. 15, 16; 1997-443, s. 11A.118(a); 1999-334, s. 1.8; 2007-444, s. 5(b).)

Effect of Amendments. — Session Laws 2007-444, s. 5(b), effective August 23, 2007, substituted "60 days" for "30 days" in the first sentence of the last paragraph of subsection (a1).

§ 131D-27. Confidentiality.

The Department of Health and Human Services is authorized to inspect residents' records maintained at the facility when necessary to investigate any alleged violation of the declaration of the residents' rights. The Department of Health and Human Services shall maintain the confidentiality of all persons who register complaints with the Department of Health and Human Services and of all records inspected by the Department of Health and Human Services. (1981, c. 923, s. 1; 1997-443, s. 11A.118(a).)

§ 131D-28. Civil action.

Every resident shall have the right to institute a civil action for injunctive relief to enforce the provisions of this Article. The Department of Health and

Human Services, a general guardian, or any person appointed ad litem pursuant to law, may institute an action pursuant to this section on behalf of the resident or residents. Any agency or person above named may enforce the rights of the resident specified in G.S. 131D-21 which the resident himself is unable to enforce. (1981, c. 923, s. 1; 1997-443, s. 11A.118(a).)

§ 131D-29. Revocation of license.

The Department of Health and Human Services shall have the authority to revoke a license issued pursuant to G.S. 131D-2 in any case where it finds that there has been a substantial failure to comply with the provisions of this Article.

Such revocation shall be effected by mailing to the licensee by registered or certified mail, or by personal service of, a notice setting forth the particular reasons for such action. Such revocation shall become effective 20 days after the mailing or service of the notice, unless the applicant or licensee, within such 20-day period, shall give written notice to the Department of Health and Human Services requesting a hearing, in which case the notice shall be deemed to be suspended. If a hearing has been requested, the licensee shall be given a prompt and fair hearing pursuant to the Administrative Procedure Act. At any time at or prior to the hearing, the Department of Health and Human Services may rescind the notice of revocation upon being satisfied that the reasons for the revocation have been or will be removed. (1981, c. 923, s. 1; 1997-443, s. 11A.118(a).)

§ 131D-30: Repealed by Session Laws 1987, c. 600, s. 1.

Cross References. — As to penalties, see G.S. 131D-34.

§ 131D-31. Adult care home community advisory committees.

(a) Statement of Purpose. — It is the intention of the General Assembly that community advisory committees work to maintain the intent of the Adult Care Home Residents' Bill of Rights within the licensed adult care homes in this State. It is the further intent of the General Assembly that the committees promote community involvement and cooperation with adult care homes to ensure quality care for the elderly and disabled adults.

(b) Establishment and Appointment of Committees. —

(1) A community advisory committee shall be established in each county that has at least one licensed adult care home, shall serve all the homes in the county, and shall work with each of these homes for the best interests of the residents. In a county that has one, two, or three adult care homes with 10 or more beds, the committee shall have five members.

(2) In a county with four or more adult care homes with 10 or more beds, the committee shall have one additional member for each adult care home with 10 or more beds in excess of three, and may have up to five additional members at the discretion of the county commissioners, not to exceed a maximum of 25 members. In each county with four or more adult care homes with 10 or more beds, the committee shall establish a subcommittee of no more than five members and no fewer than three members from the committee for each adult care home in the county. Each member must serve on at least one subcommittee.

(3) In counties with no adult care homes with 10 or more beds, the committee shall have five members. Regardless of how many members a particular community advisory committee is required to have, at least one member of each committee shall be a person involved in the area of mental retardation.

(4) The boards of county commissioners are encouraged to appoint the Adult Care Home Community Advisory Committees. Of the members, a minority (not less than one-third, but as close to one-third as possible) shall be chosen from among persons nominated by a majority of the chief administrators of adult care homes in the county. If the adult care home administrators fail to make a nomination within 45 days after written notification has been sent to them requesting a nomination, these appointments may be made without nominations. If the county commissioners fail to appoint members to a committee by July 1, 1983, the appointments shall be made by the Assistant Secretary for Aging, Department of Health and Human Services, no sooner than 45 days after nominations have been requested from the adult care home administrators, but no later than October 1, 1983. In making appointments, the Assistant Secretary for Aging shall follow the same appointment process as that specified for the County Commissioners.

(c) Joint Nursing and Adult Care Home Community Advisory Committees. — Appointment to the Nursing Home Community Advisory Committees shall preclude appointment to the Adult Care Home Community Advisory Committees except where written approval to combine these committees is obtained from the Assistant Secretary for Aging, Department of Health and Human Services. Where this approval is obtained, the Joint Nursing and Adult Care Home Community Advisory Committee shall have the membership required of Nursing Home Community Advisory Committees and one additional member for each adult care home with 10 or more beds licensed in the county. In counties with no adult care homes with 10 or more beds, there shall be one additional member for every four other types of adult care homes in the county. In no case shall the number of members on the Joint Nursing and Adult Care Home Community Advisory Committee exceed 25. Each member shall exercise the statutory rights and responsibilities of both Nursing Home Committees and Adult Care Home Committees. In making appointments to this joint committee, the county commissioners shall solicit nominations from both nursing and adult care home administrators for the appointment of approximately (but no more than) one-third of the members.

(d) Terms of Office. — Each committee member shall serve an initial term of one year. Any person reappointed to a second or subsequent term in the same county shall serve a two- or three-year term at the county commissioners' discretion to ensure staggered terms of office.

(e) Vacancies. — Any vacancy shall be filled by appointment of a person for a one-year term. If this vacancy is in a position filled by an appointee nominated by the chief administrators of adult care homes within the county, then the county commissioners shall fill the vacancy from persons nominated by a majority of the chief administrators. If the adult care home administrators fail to make a nomination by registered mail within 45 days after written notification has been sent to them requesting a nomination, this appointment may be made without nominations. If the county commissioners fail to fill a vacancy, the vacancy may be filled by the Assistant Secretary for Aging, Department of Health and Human Services no sooner than 45 days after the commissioners have been notified of the appointment or vacancy.

(f) Officers. — The committee shall elect from its members a chair, to serve a one-year term.

(g) Minimum Qualifications for Appointment. — Each member must be a resident of the county which the committee serves. No person or immediate family member of a person with a financial interest in a home served by the committee, or employee or governing board member of a home served by the committee, or immediate family member of a resident in a home served by the committee may be a member of that committee. Any county commissioner who is appointed to the committee shall be deemed to be serving on the committee in an ex officio capacity. Members of the committee shall serve without compensation, but may be reimbursed for actual expenses incurred by them in the performance of their duties. The names of the committee members and the date of expiration of their terms shall be filed with the Division of Aging, Department of Health and Human Services.

(h) Training. — The Division of Aging, Department of Health and Human Services, shall develop training materials, which shall be distributed to each committee member. Each committee member must receive training as specified by the Division of Aging prior to exercising any power under G.S. 131D-32. The Division of Aging, Department of Health and Human Services, shall provide the committees with information, guidelines, training, and consultation to direct them in the performance of their duties.

(i) Any written communication made by a member of adult care home advisory committee within the course and scope of the member's duties, as specified in G.S. 131D-32, shall be privileged to the extent provided in this subsection. This privilege shall be a defense in a cause of action for libel if the member was acting in good faith and the statements and communications do not amount to intentional wrongdoing.

To the extent that any adult care home advisory committee or any member is covered by liability insurance, that committee or member shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance. (1981, c. 923, s. 1; 1983, c. 88, s. 1; 1987, c. 682, s. 2; 1995, c. 535, s. 14; 1997-176, s. 2; 1997-443, s. 11A.118(a).)

§ 131D-32. Functions of adult care home community advisory committees.

(a) The committee shall serve as the nucleus for increased community involvement with adult care homes and their residents.

(b) The committee shall promote community education and awareness of the needs of aging and disabled persons who reside in adult care homes, and shall work towards keeping the public informed about aspects of long-term care and the operation of adult care homes in North Carolina.

(c) The committee shall develop and recruit volunteer resources to enhance the quality of life for adult care home residents.

(d) The committee shall establish linkages with the adult care home administrators and the county department of social services for the purpose of maintaining the intent of the Adult Care Home Residents' Bill of Rights.

(e) Each committee shall apprise itself of the general conditions under which the persons are residing in the homes, and shall work for the best interests of the persons in the homes. This may include assisting persons who have grievances with the home and facilitating the resolution of grievances at the local level. The identity of any complainant or resident involved in a complaint shall not be disclosed except as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq. The committee shall notify the enforcement agency of all verified violations of the Adult Care Home Residents' Bill of Rights.

(f) The committee or subcommittee may communicate through the committee chair with the Department of Health and Human Services, the county department of social services, or any other agency in relation to the interest of any resident.

(g) Each committee shall quarterly visit the adult care homes with 10 or more beds it serves. For each official quarterly visit, a majority of the committee members shall be present. A minimum of three members of the committee shall make at least one visit annually to each other type of adult care home licensed in the county. In addition, each committee may visit the adult care homes it serves whenever it deems it necessary to carry out its duties. In counties with subcommittees, the subcommittee assigned to a home shall perform the duties of the committee under this subsection, and a majority of the subcommittee members must be present for any visit. When visits are made to group homes for developmentally disabled adults, rules concerning confidentiality as adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall apply.

(h) The individual members of the committee shall have the right between 10:00 a.m. and 8:00 p.m. to enter the facility the committee serves in order to carry out the members' responsibilities. In a county where subcommittees have been established, this right of access shall be limited to members of the subcommittee which serves that home. A majority of the committee or subcommittee members shall be present to enter the facility at other hours. Before entering any adult care home, the committee or members of the committee shall identify themselves to the person present at the facility who is in charge of the facility at that time.

(i) The committee shall prepare reports as required by the Department of Health and Human Services containing an appraisal of the problems of adult care homes facilities as well as issues affecting long-term care in general. Copies of the report shall be sent to the board of county commissioners, county department of social services and the Division of Aging.

(j) Nothing contained in this section shall be construed to require the expenditure of any county funds to carry out the provisions in this section. (1981, c. 923, s. 1; 1983, c. 88, s. 2; 1991, c. 636, s. 19(b); 1995, c. 254, s. 6; c. 535, s. 15; 1997-443, s. 11A.118(a).)

§ 131D-33: Repealed by Session Laws 1983, c. 824, s. 19.

§ 131D-34. Penalties; remedies.

(a) Violations Classified. — The Department of Health and Human Services shall impose an administrative penalty in accordance with provisions of this Article on any facility which is found to be in violation of requirements of G.S. 131D-21 or applicable State and federal laws and regulations. Citations issued for violations shall be classified according to the nature of the violation as follows:

(1) "Type A Violation" means a violation by a facility of the regulations, standards, and requirements set forth in G.S. 131D-21 or applicable State or federal laws and regulations governing the licensure or certification of a facility which results in death or serious physical harm, or results in substantial risk that death or serious physical harm will occur. Type A Violations shall be abated or eliminated immediately. The Department shall require an immediate plan of correction for each Type A Violation. The person making the findings shall do the following:

a. Orally and immediately inform the administrator of the facility of the specific findings and what must be done to correct them, and set a date by which the violation must be corrected;

b. Within 10 working days of the investigation, confirm in writing to the administrator the information provided orally under sub-subdivision a. of this subdivision; and

c. Provide a copy of the written confirmation required under sub-subdivision b. of this subdivision to the Department.

The Department shall impose a civil penalty in an amount not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000) for each Type A Violation in homes licensed for six or fewer beds. The Department shall impose a civil penalty in an amount not less than one thousand dollars ($1,000) nor more than twenty thousand dollars ($20,000) for each Type A Violation in facilities licensed for seven or more beds.

(2) "Type B Violation" means a violation by a facility of the regulations, standards and requirements set forth in G.S. 131D-21 or applicable State or federal laws and regulations governing the licensure or certification of a facility which present a direct relationship to the health, safety, or welfare of any resident, but which does not result in substantial risk that death or serious physical harm will occur. The Department shall require a plan of correction for each Type B Violation and may require the facility to establish a specific plan of correction within a reasonable time period to address the violation. The required plan cannot exceed requirements imposed by existing rule or law.

(b) Penalties for failure to correct violations within time specified.

(1) Where a facility has failed to correct a Type A Violation, the Department shall assess the facility a civil penalty in the amount of up to one thousand dollars ($1,000) for each day that the deficiency continues beyond the time specified in the plan of correction approved by the Department or its authorized representative. The Department or its authorized representative shall ensure that the violation has been corrected.

(2) Where a facility has failed to correct a Type B Violation within the time specified for correction by the Department or its authorized representative, the Department shall assess the facility a civil penalty in the amount of up to four hundred dollars ($400.00) for each day that the deficiency continues beyond the date specified for correction without just reason for such failure. The Department or its authorized representative shall ensure that the violation has been corrected.

(3) The Department shall impose a civil penalty which is treble the amount assessed under subdivision (1) of subsection (a) when a facility under the same management, ownership, or control has received a citation and paid a penalty for violating the same specific provision of a statute or regulation for which it received a citation during the previous 12 months. The counting of the 12-month period shall be tolled during any time when the facility is being operated by a court-appointed temporary manager pursuant to Article 4 of this Chapter.

(c) Factors to be considered in determining amount of initial penalty. In determining the amount of the initial penalty to be imposed under this section, the Department shall consider the following factors:

(1) The gravity of the violation, including the fact that death or serious physical harm to a resident has resulted; the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(1a) The gravity of the violation, including the probability that death or serious physical harm to a resident will result; the severity of the potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(1b) The gravity of the violation, including the probability that death or serious physical harm to a resident may result; the severity of the potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(2) The reasonable diligence exercised by the licensee to comply with G.S. 131E-256 and G.S. 131E-265 and other applicable State and federal laws and regulations;

(2a) Efforts by the licensee to correct violations;

(3) The number and type of previous violations committed by the licensee within the past 36 months;

(4) The amount of assessment necessary to insure immediate and continued compliance; and

(5) The number of patients put at risk by the violation.

(c1) The facts found to support the factors in subsection (c) of this section shall be the basis in determining the amount of the penalty. The Secretary shall document the findings in written record and shall make the written record available to all affected parties including:

(1) The penalty review committee;

(2) The local department of social services who is responsible for oversight of the facility involved;

(3) The licensee involved;

(4) The residents affected; and

(5) The family members or guardians of the residents affected.

(c2) Local county departments of social services and Division of Health Service Regulation personnel shall submit proposed penalty recommendations to the Department within 45 days of the citation of a violation.

(d) The Department shall impose a civil penalty on any facility which refuses to allow an authorized representative of the Department to inspect the premises and records of the facility.

(d1) The Department shall impose a civil penalty on any applicant for licensure who provides false information or omits information on the portion of the licensure application requesting information on owners, administrators, principals, or affiliates of the facility. The amount of the penalty shall be as is prescribed for a Type A Violation.

(e) Any facility wishing to contest a penalty shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department mails a notice of penalty to a licensee. At least the following specific issues shall be addressed at the administrative hearing:

(1) The reasonableness of the amount of any civil penalty assessed, and

(2) The degree to which each factor has been evaluated pursuant to subsection (c) of this section to be considered in determining the amount of an initial penalty.

If a civil penalty is found to be unreasonable or if the evaluation of each factor is found to be incomplete, the hearing officer may recommend that the penalty be adjusted accordingly.

(f) Notwithstanding the notice requirements of G.S. 131D-26(b), any penalty imposed by the Department of Health and Human Services under this section shall commence on the day the violation began.

(g) The Secretary may bring a civil action in the superior court of the county wherein the violation occurred to recover the amount of the administrative penalty whenever a facility:

(1) Which has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of the penalty, or

(2) Which has requested an administrative hearing fails to pay the penalty within 60 days after receipt of a written copy of the decision as provided in G.S. 150B-36.

(g1) In lieu of assessing an administrative penalty, the Secretary may order a facility to provide staff training if:

(1) The cost of training does not exceed one thousand dollars ($1,000);
(2) The penalty would be for the facility's only violation within a 12-month period preceding the current violation and while the facility is under the same management; and
(3) The training is:
  a. Specific to the violation;
  b. Approved by the Department of Health and Human Services; and
  c. Taught by someone approved by the Department and other than the provider.

(h) The Secretary shall establish a penalty review committee within the Department, which shall meet as often as needed, but no less frequently than once each quarter of the year, to review administrative penalties assessed pursuant to this section and pursuant to G.S. 131E-129 as follows:

(1) The Secretary shall administer the work of the Committee and provide public notice of its meetings via Web site, and provide direct notice to the following parties involved in the penalties the Committee will be reviewing:
  a. The licensed provider, who upon receipt of the notice, shall post the notice of the scheduled Penalty Review Committee meeting in a conspicuous place available to residents, family members, and the public;
  b. The local department of social services that is responsible for oversight of the facility involved;
  c. The residents affected; and
  d. Those individuals lawfully designated by the affected resident to make health care decisions for the resident.
(2) The Secretary shall ensure that the Nursing Home/Adult Care Home Penalty Review Committee established by this subsection is comprised of nine members. At least one member shall be appointed from each of the following categories:
  a. A licensed pharmacist;
  b. A registered nurse experienced in long term care;
  c. A representative of a nursing home;
  d. A representative of an adult care home; and
  e. Two public members. One shall be a "near" relative of a nursing home patient, chosen from a list prepared by the Office of State Long Term Care Ombudsman, Division of Aging, Department of Health and Human Services. One shall be a "near" relative of a rest home patient, chosen from a list prepared by the Office of State Long Term Care Ombudsman, Division of Aging, Department of Health and Human Services. For purposes of this subdivision, a "near" relative is a spouse, sibling, parent, child, grandparent, or grandchild.
(3) Neither the pharmacist, nurse, nor public members appointed under this subsection nor any member of their immediate families shall be employed by or own any interest in a nursing home or adult care home.
(4) Repealed by Session Laws 2005-276, s. 10.40A(l), effective July 1, 2005.
(4a) Repealed by Session Laws 2007-544, s. 1, effective October 1, 2007.
(4b) Prior to serving on the Committee, each member shall complete a training program provided by the Department of Health and Human

Services that covers standards of care and applicable State and federal laws and regulations governing facilities licensed under Chapter 131D and Chapter 131E of the General Statutes.

(5) Each member of the Committee shall serve a term of two years. The initial terms of the members shall commence on August 3, 1989. The Secretary shall fill all vacancies. Unexcused absences from three consecutive meetings constitute resignation from the Committee.

(6) The Committee shall be cochaired by:

a. One member of the Department outside of the Division of Health Service Regulation; and

b. One member who is not affiliated with the Department.

(i) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1987, c. 600, s. 3; 1989, c. 556, s. 1; 1991, c. 66, s. 1; c. 572, s. 3; 1993, c. 390, s. 4; 1993 (Reg. Sess., 1994), c. 698, s. 1; 1995, c. 535, s. 16; 1995 (Reg. Sess., 1996), c. 602, s. 1; 1997-431, s. 1; 1997-443, s. 11A.118(a); 1998-215, s. 78(a); 2005-276, s. 10.40A(*l*); 2007-182, ss. 1, 1.1; 2007-544, s. 1.)

Effect of Amendments. — Session Laws 2007-182, ss. 1 and 1.1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subsection (c2) and in subdivision (h)(6)a.

Session Laws 2007-544, s. 1, effective October 1, 2007, in subsection (h), rewrote the introductory paragraph, in subdivision (h)(1), inserted "via Web site, and provide direct notice" in the introductory language, in subdivision (h)(1)a, added the language following "provider," rewrote subdivision (h)(1)d, deleted subdivision (h)(4a), added subdivision (h)(4b), and in subdivision (h)(6), substituted "Health Service Regulation" for "Facility Services."

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ 131D-34.1. Report of death of resident.

(a) An adult care home shall notify the Department of Health and Human Services immediately upon the death of any resident that occurs in the adult care home or that occurs within 24 hours of the resident's transfer to a hospital if the death occurred within seven days of the adult care home's use of physical restraint or physical hold of the resident, and shall notify the Department of Health and Human Services within three days of the death of any resident of the adult care home resulting from violence, accident, suicide, or homicide. The Department may assess a civil penalty of not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000) against a facility that fails to notify the Department of a death and the circumstances surrounding the death known to the facility. Chapter 150B of the General Statutes governs the assessment of a penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Department or the Attorney General. The clear proceeds of the penalty shall be remitted to the State Treasurer for deposit in accordance with State law.

(b) Upon receipt of notification from an adult care home in accordance with subsection (a) of this section, the Department of Health and Human Services shall notify the State protection and advocacy agency designated under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402, that a person with a disability has died. The Department shall provide the agency access to the information about each death reported pursuant to subsection (a) of this section, including information resulting from any investigation of the death by the Department and from reports received from the Chief Medical Examiner pursuant to G.S. 130A-385. The agency shall use the information in accordance with its powers and duties under applicable State and federal law and regulations.

(c) If the death of a resident of the adult care home occurs within seven days of the adult care home's use of physical restraint or physical hold, the Department shall initiate immediately an investigation of the death.

(d) Nothing in this section abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department or the agency. In carrying out the requirements of this section, the Department and the agency shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this section. A facility or provider that makes available confidential information in accordance with this section and with State and federal law is not liable for the release of the information.

(e) The Secretary shall establish a standard reporting format for reporting deaths pursuant to this section and shall provide to facilities subject to this section a form for the facility's use in complying with this section. (2000-129, s. 6(a); 2007-323, ss. 19.1(i), 19.1(j).)

Editor's Note. — Session Laws 2007-323, s. 19.1(b), provides: "Pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, the Governor shall redesignate the operation and function of the Governor's Advocacy Council for Persons with Disabilities from the Department of Administration to a nongovernmental entity. The Governor shall follow the federal statutory procedure for redesignation found at 45 C.F.R. § 1386.20, with a target transfer date of July 1, 2007."

Session Laws 2007-323, s. 19.1(*l*), provides: "This section is effective on the effective date of the redesignation and transfer of the operation and function of the Governor's Advocacy Council for Persons with Disabilities from the Department of Administration to a nongovernmental entity under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402. Any funds appropriated to the Governor's Advocacy Council for Persons with Disabilities revert to the General Fund on that date." The redesignation and transfer were effective July 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 19.1(i) and (j), effective July 1, 2007, substituted "agency" for "Council" in subsections (b) and (d); and in subsection (b), substituted "State protection and advocacy agency designated under the Developmental Disabilities Assistance and Bill of Rights Act 2000, P.L. 106-402," for "Governor's Advocacy Council for Persons With Disabilities" in the middle of the first sentence, and substituted "applicable State and" for "G.S. 143B-403.1 and applicable" near the end of the last sentence.

ARTICLE 4.

Temporary Management of Adult Care Homes.

§ 131D-35. Temporary management of adult care homes.

The provisions of Article 13 of Chapter 131E are incorporated by reference in this Article. (1993, c. 390, s. 3; 1995, c. 535, s. 18.)

Editor's Note. — Article 13 of Chapter 131E, referred to above, can be found at G.S. 131E-230 et seq.

Session Laws 2005-276, s. 10.40A(p), effective July 1, 2005, as amended by Session Laws 2006-66, s. 10.1, provides: "The Department's Division of Aging and Adult Services shall develop a Quality Improvement Consultation Program for Adult Care Homes. The purpose of the Program is to promote better care and improve quality of life in a safe environment for residents in adult care homes through consultation and assistance with adult care home providers. The county departments of social services shall be responsible for implementation of the Program with all adult care homes located in the respective county, based on a timetable for statewide implementation.

"The Division of Aging and Adult Services shall consult with adult care home providers, county departments of social services, consumer advocates, and other interested stakeholders and parties in the development of the Quality Improvement Consultation Program for Adult Care Homes.

"The Department shall submit a progress report to the North Carolina Study Commission on Aging and to the Senate Appropriations Committee on Health and Human Services and to the House of Representatives Subcommittee on Health and Human Services on or before January 1, 2007.

"The report will address the following topics:

"(1) Principles and philosophies that are resident-centered and promote independence, dignity, and choice for residents;

"(2) Approaches to develop continuous quality improvement with a focus on resident satisfaction and optimal outcomes;

"(3) Dissemination of best practice models that have been used successfully elsewhere;

"(4) A determination of the availability of standardized instruments, and their use to the extent possible, to assess and measure adult care home performance according to quality of life indicators;

"(5) Utilization of quality improvement plans for adult care homes that identify and resolve issues that adversely affect quality of care and services to residents. The plans include agreed upon time frames for completion of improvements and identification of needed resources;

"(6) Training required to equip county departments of social services' staff to implement the Program;

"(7) A distinction of roles between the regulatory role of the Department's Division of Facility Services [now the Division of Health Service Regulation] and the quality improvement consultation and monitoring responsibilities of the county departments of social services; and

"(8) Identification of staffing and other resources needed to implement the Program.

"The Division of Aging and Adult Services shall conduct a pilot of the Quality Improvement Consultation Program for Adult Care Homes. No more than four county departments of social services shall participate in the pilot. The Division of Aging and Adult Services shall consider geographic balance and size in carrying out the pilot. At the conclusion of the pilot, the Division of Aging and Adult Services shall make recommendations regarding the effectiveness of the Quality Improvement Consultation Program for Adult Care Homes. If the Division recommends expansion of the pilot to other counties or statewide implementation of the Program, its report shall include the cost and a proposed timetable for implementing these recommendations, including the identification of any necessary statutory and administrative rule changes. The recommendations shall be made to the Secretary of the Department of Health and Human Services, the North Carolina Study Commission on Aging, the Senate Appropriations Committee on Health and Human Services, and the House of Representatives Subcommittee on Health and Human Services."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

§§ 131D-36 through 131D-39: Reserved for future codification purposes.

ARTICLE 5.

Miscellaneous Provisions.

§ 131D-40. Criminal history record checks required for certain applicants for employment.

(a) Requirement; Adult Care Home. — An offer of employment by an adult care home licensed under this Chapter to an applicant to fill a position that does not require the applicant to have an occupational license is conditioned on consent to a criminal history record check of the applicant. If the applicant has been a resident of this State for less than five years, then the offer of employment is conditioned on consent to a State and national criminal history record check of the applicant. The national criminal history record check shall include a check of the applicant's fingerprints. If the applicant has been a resident of this State for five years or more, then the offer is conditioned on consent to a State criminal history record check of the applicant. An adult care home shall not employ an applicant who refuses to consent to a criminal history record check required by this section. Within five business days of making the conditional offer of employment, an adult care home shall submit a request to the Department of Justice under G.S. 114-19.10 to conduct a State or national criminal history record check required by this section, or shall submit a request to a private entity to conduct a State criminal history record check required by this section. Notwithstanding G.S. 114-19.10, the Department of Justice shall return the results of national criminal history record checks for employment positions not covered by Public Law 105-277 to the Department of Health and Human Services, Criminal Records Check Unit. Within five business days of receipt of the national criminal history of the person, the Department of Health and Human Services, Criminal Records Check Unit, shall notify the adult care home as to whether the information received may affect the employability of the applicant. In no case shall the results of the national criminal history record check be shared with the adult care home. Adult care homes shall make available upon request verification that a criminal history check has been completed on any staff covered by this section. All criminal history information received by the home is confidential and may not be disclosed, except to the applicant as provided in subsection (b) of this section.

(a1) Requirement; Contract Agency of Adult Care Home. — An offer of employment by a contract agency of an adult care home licensed under this Chapter to an applicant to fill a position that does not require the applicant to have an occupational license is conditioned upon consent to a criminal history record check of the applicant. If the applicant has been a resident of this State for less than five years, then the offer of employment is conditioned on consent to a State and national criminal history record check of the applicant. The national criminal history record check shall include a check of the applicant's fingerprints. If the applicant has been a resident of this State for five years or more, then the offer is conditioned on consent to a State criminal history record check of the applicant. A contract agency of an adult care home shall not employ an applicant who refuses to consent to a criminal history record check required by this section. Within five business days of making the conditional offer of employment, a contract agency of an adult care home shall submit a request to the Department of Justice under G.S. 114-19.10 to conduct a State or national criminal history record check required by this section, or shall submit a request to a private entity to conduct a State criminal history record check required by this section. Notwithstanding G.S. 114-19.10, the Department of Justice shall return the results of national criminal history record checks for employment positions not covered by Public Law 105-277 to the Department of Health and Human Services, Criminal Records Check Unit. Within five business days of receipt of the national criminal history of the person, the Department of Health and Human Services, Criminal Records Check Unit, shall notify the contract agency of the adult care home as to whether the information received may affect the employability of the applicant. In no case shall the results of the national criminal history record check be shared with the contract agency of the adult care home. Contract agencies of adult care homes shall make available upon request verification that a criminal history check has been completed on any staff covered by this section. All criminal history information received by the contract agency is confidential and may not be disclosed, except to the applicant as provided by subsection (b) of this section.

(b) Action. — If an applicant's criminal history record check reveals one or more convictions of a relevant offense, the adult care home or a contract agency of the adult care home shall consider all of the following factors in determining whether to hire the applicant:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a relevant offense.

The fact of conviction of a relevant offense alone shall not be a bar to employment; however, the listed factors shall be considered by the adult care home or the contract agency of the adult care home. If the adult care home or a contract agency of the adult care home disqualifies an applicant after consideration of the relevant factors, then the adult care home or the contract agency may disclose information contained in the criminal history record check that is relevant to the disqualification, but may not provide a copy of the criminal history record check to the applicant.

(c) Limited Immunity. — An adult care home and an officer or employee of an adult care home that, in good faith, complies with this section is not liable for the failure of the home to employ an individual on the basis of information provided in the criminal history record check of the individual.

(d) Relevant Offense. — As used in this section, "relevant offense" means a county, state, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or felony, that bears upon an individual's fitness to have responsibility for the safety and well-being of aged or disabled persons. These crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. These crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(e) Penalty for Furnishing False Information. — Any applicant for employment who willfully furnishes, supplies, or otherwise gives false information on an employment application that is the basis for a criminal history record check under this section shall be guilty of a Class A1 misdemeanor.

(f) Conditional Employment. — An adult care home may employ an applicant conditionally prior to obtaining the results of a criminal history record check regarding the applicant if both of the following requirements are met:

(1) The adult care home shall not employ an applicant prior to obtaining the applicant's consent for a criminal history record check as required in subsection (a) of this section or the completed fingerprint cards as required in G.S. 114-19.10.

(2) The adult care home shall submit the request for a criminal history record check not later than five business days after the individual begins conditional employment.

(g) Immunity From Liability. — An entity and officers and employees of an entity shall be immune from civil liability for failure to check an employee's history of criminal offenses if the employee's criminal history record check is requested and received in compliance with this section.

(h) For purposes of this section, the term "private entity" means a business regularly engaged in conducting criminal history record checks utilizing public records obtained from a State agency. (1995 (Reg. Sess., 1996), c. 606, s. 2; 1997-125, s. 1; 2000-154, ss. 2.(a), (b); 2004-124, ss. 10.19D(b), (g); 2005-4, ss. 6, 7; 2007-444, s. 3.1.)

Editor's Note. — Session Laws 2001-465, s. 2(a), effective November 16, 2001, provides: "The requirements of G.S. 131E-265(a1) for contract agencies of nursing homes and home care agencies, G.S. 131D-40 for adult care homes and contract agencies of adult care homes, and of G.S. 122C-80 for area mental health, developmental disabilities, and substance abuse services authorities, to conduct national criminal history record checks are suspended until January 1, 2003."

Effect of Amendments. — Session Laws 2007-444, s. 3.1, effective August 23, 2007, added subsection (h).

§ 131D-41. Compliance history provider file.

The Department of Health and Human Services shall establish and maintain a provider file to record and monitor compliance histories of facilities, owners, operators, and affiliates of nursing homes and adult care homes. (1999-334, s. 3.8.)

Editor's Note. — Session Laws 1999-334, s. 3.8, was codified as this section and G.S. 131E-266 at the direction of the Revisor of Statutes.

§ 131D-42. Report on use of restraint.

The Department shall report annually on October 1 to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services the following for the immediately preceding fiscal year:

(1) The level of compliance of each adult care home with applicable State law and rules governing the use of physical restraint and physical hold of residents. The information shall indicate areas of highest and lowest levels of compliance.

(2) The total number of adult care homes that reported deaths under G.S. 131D-34.1, the number of deaths reported by each facility, the number of deaths investigated pursuant to G.S. 131D-34.1, and the number found by the investigation to be related to the adult care home's use of physical restraint or physical hold. (2000-129, s. 6(b); 2003-58, s. 2.)

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131E-312. Regulations.
131E-313. Utilization review and grievances.
131E-314. Division Reporting.

ARTICLE 1.

General Provisions.

§ 131E-1. Definitions.

As used in this Chapter, unless the context clearly indicates otherwise:

(1) "Department" means the Department of Health and Human Services.

(2) "Person" means an individual, trust, estate, partnership, or corporation including associations, joint-stock companies, and insurance companies. (1983, c. 775, s. 1; 1997-443, s. 11A.118(a).)

Cross References. — As to criminal provisions for patient abuse and neglect, see G.S. 14-32.2.

Editor's Note. — Session Laws 1983, c. 775, repealed Chapters 131 and 131B and certain sections of Chapter 130, and enacted in their place a new Chapter 131E. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in new Chapter 131E.

CASE NOTES

Headings Irrelevant to Determine State Action in Context of Private Hospital. — The label given Article 2 of this Chapter is irrelevant in determining whether a private, nonprofit hospital's suspension and revocation of staff privileges constitutes State action. Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991).

OPINIONS OF ATTORNEY GENERAL

The General Assembly did not give any hospital authority the privilege of continuing to operate under the provisions of Chapter 131 after that chapter's repeal. See opinion of Attorney General to Roger Lee Edwards, Attorney and Counselor at Law, N.C. General Assembly, 1999 N.C.A.G. 13 (5/24/99).

Cited in Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys., 853 F.2d 1139 (4th Cir. 1988).

§ 131E-2. Contested case hearing petition time limit.

Except as otherwise provided in this Chapter, a petition for a contested case that is authorized by this Chapter shall be filed in the Office of Administrative Hearings within 30 days after the Department mails written notice of an agency decision to the person filing the petition. This section shall not be construed to create any right to file a petition for a contested case that is not otherwise granted in this Chapter. (1991, c. 143, s. 1; c. 761, s. 23.)

§§ 131E-3, 131E-4: Reserved for future codification purposes.

ARTICLE 2.

Public Hospitals.

Part 1. Municipal Hospitals.

§ 131E-5. Title and purpose.

(a) This Part shall be known and may be cited as the "Municipal Hospital Act."

(b) The purpose of this Part is to authorize municipalities to construct, operate and maintain hospitals and other facilities which furnish hospital, clinical and similar services to the people of this State. It is also the purpose of this Part to authorize municipalities to cooperate with other public and private agencies and with each other. Additionally, it is the purpose of this Part to authorize municipalities to accept assistance from State and federal agencies and from other sources.

(c) This Part provides an additional and alternative method for municipalities to establish facilities that furnish hospital, clinical and similar services. This Part shall not be regarded as repealing any powers now existing under any other law, either general, special or local.

(d) This Part shall be construed liberally to effect its purposes. (1983, c. 775, s. 1.)

Advisory Commission on Hospital Infection Control and Disclosure. — Session Laws 2007-480, provides in its preamble: "Whereas, the Centers for Disease Control and Prevention (CDC) reports that approximately 2,000,000 people annually become ill from hospital-acquired infections, called nosocomial infections, and about 90,000 people die each year from hospital-acquired infections; and

"Whereas, the CDC reports that hospital-acquired infections add at least $5,000,000,000 annually to the nation's health care bill; and

"Whereas, a Pennsylvania report on hospital-acquired infections found that 76% of the cost for treating infections in that state was billed to public health insurance; and

"Whereas, the CDC reports that despite the risks associated with nosocomial infections, information on nosocomial infection rates is hard to obtain, even though basic data is compiled as hospitals monitor infections, particularly in intensive care units and following surgery; and

"Whereas, the CDC estimates, based on voluntary reporting, that hospital-acquired infections have become America's leading cause of death from infectious disease; and

"Whereas, it is the intent of the General Assembly to enact a law requiring public disclosure of hospital-acquired infection incidence rates to become effective in 2010; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2007-480, s. 1, provides: "(a) There is established the Advisory Commission on Hospital Infection Control and Disclosure (Advisory Commission). The purpose of the Advisory Commission is to prepare State agencies, hospitals, and the public for the reporting and public disclosure of hospital-acquired infection incidence rates as may be required by law for specific clinical procedures under the following categories:

"(1) Class I surgical site infections.

"(2) Ventilator-associated pneumonia.

"(3) Central line-related bloodstream infections.

"(b) The Advisory Commission shall consist of 13 members appointed as follows:

"(1) Four shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as follows:

"a. One member who is a hospital infection control professional, as recommended by the North Carolina Hospital Association;

"b. One physician who is a member of the Society for Health Care Epidemiology, as recommended by the Society for Health Care Epidemiology;

"c. The Director of the Statewide Program for Infection Control and Epidemiology at the School of Medicine of the University of North Carolina at Chapel Hill; and

"d. One who is a member of the general public but who is neither a health care professional nor affiliated with a health care facility.

"(2) Four shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as follows:

"a. One physician who is a member of the Society for Health Care Epidemiology, as recommended by the Society for Health Care Epidemiology;

"b. One member who is a hospital infection control professional, as recommended by the North Carolina Hospital Association;

"c. The Director of the Duke Inspection Control Network, or the Director's designee; and

"d. One who is a member of the general public but who is neither a health care professional nor affiliated with a health care facility.

"(3) Five shall be appointed by the Governor, as follows:

"a. A representative of the North Carolina Institute of Medicine, as recommended by the North Carolina Institute of Medicine;

"b. The Director of the NC Center for Hospital Quality and Patient Safety;

"c. The Director of the Consumer Protection Division of the Office of the NC Attorney General;

"d. The State Health Director; and

"e. The State Epidemiologist.

"The Governor shall appoint the Chair of the Advisory Committee.

"(c) Subject to the approval of the Legislative Services Commission, the Advisory Commission may meet in the State Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist in the work of the Advisory Commission. The Directors of Legislative Assistants for the House of Representatives and the Senate shall assign clerical staff to the Advisory Commission, and the expenses relating to the clerical employees shall be borne by the Advisory Commission. The Advisory Commission, while in the discharge of its official duties, may exercise all the powers provided under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may meet during a regular or extra session of the General Assembly, subject to the approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 138-5 or G.S. 138-6, as applicable.

Session Laws 2007-480, s. 2, provides: "(a) The Advisory Commission shall be meaningfully involved in the development of all aspects of the methodology used for collecting, analyzing, and disclosing publicly the information on hospital-acquired infection incidence rates, including collection methods, formatting, and methods and means for release and dissemination.

"(b) The Advisory Commission shall develop a process to ensure that information and data on hospital-acquired infection incidence rates available for dissemination to the general public shall not be made available in any form unless the information and data have been reviewed, adjusted, and validated according to the following process:

"(1) The entire methodology for collecting and analyzing the data shall be disclosed to all relevant organizations and to all hospitals and ambulatory surgical facilities that are the subject of any information to be made available to the public before any public disclosure of the information or data.

"(2) Data collection and analytical methodologies shall be used that meet accepted standards of validity and reliability before any information is made available to the public.

"(3) Comparisons among hospitals and freestanding ambulatory surgical facilities shall adjust for patient case mix and other relevant risk factors and control for provider peer groups, when appropriate.

"(4) The limitations of the data sources and analytical methodologies used to develop comparative hospital and freestanding ambulatory surgical facility information shall be clearly identified and acknowledged, including the appropriate and inappropriate uses of the data.

"(5) To the greatest extent possible, comparative hospital and freestanding ambulatory surgical facility information initiatives shall use standard-based norms derived from widely accepted provider-developed practice guidelines.

"(6) Comparative hospital and freestanding ambulatory surgical facility information and other information that the statewide data processor or Department has compiled regarding the hospital or freestanding ambulatory surgical facility shall be shared with the hospital or freestanding ambulatory surgical facility under review prior to public dissemination of the information, and the hospital or freestanding ambulatory surgical facility shall have 30 days to make corrections and to add helpful explanatory comments about the information before the publication.

"(7) Safeguards shall be implemented to:

"a. Protect against the unauthorized use or disclosure of hospital and freestanding ambulatory surgical facility information; and

"b. Protect against the dissemination of inconsistent, incomplete, invalid, inaccurate, or subjective hospital or freestanding ambulatory surgical facility data.

"(8) A process to ensure the quality and accuracy of information reported by a hospital or freestanding ambulatory surgical facility under this section and its data collection, analysis, and dissemination methodologies are evaluated regularly.

"(9) A process to ensure that only the most basic identifying information from submitted reports are used, and except as otherwise authorized by Article 11A of Chapter 131E of the General Statutes, information identifying a patient, employee, or licensed professional shall not be released.

"(c) The Advisory Commission shall establish standardized criteria and methods for data submitted to the statewide data processor under G.S. 131E-214.2.

Session Laws 2007-480, s. 3, provides: "(a) The Advisory Commission shall submit an interim report on its activities to the General Assembly on or before May 1, 2008. The Advisory Commission shall submit its final report to the 2009 General Assembly upon its convening with recommendations and proposed legislation for requiring hospital-acquired infection incidence rates public disclosure. Upon submission of its final report, the Commission shall terminate.

"(b) It is the intent of the General Assembly to enact legislation before adjournment sine die of the 2009 General Assembly requiring hospitals to report and publicly disclose hospital-acquired infection incidence rates.

Session Laws 2007-480, s. 4, provides: "The Legislative Services Officer shall allocate funds appropriated to the General Assembly for this purpose to implement this act.

Session Laws 2007-480, s. 5, provides: "This act is effective when it becomes law."

Editor's note. — Session Laws 1983, c. 775, which repealed former Chapter 131 of the General Statutes, in s. 3, provided: "Sec. 3. Notwithstanding the foregoing, any unit of government, or units of government acting jointly, that as of December 31, 1983, is operating a hospital or hospitals pursuant to Articles 2 or 2A of Chapter 131 of the General Statutes may continue to operate pursuant to the provisions of those Articles as they existed on December 31, 1983, to the extent that those Articles are inconsistent with this Chapter. However, a unit of government that has been operating a hospital pursuant to those Articles may choose to continue operations under the provisions of one of the Parts of Article 2 of this Chapter by adopting an appropriate resolution and by satisfying all other requirements of the relevant Part of Article 2 of this Chapter."

Session Laws 1989, c. 283, ss. 1 and 2, effective June 12, 1989, amended G.S. 131-7. Chapter 131 was repealed by Session Laws 1983, c. 775, s. 1, effective January 1, 1984. However, Session Laws 1983, c. 775, s. 3 contained a savings provision for certain units of government.

Session Laws 1989, c. 283, ss. 1 and 2, provided: "Section 1. G.S. 131-7, as it applies to hospitals continuing to operate under Article 2, Chapter 131, of the North Carolina General Statutes pursuant to Section 3, Chapter 775, of the 1983 Session Laws, is amended by rewriting the first sentence to read: 'Should a majority of the qualified voters upon the question be in favor of establishing such county, township, or town hospital, the governing body shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, township or town, who shall constitute a board of trustees for such public hospital.'

"Sec. 2. G.S. 131-7 is amended by deleting the phrase 'No practicing physician may serve as a trustee,' and substituting 'One practicing physician may serve as a trustee.'"

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

CASE NOTES

As to the constitutionality of former statutory scheme delegating authority to board of county commissioners to assume the role of "governing body" for the purpose of implementing enabling legislation, including the levying of a tax to support a township hospital, see Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272, appeal dismissed, 293 N.C. 740, 241 S.E.2d 513 (1977).

Cited in Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986).

§ 131E-6. Definitions.

As used in this Part, unless otherwise specified:

(1) "City", as defined in G.S. 160A-1(2), means a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. The term "city" does not include counties or municipal corporations organized for a special purpose under any statute or law. The word "city" is interchangeable with the words "town" and "village" and shall mean any city as defined in this subdivision without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage.

(2) "Community general hospital" means a short-term nonfederal hospital that provides diagnostic and therapeutic services to patients for a variety of medical conditions, both surgical and nonsurgical, such services being available for use primarily by residents of the community in which it is located.

(3) "Corporation, foreign or domestic, authorized to do business in North Carolina" means a corporation for profit or having a capital stock which is created and organized under Chapter 55 of the General Statutes or any other general or special act of this State, or a foreign corporation which has procured a certificate of authority to transact business in this State pursuant to Article 10 of Chapter 55 of the General Statutes.

(4) "Hospital facility" means any one or more buildings, structures, additions, extensions, improvements or other facilities, whether or not located on the same site or sites, machinery, equipment, furnishings or other real or personal property suitable for health care or medical care; and includes, without limitation, general hospitals; chronic disease, maternity, mental, tuberculosis and other specialized hospitals; nursing homes, including skilled nursing facilities and intermediate care facilities; adult care homes for the aged and disabled; public health center facilities; housing or quarters for local public health departments; facilities for intensive care and self-care; clinics and outpatient facilities; clinical, pathological and other laboratories; health care research facilities; laundries; residences and training facilities for nurses, interns, physicians and other staff members; food preparation and food service facilities; administrative buildings, central service and other administrative facilities; communication, computer and other electronic facilities; fire-fighting facilities; pharmaceutical and recreational facilities; storage space; X ray, laser, radiotherapy and other apparatus and equipment; dispensaries; utilities; vehicular parking lots and garages; office facilities for hospital staff members and physicians; and such other health and hospital facilities customarily under the jurisdiction of or provided by hospitals, or any combination of the foregoing, with all necessary, convenient or related interests in land, machinery, apparatus, appliances,

equipment, furnishings, appurtenances, site preparation, landscaping, and physical amenities.

(4a) "Hospital land" means air and ground rights to real property held either in fee or by lease by a municipality, with all easements, rights-of-way, appurtenances, landscaping, and physical amenities such as utilities, parking lots, and garages, but excluding other improvements to land described in subsection (4) of this section and G.S. 131E-16(15).

(5) "Municipality" means any county, city, or other political subdivision of this State, or any hospital district created under Part C of this Article.

(6) "Nonprofit association" or "nonprofit corporation" means any association or corporation from which no part of the net earnings inures or may lawfully inure to the benefit of a private shareholder or individual. (1983, c. 775, s. 1; 1997-233, s. 1.)

Editor's Note. — Subdivision (4.1) of this section was renumbered as subdivision (4a) pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

CASE NOTES

Cited in Hospital Corp. v. Iredell County, 120 N.C. App. 445, 462 S.E.2d 675 (1995); Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

§ 131E-7. General powers.

(a) A municipality shall have all the powers necessary or convenient to carry out the purposes of this Part, including the following powers, which are in addition to the powers granted elsewhere in this Part:

(1) To construct, equip, operate, and maintain hospital facilities;

(2) To levy property taxes pursuant to G.S. 153A-149 or G.S. 160A-209 and to allocate those and other revenues whose use is not otherwise restricted by law to fund hospital facilities; a hospital district may levy annually a tax on property having a situs in the district under the rules and according to the procedures prescribed in the Machinery Act, Chapter 105 of the General Statutes, Subchapter II, and a hospital district may allocate those and other revenues whose use is not otherwise restricted by law to fund hospital facilities;

(3) To issue bonds and notes pursuant to the Local Government Finance Act, Chapter 159 of the General Statutes, for the financing of hospital facilities;

(4) To use property owned or controlled by the municipality;

(5) To acquire real or personal property, including existing hospital facilities, by purchase, grant, gift, devise, lease, condemnation, or otherwise;

(6) To establish a fee schedule for services received from hospital facilities and to make services available regardless of ability to pay.

(b) A municipality or a public hospital may contract with or enter into any arrangement with other public hospitals or municipalities of this or other states, the State of North Carolina, federal, or public agencies, or with any person, private organization, or nonprofit corporation or association for the provision of health care. The municipality or public hospital may pay for or contribute its share of the cost of any such contract or arrangement from revenues available for these purposes, including revenues rising from the provision of health care.

(c) Any two or more municipalities may enter into agreements to jointly exercise the powers, privileges, and authorities granted by this Part. These agreements may provide for:

1. (1) The appointment of a board, composed of representatives of the parties to the agreement, to supervise and manage a hospital facility;
2. (2) The authority and duties of the board and the compensation of its members;
3. (3) The proportional share of the costs of acquisition, construction, improvement, maintenance, or operation of hospital facilities;
4. (4) The duration, amendment, and termination of the agreement and the disposition of property on termination of the agreement; and
5. (5) Any other matters as necessary.

(d) A municipality may lease any hospital facility, or part, to a nonprofit association on terms and conditions consistent with the purposes of this Part. The municipality will determine the length of the lease. No lease executed under this subsection shall be deemed to convey a freehold interest.

(e) Expired pursuant to Session Laws 1983, c. 775, s. 1.

(f) In addition to the general and special powers conferred by this Part, a municipality is authorized to exercise powers necessary to implement the powers under this Part. (1983, c. 775, s. 1; 1993, c. 529, s. 5.3; 1995, c. 509, s. 71.)

Editor's Note. — Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals that continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes, have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

CASE NOTES

Cited in Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986).

OPINIONS OF ATTORNEY GENERAL

The proposal of a county hospital system to lend money to a separately licensed acute care hospital was authorized by law. See opinion of Attorney General to Granger R. Barrett, Cumberland County Attorney, and Wilson Hayman, Poyner & Spruill, L.L.P., 2002 N.C. AG LEXIS 14 (2/19/02).

§ 131E-7.1. Public hospitals' managed care development authorized.

A public hospital as defined in G.S. 159-39(a) may acquire an ownership interest, in whole or in part, in a nonprofit or for-profit managed care company, including a health maintenance organization, physician hospital organization, physician organization, management services organization, or preferred provider organization with which the public hospital is also directly or indirectly a contracting provider. Ownership interest may be evidenced by the ownership or acquired by the purchase of stock. This ownership or acquisition of stock is the exercise of a health care function and is not the investment of idle funds within the meaning of G.S. 159-30 and G.S.159-39(g). (1995 (Reg. Sess., 1996), c. 713, s. 1.)

Editor's Note. — Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals that continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes, have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

§ 131E-8. Sale of hospital facilities to nonprofit corporations.

(a) A municipality as defined in G.S. 131E-6(5) or hospital authority as defined in G.S. 131E-16(14), upon such terms and conditions as it deems wise, with or without monetary consideration, may sell or convey to a nonprofit corporation organized under Chapter 55A of the General Statutes any rights of ownership the municipality or hospital authority has in a hospital facility including the building, land and equipment associated with the hospital, if the nonprofit corporation is legally committed to continue to operate the facility as a community general hospital open to the general public, free of discrimination based upon race, creed, color, sex or national origin. The nonprofit corporation shall also agree, as a condition of the municipality or hospital authority's conveying ownership, to provide such services to indigent patients as the municipality or hospital authority and the nonprofit corporation shall agree. The nonprofit corporation shall further agree that should it fail to operate the facility as a community general hospital open to the general public or should the nonprofit corporation dissolve without a successor nonprofit corporation to carry out the terms and conditions of the agreement of conveyance, all ownership rights in the hospital facility, including the building, land and equipment associated with the hospital, shall revert to the municipality or hospital authority or successor entity originally conveying the hospital.

(b) When either general obligation bonds or revenue bonds issued for the benefit of the hospital to be conveyed are outstanding at the time of sale or conveyance, then the nonprofit corporation must agree to the following:

> By the effective date of sale or conveyance, the nonprofit corporation shall place into an escrow fund money or direct obligations of, or obligations the principal of and interest on which, are unconditionally guaranteed by the United States of America (as approved by the Local Government Commission), the principal of and interest on which, when due and payable, will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding to the maturity date or dates of such bonds or to the date or dates specified for the redemption thereof. The nonprofit corporation shall furnish to the Local Government Commission such evidence as the Commission may require that the securities purchased will satisfy the requirements of this section. A hospital which has placed funds in escrow to retire outstanding general obligation or revenue bonds, as provided in this section, shall not be considered a public hospital, and G.S. 159-39(a)(3) shall be inapplicable to such hospitals.

(c) Any sale or conveyance under this section must be approved by the municipality or hospital authority by a resolution adopted at a regular meeting of the governing body on 10 days' public notice. Notice shall be given by publication describing the hospital facility to be conveyed, the proposed monetary consideration or lack thereof, and the governing body's intent to authorize the sale or conveyance.

(d) Neither G.S. 153A-176 nor Article 12 of Chapter 160A of the General Statutes shall apply to sales or conveyances pursuant to this section.

(e) A sale or conveyance of substantially all the equipment is a sale or conveyance of hospital facility. (1983, c. 775, s. 1; 1989, c. 444.)

Local Modification. — Richmond: 1995 (Reg. Sess., 1996), c. 597, s. 1.

Cross References. — For section regarding lease or sale of hospital facilities to for-profit corporations by municipalities and hospital authorities, see G.S. 131E-13. For section regarding the lease or sale of hospital facilities to nonprofit corporations, see G.S. 131E-14.

Editor's Note. — Session Laws 1999-386, s. 4, effective August 4, 1999, provides that, notwithstanding the requirements of G.S. 131E-8, 131E-13, 131E-14 and 153A-176 and Article 12 of Chapter 160A of the General Statutes, and any past compliance or failure to comply with those requirements, the prior conveyance by a municipality, as defined in G.S. 131E-6(5), or by a hospital authority, as defined in G.S. 131E-16(14), of a hospital facility that currently serves as collateral in a transaction involving North Carolina Medical Care Commission bonds issued under Part 10 of Article 3 of Chapter 143B of the General Statutes is hereby validated. Section 5 of 1999-386 provides that Section 4 shall not apply to litigation pending on or before the effective date.

CASE NOTES

Section Does Not Necessarily Imply State Action. — The fact that a State statute governs the method of conveying municipal hospitals to private, nonprofit corporations is not to be interpreted to mean that a private, nonprofit hospital's suspension and revocation of staff privileges constitutes State action. Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991).

Cited in Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986); Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

§ 131E-8.1. Maintenance of Health Education Facilities.

(a) This section shall apply to all sales and leases of a hospital facility by a municipality or hospital authority where any portion of the facility was constructed with a capital grant from the Area Health Education Centers Program (AHEC).

(b) The municipality or hospital authority shall give specific notice of intent to sell or lease and of any public hearing to the Director of the local AHEC program and the Director of the AHEC Program at the University of North Carolina School of Medicine at Chapel Hill.

(c) The municipality or hospital authority may provide continued access to the identical or equivalent facilities suitable for continuation of AHEC activities, including all services being provided under the existing operating contract. The municipality or hospital authority may convey all ownership rights in the hospital facility, or any part thereof, to the local AHEC Program without monetary consideration. Further, the municipality or hospital authority may reimburse the local AHEC Program for any funds used for the original construction of any office for AHEC provided by AHEC to establish or continue the hospital facility.

(d) No portion of this section shall be construed to alter rights or obligations of the operating contracts between the hospital facility and AHEC. (1983 (Reg. Sess., 1984), c. 1056, s. 1; 1985 (Reg. Sess., 1986), c. 995.)

§ 131E-9. Governing authority of hospital facilities.

(a) The governing body of a municipality may establish by resolution an office, board, or other municipal agency to plan, establish, construct, maintain, or operate a hospital facility. The resolution shall prescribe the powers, duties, compensation, and tenure of the members of the governing authority. The municipality shall remain responsible for the expenses of planning, establishment, construction, maintenance and operation of the hospital facilities.

(b)(1) The county board of commissioners of a county may establish by resolution a county hospital authority to plan, establish, construct, maintain, or operate a hospital facility. The authority shall be referred to as " ________ County Hospital Authority."

(2) The county hospital authority shall consist of six appointed members and one ex officio member.

(3) The appointed members of the authority shall be appointed by the county board of commissioners. All appointed members shall be residents of the county. Three of the members shall be residents of a city in the county and the remaining three members shall not be residents of the same city or cities in which the other three members appointed under this subdivision reside.

(4) For the initial appointments to the county hospital authority, two of the members shall be appointed for a term of three years, two for a term of four years, and two for a term of five years to achieve staggered terms. All subsequent appointments shall be for five-year terms.

(5) The ex officio member of the county hospital authority shall be a member of the county board of commissioners. The ex officio member's term on the hospital authority shall be commensurate with his or her term as a member of the county board of commissioners.

(6) When any member of the county hospital authority resigns or is removed from office before the expiration of the member's term, the county board of commissioners shall appoint a person to serve the unexpired portion of the term.

(c) Any authority vested in a county under this Part or any authority or power that may be exercised by a hospital authority under the Hospital Authorities Act, Chapter 131E, Article 2, Part 2, may be vested by resolution of the county board of commissioners in a county hospital authority established under this section. However, a county hospital authority shall exercise only the powers and duties prescribed in the county board of commissioners' resolution. The county board of commissioners shall determine in the resolution the compensation, traveling and any other expenses which shall be paid to each member of the county hospital authority. However, the expenses to plan, establish, construct and operate the hospital facility shall remain the responsibility of the county. (1983, c. 775, s. 1.)

Local Modification. — Johnston Memorial Hospital: 1995, c. 221, s. 1.

CASE NOTES

Appointment of Trustees Not Necessarily Indicative of State Action. — The fact that the county appointed the majority of a private, nonprofit hospital's trustees, though indicative of State action, did not alone compel the conclusion that the suspension and revocation of a doctor's staff privileges constituted State action. Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991).

Cited in Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

§ 131E-10. Condemnation.

Every municipality is authorized to condemn property to carry out the purposes of this Part. In condemning property, a municipality shall proceed in the manner provided in Chapter 40A of the General Statutes or in the charter of the municipality. A municipality or its agents is authorized to enter upon land, provided no unnecessary damage is done, to make surveys and examinations relative to any condemnation proceeding. Notwithstanding the provisions of any other statute or of any applicable municipal charter, the municipality may take possession of property to be condemned at any time after the commencement of the condemnation proceeding. The municipality shall not be precluded from abandonment of the condemnation of property in any case where possession has not taken place. (1983, c. 775, s. 1.)

§ 131E-11. Federal and State aid.

Every municipality or nonprofit association is authorized to accept and disburse federal and State moneys, whether made available by grant, loan, gift or devise, to carry out the purposes of this Part. All federal moneys shall be accepted and disbursed upon the terms and conditions prescribed by the United States, if the terms and conditions are consistent with State law. All State moneys shall be accepted and disbursed upon the terms and conditions prescribed by either or both the State and the North Carolina Medical Care Commission. Unless the terms and conditions provide otherwise, the chief financial officer of the municipality shall deposit all moneys received under this section and keep them in separate trust funds. (1983, c. 775, s. 1.)

Editor's Note. — Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals that continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes, have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

§ 131E-12. Public purposes.

The exercise of the powers, privileges, and authorities conferred on municipalities by this Part are public and government functions, exercised for a public purpose and matters of public necessity. In the case of a county, the exercise of the powers, privileges and authorities conferred by this Part is a county function and purpose, as well as a public and governmental function. In the case of any municipality other than a county, the exercise of the powers, privileges, and authorities conferred by this Part is a municipal function and purpose, as well as a public and governmental function. (1983, c. 775, s. 1.)

CASE NOTES

Venue. — Venue of negligence suit against hospital authority was properly transferred to the county by which it was governed, pursuant to G.S. 1-77, providing for venue of actions against a public officer, despise the fact that the authority operated in multiple counties. Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

§ 131E-13. Lease or sale of hospital facilities to or from for-profit or nonprofit corporations or other business entities by municipalities and hospital authorities.

(a) A municipality or hospital authority as defined in G.S. 131E-16(14), may lease, sell, or convey any hospital facility, or part, to a corporation, foreign or domestic, authorized to do business in North Carolina, subject to these conditions, which shall be included in the lease, agreement of sale, or agreement of conveyance:

(1) The corporation shall continue to provide the same or similar clinical hospital services to its patients in medical-surgery, obstetrics, pediatrics, outpatient and emergency treatment, including emergency services for the indigent, that the hospital facility provided prior to the lease, sale, or conveyance. These services may be terminated only as prescribed by Certificate of Need Law prescribed in Article 9 of Chapter 131E of the General Statutes, or, if Certificate of Need Law is inapplicable, by review procedure designed to guarantee public participation pursuant to rules adopted by the Secretary of the Department of Health and Human Services.

(2) The corporation shall ensure that indigent care is available to the population of the municipality or area served by the hospital authority at levels related to need, as previously demonstrated and determined mutually by the municipality or hospital authority and the corporation.

(3) The corporation shall not enact financial admission policies that have the effect of denying essential medical services or treatment solely because of a patient's immediate inability to pay for the services or treatment.

(4) The corporation shall ensure that admission to and services of the facility are available to beneficiaries of governmental reimbursement programs (Medicaid/Medicare) without discrimination or preference because they are beneficiaries of those programs.

(5) The corporation shall prepare an annual report that shows compliance with the requirements of the lease, sale, or conveyance.

The corporation shall further agree that if it fails to substantially comply with these conditions, or if it fails to operate the facility as a community general hospital open to the general public and free of discrimination based on race, creed, color, sex, or national origin unless relieved of this responsibility by operation of law, or if the corporation dissolves without a successor corporation to carry out the terms and conditions of the lease, agreement of sale, or agreement of conveyance, all ownership or other rights in the hospital facility, including the building, land and equipment associated with the hospital, shall revert to the municipality or hospital authority or successor entity originally conveying the hospital; provided that any building, land, or equipment associated with the hospital facility that the corporation has constructed or acquired since the sale may revert only upon payment to the corporation of a sum equal to the cost less depreciation of the building, land, or equipment.

This section shall not apply to leases, sales, or conveyances of nonmedical services or commercial activities, including the gift shop, cafeteria, the flower shop, or to surplus hospital property that is not required in the delivery of necessary hospital services at the time of the lease, sale, or conveyance.

(b) In the case of a sale or conveyance, if either general obligation bonds or revenue bonds issued for the benefit of the hospital to be conveyed are outstanding at the time of sale or conveyance, then the corporation shall agree to the following:

By the effective date of sale or conveyance, the corporation shall place into an escrow fund money or direct obligations of, or obligations the principal of and interest on which, are unconditionally guaranteed by the United States of America (as approved by the Local Government Commission), the principal of and interest on which, when due and payable, will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding to the maturity date or dates of such bonds or to the date or dates specified for the redemption thereof. The corporation shall furnish to the Local Government Commission such evidence as the Commission may require that the securities purchased will satisfy the requirements of this section. A hospital which has placed funds in escrow to retire outstanding general obligation or revenue bonds, as provided in this section, shall not be considered a public hospital, and G.S. 159-39(a)(3) shall be inapplicable to such hospitals.

No bonds, notes or other evidences of indebtedness shall be issued by a municipality or hospital authority to finance equipment for or the acquisition, extension, construction, reconstruction, improvement, enlargement, or betterment of any hospital facility if the facility has been sold or conveyed to a corporation, foreign or domestic, authorized to do business in North Carolina.

(c) In the case of a lease, the municipality or hospital authority shall determine the length of the lease. No lease executed under this section shall be deemed to convey a freehold interest. Any sublease or assignment of the lease shall be subject to the conditions prescribed by this section. If the term of the lease is more than 10 years, and either general obligation bonds or revenue bonds issued for the benefit of the hospital to be leased are outstanding at the time of the lease, then the corporation shall agree to the following:

By the effective date of the lease, the corporation shall place into an escrow fund money or direct obligations of, or obligations the principal of and interest on which, are unconditionally guaranteed by the United States of America (as approved by the Local Government Commission), the principal of and interest on which, when due and payable, will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding to the maturity date or dates of such bonds or to the date or dates specified for the redemption thereof. The corporation shall furnish to the Local Government Commission such evidence as the Commission may require that the securities purchased will satisfy the requirements of this section.

No bonds, notes or other evidences of indebtedness shall be issued by a municipality or hospital authority to finance equipment for or the acquisition, extension, construction, reconstruction, improvement, enlargement, or betterment of any hospital facility when the facility is leased to a corporation, foreign or domestic, authorized to do business in North Carolina.

(d) The municipality or hospital authority shall comply with the following procedures before leasing, selling, or conveying a hospital facility, or part thereof:

(1) The municipality or hospital authority shall first adopt a resolution declaring its intent to sell, lease, or convey the hospital facility at a regular meeting on 10 days' public notice. Notice shall be given by publication in one or more papers of general circulation in the affected area describing the intent to lease, sell, or convey the hospital facility involved, known potential buyers or lessees, a solicitation of additional interested buyers or lessees and intent to negotiate the terms of the lease or sale. Specific notice, given by certified mail, shall be given to the local office of each state-supported program that has made a capital expenditure in the hospital facility, to the Department of Health and Human Services, and to the Office of State Budget and Management.

(2) At the meeting to adopt a resolution of intent, the municipality or hospital authority shall request proposals for lease or purchase by direct solicitation of at least five prospective lessees or buyers. The solicitation shall include a copy of G.S. 131E-13.

(3) The municipality or hospital authority shall conduct a public hearing on the resolution of intent not less than 15 days after its adoption. Notice of the public hearing shall be given by publication at least 15 days before the hearing. All interested persons shall be heard at the public hearing.

(4) Before considering any proposal to lease or purchase, the municipality or hospital authority shall require information on charges, services,

and indigent care at similar facilities owned or operated by the proposed lessee or buyer.

(5) Not less than 45 days after adopting a resolution of intent and not less than 30 days after conducting a public hearing on the resolution of intent, the municipality or hospital authority shall conduct a public hearing on proposals for lease or purchase that have been made. Notice of the public hearings shall be given by publication at least 10 days before the hearing. The notice shall state that copies of proposals for lease or purchase are available to the public.

(6) The municipality or hospital authority shall make copies of the proposals to lease or purchase available to the public at least 10 days before the public hearing on the proposals.

(7) Not less than 60 days after adopting a resolution of intent, the municipality or hospital authority at a regular meeting shall approve any lease, sale, or conveyance by a resolution. The municipality or hospital authority shall adopt this resolution only upon a finding that the lease, sale, or conveyance is in the public interest after considering whether the proposed lease, sale, or conveyance will meet the health-related needs of medically underserved groups, such as low income persons, racial and ethnic minorities, and handicapped persons. Notice of the regular meeting shall be given at least 10 days before the meeting and shall state that copies of the lease, sale, or conveyance proposed for approval are available.

(8) At least 10 days before the regular meeting at which any lease, sale, or conveyance is approved, the municipality or hospital authority shall make copies of the proposed contract available to the public.

(e) Notwithstanding the provisions of subsections (c) and (d) of this section or G.S. 131E-23, a hospital authority as defined in G.S. 131E-16(14) or a municipality may lease or sublease hospital land to a corporation or other business entity, whether for profit or not for profit, and may participate as an owner, joint venturer, or other equity participant with a corporation or other business entity for the development, construction, and operation of medical office buildings and other health care or hospital facilities, so long as the municipality, hospital authority, or other entity continues to maintain its primary community general hospital facilities as required by subsection (a) of this section.

(f) A municipality or hospital authority may permit or consent to the pledge of hospital land or leasehold estates in hospital land to facilitate the development, construction, and operation of medical office buildings and other health care or hospital facilities. A municipality or hospital authority also may, as lessee, enter into master leases or agreements to fund for temporary vacancies relating to hospital land or hospital facilities for use in the provision of health care.

(g) Neither G.S. 153A-176 nor Article 12 of Chapter 160A of the General Statutes shall apply to leases, subleases, sales, or conveyances under this Chapter. (1983 (Reg. Sess., 1984), c. 1066, s. 1; 1997-233, s. 2; 1997-443, s. 11A.118(a); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

Local Modification. — (As to the Richmond Memorial Hospital) Richmond: 1993, c. 10, s. 1.

Cross References. — For section regarding sale of hospital facilities to nonprofit corporations, see G.S. 131E-8.

Editor's Note. — Session Laws 1999-386, s. 4, effective August 4, 1999, provides that, notwithstanding the requirements of G.S. 131E-8, 131E-13, 131E-14 and 153A-176 and Article 12 of Chapter 160A of the General Statutes, and any past compliance or failure to comply with those requirements, the prior conveyance by a municipality, as defined in G.S. 131E-6(5), or by a hospital authority, as defined in G.S. 131E-16(14), of a hospital facility that currently serves as collateral in a transaction involving North Carolina Medical Care Commission bonds issued under Part 10 of Article 3 of

Chapter 143B of the General Statutes is hereby validated. Section 5 of 1999-386 provides that Section 4 shall not apply to litigation pending on or before the effective date.

CASE NOTES

Hospital Facility. — Agency which provided health care for persons in their homes and hospitals consisted of a license, equipment and office space, and was a hospital facility within the meaning of subsection (d). Hospital Corp. v. Iredell County, 120 N.C. App. 445, 462 S.E.2d 675 (1995).

Cited in Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

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A county hospital authority may amend or consent to a transfer of its lease subject to the provisions of this section; the authority may not consent to any assignment of the lease unless it first solicits bids from five potential lessees and complies with all of the other substantive and procedural requirements of this section. See opinion of Attorney General to Roger Lee Edwards, Attorney and Counselor at Law, N.C. General Assembly, 1999 N.C.A.G. 13 (5/24/99).

Sale of Vacant Property to Physicians. — A hospital authority would not be required to comply with this section if it sold vacant property to one or more physicians based upon a determination that the vacant property was not necessary, convenient, or related to the operation of any hospital facility owned by the authority. See opinion of Attorney General to Roger Lee Edwards, Attorney, 2000 N.C. AG LEXIS 25 (6/8/2000).

§ 131E-14. Lease or sale of hospital facilities to certain nonprofit corporations.

If a municipality or hospital authority leases, sells, or conveys a hospital facility, or part, to a nonprofit corporation of which a majority of voting members of its governing body is not appointed or controlled by the municipality or hospital authority, the procedural requirements set forth in G.S. 131E-13(d) shall apply. (1983 (Reg. Sess., 1984), c. 1066, s. 2.)

Cross References. — For section regarding sale of hospital facilities to nonprofit corporations, see G.S. 131E-8.

Editor's Note. — Session Laws 1999-386, s. 4, effective August 4, 1999, provides that, notwithstanding the requirements of G.S. 131E-8, 131E-13, 131E-14 and 153A-176 and Article 12 of Chapter 160A of the General Statutes, and any past compliance or failure to comply with those requirements, the prior conveyance by a municipality, as defined in G.S. 131E-6(5), or by a hospital authority, as defined in G.S. 131E-16(14), of a hospital facility that currently serves as collateral in a transaction involving North Carolina Medical Care Commission bonds issued under Part 10 of Article 3 of Chapter 143B of the General Statutes is hereby validated. Section 5 of 1999-386 provides that Section 4 shall not apply to litigation pending on or before the effective date.

§ 131E-14.1. Branch facilities.

Notwithstanding anything in this Article, any municipality owning and operating a hospital organized under the provisions of this Part or Part 3 or any nonprofit corporation which leases or operates a hospital facility pursuant to an agreement with the municipality may erect, remodel, enlarge, purchase, finance, and operate branches and related facilities within this State but outside the boundaries of the county subject to the following limitations:

(1) No moneys derived from the exercise by the owning municipality of its power of taxation shall be expended on facilities located outside its boundaries;

(2) No moneys derived from the issuance by the owning municipality of its bonds or notes shall be expended on facilities located outside its boundaries;

(3) The owning municipality shall not possess the power of eminent domain or have the right of condemnation with respect to hospital facilities located outside its boundaries; and

(4) The power conferred on counties by G.S. 153A-169 and G.S. 153A-170 to adopt ordinances regulating the use of county-owned property and parking on county-owned property shall not extend to hospital facilities located outside its boundaries unless the board of commissioners of the county in which the facility is located shall by resolution permit any such ordinance to be applicable within its jurisdiction.

(5), (6) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 676, s. 1, effective July 1, 1994. (1983, c. 578, s. 1; 1993 (Reg. Sess., 1994), c. 676, s. 1.)

Editor's Note. — This section was enacted by Session Laws 1983, c. 578, s. 1, as G.S. 131-28.22A. Pursuant to Session Laws 1983, c. 775, s. 6, this section has been redesignated as G.S. 131E-14.1.

§ 131E-14.2. Conflict of interest.

(a) No member of the board of directors or employee of a public hospital, as defined in G.S. 159-39(a), or that person's spouse shall do either of the following:

(1) Acquire any interest, direct or indirect, in any hospital facility or in any property included or planned to be included in a hospital facility.

(2) Have any direct interest in any contract or proposed contract for materials or services to be furnished or used in connection with any hospital facility, except an employment contract for an employee. This restriction shall not apply to any contract, undertaking, or other transaction with a bank or banking institution, savings and loan association or public utility in the regular course of its business provided that the contract, undertaking, or other transaction shall be authorized by the board by specific resolution on which no director having direct interest shall vote.

(b) The fact that a person or that person's spouse owns ten percent (10%) or less stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of that corporation or other business entity does not make the person have a "direct interest" as this phrase is used in subsection (a) of this section; provided that, in order for the exception to apply, the contract, undertaking, or other transaction shall be authorized by the board of directors by specific resolution on which no director or employee having an interest, direct or indirect, shall vote.

(c) If a member of the board of directors or an employee of a public hospital or that person's spouse owns or controls an interest, direct or indirect, in any property included or planned to be included in any hospital facility, the member of the board of directors or the employee shall immediately disclose the same in writing to the board and the disclosure shall be entered upon the minutes of the board. Failure to disclose shall constitute misconduct in office and shall be grounds for removal.

(c1) Subsection (a) of this section shall not apply if the director or employee is not involved in making or administering the contract. A director or employee is involved in administering a contract if the director or employee oversees the performance of or interprets the contract. A director or employee is involved in making a contract if the director or employee participates in the development of specifications or terms or in the preparation or award of the contract. A director or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract. A director is also involved in making a contract if the board of directors takes action on the contract, whether or not the director actually participates in that action, unless the contract is approved under an exception to this section under which the director is allowed to benefit and is prohibited from voting.

(d) Subsection (a) of this section shall not apply to any member of the board of directors of a public hospital if (i) the undertaking or contract or series of undertakings or contracts between the public hospital and one of its officials is approved by specific resolution of the board adopted in an open and public meeting and recorded in its minutes; (ii) the official entering into the contract or undertaking with the public hospital does not in an official capacity participate in any way or vote; and (iii) the amount does not exceed twelve thousand five hundred dollars ($12,500) for medically related services and twenty-five thousand dollars ($25,000) for other goods or services within a 12-month period, or the contract is for medically related or administrative services that are provided by a director who serves on the board as an ex officio representative of the hospital medical staff pursuant to a hospital bylaw adopted prior to January 1, 2005, or that are provided by the spouse of that director.

(e) Subsection (a) of this section shall not apply to any employment relationship between a public hospital and the spouse of a member of the board of directors of the public hospital.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved as provided in this subsection. A public hospital that is a party to the contract may request approval to continue contracts under this subsection from the chairman of the Local Government Commission. Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (2001-409, s. 6; 2005-70, s. 1; 2006-264, s. 64(b).)

Editor's Note. — Session Laws 2001-409, s. 10, made this section effective July 1, 2002, and applicable to actions taken and offenses committed on or after that date. Prosecutions for offenses committed before the effective dates of the provisions of the act are not abated or affected by the act, and the statutes that would be applicable but for the act remain applicable to those prosecutions.

Effect of Amendments. — Session Laws 2006-264, s. 64(b), effective August 27, 2006, inserted "or administrative" and made a minor punctuation change in clause (iii) in subsection (d).

Part 2. Hospital Authority.

§ 131E-15. Title and purpose.

(a) This Part shall be known as the "Hospital Authorities Act."

(b) The General Assembly finds and declares that in order to protect the public health, safety, and welfare, including that of low income persons, it is necessary that counties and cities be authorized to provide adequate hospital, medical, and health care and that the provision of such care is a public purpose. Therefore, the purpose of this Part is to provide an alternate method for counties and cities to provide hospital, medical, and health care. (1943, c. 780, ss. 1, 2; 1971, c. 799; 1983, c. 775, s. 1.)

Editor's Note. — Session Laws 1983, c. 775, which repealed former Chapter 131 of the General Statutes and enacted this Chapter, provided in s. 3: "Notwithstanding the foregoing, any unit of government, or units of government acting jointly, that as of December 31, 1983, is operating a hospital or hospitals pursuant to Articles 2 or 2A of Chapter 131 of the General Statutes may continue to operate pursuant to the provisions of those Articles as they existed on December 31, 1983, to the extent that those Articles are inconsistent with this Chapter. However, a unit of government that has been operating a hospital pursuant to those Articles may choose to continue operations under the provisions of one of the Parts of Article 2 of this Chapter by adopting an appropriate resolution and by satisfying all other requirements of the relevant Part of Article 2 of this Chapter."

Session Laws 1989, c. 283, ss. 1 and 2, effective June 12, 1989, amended G.S. 131-7. Chapter 131 was repealed by Session Laws 1983, c. 775, s. 1, effective January 1, 1984. However, Session Laws 1983, c. 775, s. 3 contained a savings provision for certain units of government.

Session Laws 1989, c. 283, ss. 1 and 2 provided: "Section 1. G.S. 131-7, as it applies to hospitals continuing to operate under Article 2, Chapter 131 of the North Carolina General Statutes pursuant to Section 3, Chapter 775 of the 1983 Session Laws, is amended by rewriting the first sentence to read: 'Should a majority of the qualified voters upon the question be in favor of establishing such county, township, or town hospital, the governing body shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, township or town, who shall constitute a board of trustees for such public hospital."

"Sec. 2. G.S. 131-7 is amended by deleting the phrase 'No practicing physician may serve as a trustee.', and substituting 'One practicing physician may serve as a trustee'."

Session Laws 1997-502, s. 12, effective January 1, 1998, and applicable to contracts and agreements entered into on or after that date, provides: "Any county which, on or prior to July 1, 1997, established a hospital authority board composed of no more than seven members under the provisions of Part B of Article 2 of Chapter 131E of the General Statutes may, by resolution adopted by its board of county commissioners and with the approval of the State Health Director, assign that authority board the power, duties, and responsibilities to provide public health services as outlined in G.S. 130A-1.1. Thereafter, such authority board shall act as the local board of health for the county together with such additional powers, duties, and authority assigned to it by the board of county commissioners."

CASE NOTES

Venue. — Venue of negligence suit against hospital authority was properly transferred to the county by which it was governed, pursuant to G.S. 1-77, providing for venue of actions against a public officer, despise the fact that the authority operated in multiple counties. Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

Hospital Granting Exclusive Privilege to Use Equipment Held Not Immune Under State Action Exemption. — In an antitrust action brought under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) by plaintiff physicians asserting that defendant hospital had improperly restricted use of its CAT Scan, defendant was held to have failed to show, in support of its motion to dismiss, that the General Assembly had authorized defendant to grant exclusive privileges to certain physicians to use its facilities with the intent to restrict competition, so as to render defendant immune from antitrust liability under the state action exemption. Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

Cited in Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

§ 131E-16. Definitions.

As used in this Part, unless otherwise specified:

(1) "Board of county commissioners" means the legislative body charged with governing the county.

(2) "Bonds" means any bonds or notes issued by the hospital authority pursuant to this Part and the Local Government Finance Act, Chapter 159 of the General Statutes.

(3) "City" means any city or town which is, or is about to be, included in the territorial boundaries of a hospital authority when created hereunder.

(4) "City clerk" and "mayor" means the clerk and mayor, respectively, of the city, or the officers thereof charged with the duties customarily imposed on the clerk and mayor, respectively.

(5) "City council" means the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city or town.

(6) "Commissioner" means one of the members of a hospital authority appointed in accordance with the provisions of this Part.

(7) "Community general hospital" means a short-term nonfederal hospital that provides diagnostic and therapeutic services to patients for a variety of medical conditions, both surgical and nonsurgical, such services being available for use primarily by residents of the community in which it is located.

(8) "Contract" means any agreement of a hospital authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.

(9) "Corporation, foreign or domestic, authorized to do business in North Carolina" means a corporation for profit or having a capital stock which is created and organized under Chapter 55 of the General Statutes or any other general or special act of this State, or a foreign corporation which has procured a certificate of authority to transact business in this State pursuant to Article 10 of Chapter 55 of the General Statutes.

(10) "County" means the county which is, or is about to be, included in the territorial boundaries of a hospital authority when created hereunder.

(11) "County clerk" and "chairman of the board of county commissioners" means the clerk and chairman, respectively, of the county or the officers thereof charged with the duties customarily imposed on the clerk and chairman, respectively.

(12) "Federal government" means the United States of America, or any agency, instrumentality, corporate or otherwise, of the United States of America.

(13) "Government" means the State and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(14) "Hospital authority" means a public body and a body corporate and politic organized under the provisions of this Part.

(15) "Hospital facilities" means any one or more buildings, structures, additions, extensions, improvements or other facilities, whether or not located on the same site or sites, machinery, equipment, furnishings or other real or personal property suitable for health care or medical care; and includes, without limitation, general hospitals; chronic disease, maternity, mental, tuberculosis and other specialized hospitals; nursing homes, including skilled nursing facilities and intermediate care facilities; adult care homes for the aged and disabled; public health center facilities; housing or quarters for local public health departments; facilities for intensive care and self-care; clinics and outpatient facilities; clinical, pathological and other laboratories; health care research facilities; laundries; residences and training facilities for nurses, interns, physicians and other staff members; food preparation and food service facilities; administrative buildings, central service and other administrative facilities; communication, computer and other electronic facilities; fire-fighting facilities; pharma-

ceutical and recreational facilities; storage space; X ray, laser, radiotherapy and other apparatus and equipment; dispensaries; utilities; vehicular parking lots and garages; office facilities for hospital staff members and physicians; and such other health and hospital facilities customarily under the jurisdiction of or provided by hospitals, or any combination of the foregoing, with all necessary, convenient or related interests in land, machinery, apparatus, appliances, equipment, furnishings, appurtenances, site preparation, landscaping and physical amenities.

(15a) "Hospital land" means air and ground rights to real property held either in fee or by lease by a hospital authority, with all easements, rights-of-way, appurtenances, landscaping, and physical amenities such as utilities, parking lots, and garages, but excluding other improvements to land described in G.S. 131E-6(4) and subsection (15) of this section.

(16) "Municipality" means any county, city, town or incorporated village, other than a city as defined above, which is located within or partially within the territorial boundaries of an authority.

(17) "Real property" means lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(18) "State" means the State of North Carolina. (1943, c. 780, s. 3; 1971, c. 780, s. 22; c. 799; 1983, c. 775, s. 1; 1995, c. 535, s. 19; 1997-233, s. 3.)

Editor's Note. — Subdivision (15.1) of this section was renumbered as subdivision (15a) pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 131E-17. Creation of a hospital authority.

(a) A hospital authority may be created whenever a city council or a county board of commissioners finds and adopts a resolution finding that it is in the interest of the public health and welfare to create a hospital authority.

(b) After the adoption of a resolution creating a hospital authority, the mayor or the chairman of the county board of commissioners shall appoint commissioners in accordance with G.S. 131E-18.

(c) The commissioners shall be a public body and a body corporate and politic upon the completion of the procedures described in G.S. 131E-19. (1943, c. 780, s. 4; 1971, c. 799; 1983, c. 775, s. 1.)

CASE NOTES

Cited in Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

§ 131E-18. Commissioners.

(a) The mayor or the chairman of the county board shall appoint the commissioners of the authority. There shall be not less than six and not more than 30 commissioners. Upon a finding that it is in the public interest, the commissioners may adopt a resolution increasing or decreasing the number of commissioners by a fixed number; Provided that no decrease in the number of commissioners shall shorten a commissioner's term. A certified copy of the resolution and a list of nominees shall be submitted to the mayor or the chairman of the county board of commissioners for appointments in accordance with the procedures set forth in subsection (d) of this section.

(b) For the initial appointments of commissioners, one-third of the commissioners shall be appointed for a term of one year, one-third for a term of two years, and one-third for a term of three years to achieve staggered terms. All subsequent appointments shall be for three-year terms. A commissioner shall hold office until a successor has been appointed and qualified. Vacancies from resignation or removal from office shall be filled for the unexpired portion of the term.

(c) The mayor or the chairman of the county board of commissioners shall name the first chair of the authority. Thereafter, the commissioners shall elect each subsequent chair from their members. The commissioners shall elect from their members the first vice-chair and all subsequent vice-chairs.

(d) When a commissioner resigns, is removed from office, completes a term of office, or when there is an increase in the number of commissioners, the remaining commissioners shall submit to the mayor or the chairman of the county board of commissioners a list of nominees for appointment to the commission. The mayor or the chairman of the county board of commissioners shall appoint, only from the nominees, the number of commissioners necessary to fill all vacancies. However, the mayor or the chairman of the county board of commissioners may require the commissioners to submit as many additional lists of nominees as he or she may desire.

(e) The mayor shall file with the city clerk, or the chairman of the county board of commissioners shall file with the county clerk, a certificate of appointment or reappointment of a commissioner. The certificate shall be conclusive evidence of the due and proper appointment of the commissioner.

(f) Commissioners shall receive no compensation for their services, but they shall be entitled to reimbursement for necessary expenses, including travel expenses, incurred in the discharge of their duties.

(g) For a county with a population of less than 75,000, according to the most recent decennial federal census, the following exceptions to the provisions of this section shall apply:

(1) The commissioners shall be appointed by the county board of commissioners rather than the chairman of the county board of commissioners;

(2) In making appointments under subsection (d) of this section, the county board of commissioners shall consider the nominations of the commissioners of the authority, but the county board of the commissioners is not bound by the nominations and may choose any qualified person.

The foregoing exceptions shall not apply when a county with a population of less than 75,000 jointly establishes a hospital authority with a city.

(h) A majority of the commissioners shall constitute a quorum. (1943, c. 780, s. 5; 1971, c. 799; 1973, c. 792; 1981, c. 525, s. 1; 1983, c. 775, s. 1.)

Local Modification. — Craven: 1987 (Reg. Sess., 1988), c. 922, s. 1; 1989, c. 190, s. 1; 1999-15, s. 1; Nash: 1991 (Reg. Sess., 1992), c. 1022; Onslow: 1987 (Reg. Sess., 1988), c. 945; Pasquotank: 1959, c. 203, s. 1; 1989, c. 140, s. 1; 1995 (Reg. Sess., 1996), c. 567, s. 1 (expires July 31, 2000).

OPINIONS OF ATTORNEY GENERAL

A county board of commissioners does not have the authority to increase the number of commissioners on a hospital authority located within the county. See opinion of Attorney General to William I. Millar, Attorney at Law, and Thomas S. Stukes, Smith Helms Mulliss & Moore, L.L.P., 1999 N.C. AG LEXIS 39 (12/21/99).

Hospital Authority Has Authority to Expand Number of Its Commissioners. — This section expressly grants the authority to expand the number of a hospital authority's commissioners to the hospital authority's commissioners themselves, rather than to the board of county commissioners; therefore, a resolution of a county board of commissioners which provided that the number of members to the board of commissioners of a hospital authority could not be changed except by resolution of the county board of commissioners was a nullity and had no force and effect. See opinion of Attorney General to Haywood Regional Medical Center, 1999 N.C. AG LEXIS 40 (12/21/99).

§ 131E-19. Incorporation of a hospital authority.

(a) After the commissioners are appointed, they shall present to the Secretary of State an application for incorporation as a hospital authority. The application shall be signed by each of the commissioners and shall set forth:

(1) That the city council or the county board of commissioners has found that it is in the interest of the public health and welfare to create a hospital authority;
(2) That the mayor or the chairman of the county board of commissioners has appointed them as commissioners;
(3) The name and official residence of each of the commissioners;
(4) A certified copy of the appointment evidencing the commissioners' right to office, and the date and place of induction into and taking of office;
(5) That they desire the hospital authority to become a public body and a body corporate and politic under this Part;
(6) The term of office of each of the commissioners;
(7) The name which is proposed for the corporation; and
(8) The location and principal office of the corporation.

The application shall be subscribed and sworn to by each of the commissioners before an officer authorized by the laws of this State to take and certify oaths. This officer shall certify upon the application that he or she personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed to the application and took the oath in the officer's presence.

(b) The Secretary of State shall examine the application. If he or she finds that the name proposed for the corporation is not identical with that of a person or of any other corporation in this State or so nearly similar so as to lead to confusion and uncertainty, the application shall be filed and recorded in the appropriate book of record in the Secretary of State's office. The Secretary of State shall then make and issue to the commissioners a certificate of incorporation pursuant to this Part, under the Seal of the State, and shall record the certificate with the application.

(c) A hospital authority's name or the location or principal office of the corporation may be changed by the adoption of a resolution by the majority of the authority's commissioners. A copy of the resolution, duly verified by the chair and secretary of the commission before an officer authorized by the laws of this State to take and certify oaths, shall be delivered to the Secretary of State, along with a conformed copy. If the Secretary of State finds that the proposed name is not identical with that of a person or any corporation of this State, or so nearly similar as to lead to confusion and uncertainty, the resolution shall be filed and recorded in the appropriate book of record in the Secretary of State's office. A resolution changing the location or principal office of the hospital authority shall be filed and recorded in the appropriate book of record in the Secretary of State's office. The Secretary of State shall then return to the authority the conformed copy, together with a certificate stating that the attached copy is a true copy of the document in the Secretary of State's office, that shows the date of filing.

(d) In any legal proceeding, a copy of the certificate of incorporation, certified by the Secretary of State, shall be admissible in evidence and shall be conclusive proof of its filing and contents and the incorporation of the hospital authority in accordance with this Part. (1943, c. 780, s. 4; 1966, c. 988, s. 1; 1971, c. 799; 1983, c. 775, s. 1.)

§ 131E-20. Boundaries of the authority.

(a) The territorial boundaries of a hospital authority shall include the city or county creating the authority and the area within 10 miles from the territorial boundaries of that city or county. However, a hospital authority may engage in health care activities in a county outside its territorial boundaries pursuant to:

(1) An agreement with a hospital facility if only one hospital currently exists in that county;
(2) An agreement with any hospital if more than one hospital currently exists in that county; or
(3) An agreement with any health care agency if no hospital currently exists in that county.

In no event shall the territorial boundaries of a hospital authority include, in whole or in part, the area of any previously existing hospital authority. All priorities shall be determined on the basis of the time of issuance of the certificates of incorporation by the Secretary of State.

(b) After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city or county shall in no way affect the territorial boundaries of the authority. (1943, c. 780, s. 4; 1971, c. 799; 1983, c. 775, s. 1; 1993, c. 529, s. 6.1.)

CASE NOTES

Applicability. — G.S. 131E-20, concerning the territorial boundaries of a hospital authority, applies to hospital authorities organized pursuant to G.S. 131E-15 to 131E-39 (the Hospital Authorities Act). Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

Venue. — Venue of negligence suit against hospital authority was properly transferred to the county by which it was governed, pursuant to G.S. 1-77, providing for venue of actions against a public officer, despise the fact that the authority operated in multiple counties. Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

Cited in Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

§ 131E-21. Conflict of interest.

(a) No commissioner or employee of the hospital authority or that person's spouse shall do either of the following:

(1) Acquire any interest, direct or indirect, in any hospital facility or in any property included or planned to be included in a hospital facility.
(2) Have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any hospital facility, except an employment contract for an employee. The foregoing restriction shall not apply to any contract, undertaking, or other transaction with a bank or banking institution, savings and loan association or public utility in the regular course of its business; Provided that any such contract, undertaking, or other transaction shall be authorized by the commissioners by specific resolution on which no commissioner having an interest, direct or indirect, shall vote.

(b) The fact that a person or that person's spouse owns ten percent (10%) or less stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of that corporation or other business entity does not make the person have an "interest, direct or indirect" as this phrase is used in subsection (a) of this section; provided that, in order for the exception to apply, the contract, undertaking or other transaction shall be authorized by the commissioners by specific resolution on which no commissioner or employee having an interest, direct or indirect, shall vote.

(c) If a commissioner or employee of an authority or that person's spouse owns or controls an interest, direct or indirect, in any property included or planned to be included in any hospital facility, the commissioner or employee shall immediately disclose the same in writing to the authority and the disclosure shall be entered upon the minutes of the authority. Failure to disclose shall constitute misconduct in office and shall be grounds for a commissioner's removal from office under G.S. 131E-22.

(d) Subsection (a) of this section shall not apply to any commissioner of a hospital authority if (i) the undertaking or contract or series of undertakings or contracts between the hospital authority and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting and recorded in its minutes and the amount does not exceed twelve thousand five hundred dollars ($12,500) for medically related services and twenty-five thousand dollars ($25,000) for other goods or services within a 12-month period; and (ii) the official entering into the contract or undertaking with the hospital authority does not in an official capacity participate in any way or vote.

(e) Subsection (a) of this section shall not apply to any employment relationship between a hospital authority and the spouse of a commissioner of the hospital authority.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved as provided in this subsection. A hospital authority that is a party to the contract may request approval to continue contracts under this subsection from the chairman of the Local Government Commission. Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (1943, c. 780, s. 7; 1971, c. 749; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1058, s. 1; 2001-409, s. 7.)

§ 131E-22. Removal of commissioners.

(a) The appointing authority, as stated in G.S. 131E-18, may remove a commissioner for inefficiency, neglect of duty, or misconduct in office. A commissioner may be removed only after he or she has been given a copy of the charges and provided the opportunity to be heard in person or by counsel. A commissioner is entitled to at least 10 days after receipt of the notice to prepare for a hearing before the mayor or the chairman of the county.

(b) An obligee of the authority may file with the mayor or the chairman of the county board of commissioners written charges that the authority is willfully violating the laws of the State or a term, provision, or covenant to any contract to which the authority is a party. The mayor or the chairman of the county board of commissioners shall give each of the commissioners a copy of the charges at least 10 days prior to the hearing on the charges. The commissioners shall be provided an opportunity to be heard in person or by counsel. The mayor or the chairman of the county board of commissioners shall, within 15 days after receipt of the charges, remove any commissioners of the authority who are found to have acquiesced in any willful violation. If a commissioner has not filed a written statement before the hearing with the authority stating his or her objections to or lack of participation in the violation, the commissioner shall be deemed to have acquiesced in a willful violation.

(c) If, after due and diligent search, a commissioner to whom charges are required to be delivered cannot be found within the county where the authority is located, the charges shall be deemed to be served upon the commissioner when it is mailed to the commissioner at the commissioner's last known address as the same appears on the records of the authority.

(d) In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk, or the chairman of the county board of commissioners shall file with the county clerk, a record of the proceedings together with the charges against the commissioner and the findings. (1943, c. 780, s. 8; 1971, c. 799; 1983, c. 775, s. 1.)

§ 131E-23. Powers of the authority.

(a) An authority shall have all powers necessary or convenient to carry out the purposes of this Part, including the following powers, which are in addition to those powers granted elsewhere in this Part:

(1) To investigate hospital, medical, and health conditions and the means of improving those conditions;
(2) To determine where inadequate hospital and medical facilities exist;
(3) To accept donations or money, personal property, or real estate for the benefit of the authority and to take title to the same from any person, firm, corporation or society;
(4) To acquire by purchase, gift, devise, lease, condemnation, or otherwise any existing hospital facilities;
(5) To purchase, lease, obtain options upon, or otherwise acquire any real or personal property or any interest therein from any person, firm, corporation, city, county, or government;
(6) To sell, exchange, transfer, assign, or pledge any real or personal property or any interest therein to any person, firm, corporation, city, county or government;
(7) To own, hold, clear and improve property;
(8) To borrow money upon its bonds, notes, debentures, or evidences of indebtedness, as provided for in G.S. 131E-26 and G.S. 131E-27;
(9) To purchase real or personal property pursuant to G.S. 131E-32;
(10) To appoint an administrator of a hospital facility and necessary assistants, and any and all other employees necessary or advisable, to fix their compensation, to adopt necessary rules governing their employment, and to remove employees;
(11) To delegate to its agents or employees any powers or duties as it may deem appropriate;
(12) To employ its own counsel and legal staff;
(13) To adopt, amend and repeal bylaws for the conduct of its business;
(14) To enter into contracts for necessary supplies, equipment, or services for the operation of its business;
(15) To appoint committees or subcommittees as it shall deem advisable, to fix their duties and responsibilities, and to do all things necessary in connection with the construction, repair, reconstruction, management, supervision, control and operation of the authority's business;
(16) To establish procedures for health care providers to secure the privilege of practicing within any hospital operated by the authority pursuant to Part 3 of Article 5 of this Chapter;

(17) To establish reasonable rules governing the conduct of health care providers while on duty in any hospital operated by the facility pursuant to Part 3 of Article 5 of this Chapter;
(18) To provide for the construction, reconstruction, improvement, alteration or repair of any hospital facility, or any part of a facility;
(19) To enter into any contracts or other arrangements with any municipality, other public agency of this or any other State or of the United States, or with any individual, private organization, or nonprofit association for the provision of hospital, clinical, or similar services;
(20) To lease any hospital facilities to or from any municipality, other public agency of this or any other state or of the United States, or to any individual, corporation, or association upon any terms and subject to any conditions as may carry out the purposes of this Part. The authority may provide for the lessee to use, operate, manage and control the hospital facilities, and to exercise designated powers, in the same manner as the authority itself might do;
(21) To act as an agent for the federal, State or local government in connection with the acquisition, construction, operation or management of a hospital facility, or any part thereof;
(22) To arrange with the State, its subdivisions and agencies, and any county or city, to the extent it is within the scope of their respective functions,
  a. To cause the services customarily provided by each to be rendered for the benefit of the hospital authority,
  b. To furnish, plan, replan, install, open or close streets, roads, alleys, sidewalks or similar facilities and to acquire property, options or property rights for the furnishing of property or services for a hospital facility, and
  c. To provide and maintain parks and sewage, water and other facilities for hospital facilities and to lease and rent any of the dwellings or other accommodations or any of the lands, buildings, structures or facilities embraced in any hospital facility and to establish and revise the rents and charges;
(23) To insure the property or the operations of the authority against risks as the authority may deem advisable;
(24) To invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which trustees, guardians, executors, administrators, and others acting in a fiduciary capacity may legally invest funds under their control;
(25) To sue and be sued;
(26) To have a seal and to alter it at pleasure;
(27) To have perpetual succession;
(28) To make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority;
(29) To remove vehicles parked on land owned or leased by the hospital authority in areas clearly designated as no parking or restricted parking zones. An owner of a removed vehicle as a condition of regaining possession of the vehicle, shall reimburse the hospital authority for all reasonable costs, not to exceed fifty dollars ($50.00), incidental to the removal and storage of the vehicle provided that the designation of the area as a no parking or restricted parking zone clearly indicates that the owner may be subject to these costs;
(30) To plan and operate hospital facilities;
(31) To provide teaching and instruction programs and schools for medical students, interns, physicians, nurses, technicians and other health care professionals;

(32) To provide and maintain continuous resident physician and intern medical services;

(33) To adopt, amend and repeal rules and regulations governing the admission of patients and the care, conduct, and treatment of patients;

(34) To establish a fee schedule for services received from hospital facilities and make the services available regardless of ability to pay;

(35) To maintain and operate isolation wards for the care and treatment of mental, contagious, or other similar diseases;

(36) To sell a hospital facility pursuant to G.S. 131E-8 or G.S. 131E-13; and

(37) To agree to limitations upon the exercise of any powers conferred upon the hospital authority by this Part in connection with any loan by a government.

(b) A hospital authority may exercise any or all of the powers conferred upon it by this Part, either generally or with respect to any specific hospital facility or facilities, through or by designated agents, including any corporation or corporations which are or shall be formed under the laws of this State.

(c) Expired pursuant to Session Laws 1983, c. 775, s. 1.

(d) No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to a hospital authority unless otherwise specified by the General Assembly. (1913, c. 42, s. 15; 1917, c. 268; C.S., s. 7273; 1983, c. 775, s. 1; 1995, c. 509, s. 135.1(l); 1997-456, s. 27; 1999-456, s. 6.)

Local Modification. — Craven County: 1987 (Reg. Sess., 1988), c. 922, s. 3.

Editor's Note. — Subdivisions (22)(a), (22)(b) and (22)(c) of this section were renumbered as subdivisions (22)a., (22)b., and (22)c., pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals which continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

CASE NOTES

Observance of Due Process Requirements. — Hospital authority, in the administration of its public duties of determining who practices medicine and surgery in the hospital, must observe the due process or procedural fairness requirements of the Constitution of the United States. Poe v. Charlotte Mem. Hosp., 374 F. Supp. 1302 (W.D.N.C. 1974), decided under former statutory provisions.

Hospital Granting Exclusive Privilege to Use Equipment Held Not Immune Under State Action Exemption. — In an antitrust action brought under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) by plaintiff physicians asserting that defendant hospital had improperly restricted use of its CAT Scan, defendant was held to have failed to show, in support of its motion to dismiss, that the General Assembly had authorized defendant to grant exclusive privileges to certain physicians to use its facilities with the intent to restrict competition, so as to render defendant immune from antitrust liability under the state action exemption. Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

§ 131E-24. Eminent domain.

(a) A hospital authority may acquire by eminent domain any real property, including fixtures and improvements, which it deems necessary to carry out the purposes of this Part. The hospital authority may exercise the power of eminent domain under the provisions of Chapter 40A of the General Statutes or any other statute now in force or subsequently enacted for the exercise of the power of eminent domain.

(b) No property belonging to any city, town, or county, any government, religious or charitable organization, or to any existing hospital or clinic may be acquired without its consent. No property belonging to a public utility corporation may be acquired without the approval of the commission or other officer or agency, if any, having regulatory power over the corporation.

(c) The right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for the facility has been issued by the North Carolina Utilities Commission. The proceedings leading up to issuing of the certificate of public convenience and necessity, and the right of appeal from the proceedings shall be governed by the Public Utilities Act, Chapter 62 of the General Statutes, and the rights under that act are hereby expressly reserved to all interested parties in the proceedings. In addition to the powers now granted by law to the North Carolina Utilities Commission, the Utilities Commission is authorized to investigate and examine all facilities set up or attempted to be set up under this Part and to determine the question of public convenience and necessity for the facility. (1943, s. 780, s. 10; 1971, c. 799; 1981, c. 919, s. 18; 1983, c. 775, s. 1.)

§ 131E-25. Zoning and building laws.

All hospital facilities of the authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the hospital facility is situated. (1943, c. 780, s. 11; 1971, c. 799; 1983, c. 775, s. 1.)

§ 131E-26. Revenue bonds and notes.

(a) A hospital authority shall have the power to issue revenue bonds under the Local Government Revenue Bond Act, Chapter 159 of the General Statutes, Article 5, or the bond and revenue anticipation provisions of Chapter 159 of the General Statutes, Article 9, for the purpose of acquiring, constructing, reconstructing, improving, enlarging, bettering, equipping, extending or operating hospital facilities.

(b) A hospital authority shall have the power to borrow for the purposes above enumerated upon its notes or other evidences of indebtedness, subject to the approval of the Local Government Commission as provided in G.S. 131E-32(c). Such approval shall be required regardless of the amount of any such borrowing. Any borrowing by a hospital authority before the date of ratification of Part 2 of Article 2 of this Chapter, whether or not approved by the Local Government Commission, is valid, ratified and confirmed. (1983, c. 775, s. 1.)

Editor's Note. — Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals that continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes, have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

§ 131E-27. Contracts with federal government.

A hospital authority is authorized:

(1) To borrow money and accept grants from the federal government for or to aid in the construction of a hospital facility;

(2) To acquire any land acquired by the federal government for the construction of a hospital facility; and

(3) To acquire, lease or manage any hospital facility constructed or owned by the federal government.

To these ends, a hospital authority is authorized to enter into contracts, mortgages, trust indentures, leases or other agreements giving the federal government the right to supervise and approve the construction, maintenance and operation of the hospital facility. It is the purpose and intent of this Part to authorize every hospital authority to do any and all things necessary to secure the financial aid and cooperation of the federal government in the construction, maintenance, and operation of hospital facilities. (1943, c. 780, s. 19; 1971, c. 799; 1983, c. 775, s. 1.)

Editor's Note. — Session Laws 1999-377, s. 3, effective August 4, 1999, provides that all hospitals that continue to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall, in addition to the powers and authorities set forth in Article 2 of Chapter 131 of the General Statutes, have the powers set forth in G.S. 131E-7(a)(1), (3), (5), (6), 131E-7(b), 131E-7(c), 131E-7.1, 131E-11, 131E-23(1), (2), (5), (6), (7), (8), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), 131E-26, and 131E-27.

§ 131E-28. Tax exemptions.

(a) Hospital authorities shall be exempt from the payment of taxes or fees to the State or any of its subdivisions, or to any officer or employee of the State or any of its subdivisions.

(b) Hospital authority property used for public purposes shall be exempt from all local and municipal taxes and for the purposes of this tax exemption, an authority shall be deemed to be a municipal corporation.

(c) Bonds, notes, debentures, or other evidences of indebtedness of a hospital authority issued under the Local Government Revenue Bond Act, Chapter 159 of the General Statutes, Article 5, or issued pursuant to the bond and revenue anticipation provisions of Chapter 159 of the General Statutes, Article 9, or issued pursuant to G.S. 131E-26(b) or contracted pursuant to G.S. 131E-32 shall at all times be free from taxation by the State or any of its subdivisions, except for inheritance or gift taxes, income taxes on the gain from the transfer of the instruments, and franchise taxes. The interest on the instruments is not subject to taxation as income. (1943, c. 780, s. 21; 1971, c. 799; 1973, c. 695, s. 6; 1977, c. 268; 1983, c. 775, s. 1; 1995, c. 46, s. 13.)

§ 131E-29. Audits and recommendations.

Each hospital authority shall file with the mayor of the city or the chairman of the county board of commissioners at least annually an audit report by a certified public accountant of its activities for the preceding year, and shall make any recommendations necessary to carry out the purposes of this Part. (1943, c. 780, s. 22; 1971, c. 799; 1983, c. 775, s. 1.)

§ 131E-30. Appropriations.

Each year the governing body of a city or county in which the hospital authority is located may appropriate and transfer funds to the authority. The appropriations shall be from the General Fund and may not exceed five percent (5%) of the General Fund. Money appropriated and paid to the hospital authority by a city or county shall be deemed a necessary expense of the city or county. However, the appropriations shall not be deemed to be a revenue of the authority for the purpose of bonds of the hospital authority issued under the Local Government Revenue Bond Act, Chapter 159 of the General Statutes, Article 5. (1943, c. 780, s. 25; 1971, c. 780, s. 23; c. 799; 1983, c. 775, s. 1.)

Local Modification to Former G.S. 131-114. — City of Charlotte: 1955, c. 1114.

§ 131E-31. Transfers of property by a city or county to a hospital authority.

(a) A city or county may lease, sell, convey, or otherwise transfer, with or without consideration or with nominal consideration, any property, whether real or personal or mixed, to a hospital authority whose territorial boundaries include at least part of the city or county. A hospital authority is authorized to accept such lease, transfer, assignment or conveyance and to bind itself to the performance and observation of any agreements and conditions required by the city or county.

(b) If a city or county sells, conveys, or otherwise irrevocably transfers to a hospital authority property with a market value in excess of two hundred fifty thousand dollars ($250,000), and if the hospital authority accepts this property, the mayor of the city or the chairman of the county board of commissioners shall have the right to name additional commissioners to serve on the authority. The number of additional commissioners shall be such that the proportion of additional commissioners to existing commissioners is approximately equal to the proportion of the total value being transferred to the hospital authority to the total value of property already held by the authority. The determination of the ratios will be made solely by the governing body of the city or county transferring the property to the hospital authority; however, in no event shall fewer than two nor more than nine commissioners be added to the hospital authority. The total number of commissioners shall be increased by the number of commissioners added under this subsection. The times of commencement and expiration of the initial terms of the commissioners being added shall be determined by agreement between the hospital authority and the governing body of the city or county. After the expiration of the initial terms, subsequent terms will be three years. Copies of the agreement setting out the number of persons being added and the terms of each shall be filed with the clerk of the city or the clerk of the county board of commissioners making the transfer and, thereafter, copies of the reports referred to in G.S. 131E-29 shall be filed with the clerk of the city or the clerk of the county board of commissioners. (1943, c. 780, s. 26; 1961, c. 988, s. 2; 1971, c. 799; 1983, c. 775, s. 1.)

OPINIONS OF ATTORNEY GENERAL

County May Limit Hospital's Exercise of Powers in Lease Agreement. — Under this section, a county has the authority to lease hospital property to a hospital authority organized pursuant to the Hospital Authorities Act under a lease that would require the hospital authority to obtain the county's prior written approval before it exercises some of its powers. See opinion of Attorney General to Thomas S. Stukes, Esq. Smith Helms Mulliss & Moore, L.L.P., 1997 N.C.A.G. 51 (8/18/97).

§ 131E-32. Purchase money security interests.

(a) An authority shall have the power and authority to purchase real or personal property under installment contracts, purchase money mortgages or deeds of trust, or other instruments, which create in the property purchased a security interest to secure payment of the purchase price and interest thereon. No deficiency judgment may be rendered against any authority for breach of an obligation authorized by this section. Any contract made or entered into by an authority before the date of ratification of Part 2 of Article 2 of this Chapter which would have been valid hereunder is valid, ratified and confirmed.

(b) A hospital authority may contract pursuant to this section in an amount of less than seven hundred fifty thousand dollars ($750,000), adjusted, as hereinafter provided, in any single transaction without the approval of the Local Government Commission: Provided, however, that the approval of the Local Government Commission shall be required for any single contract pursuant to this section if the aggregate dollar amount of all such contracts outstanding after any such single transaction, exclusive of revenue bonds issued pursuant to G.S. 131E-26 and federal contracts entered pursuant to G.S. 131E-27, would exceed ten percent (10%) of the total operating revenues, as hereinafter defined, of the hospital authority for its most recently completed fiscal year as set forth in the audited financial statements of such authority for such fiscal year. The approval of the Local Government Commission shall be required with respect to any single contract pursuant to this section in an amount of seven hundred fifty thousand dollars ($750,000) or more, adjusted as hereinafter provided.

(c) Approval of the Local Government Commission under this section or as required by G.S. 131E-26(b) shall be obtained in accordance with such rules and regulations as the Local Government Commission may prescribe and shall be evidenced by the secretary's certificate on the contract or note or other evidence of indebtedness. In determining whether to approve any such contract or borrowing, the Local Government Commission shall consider whether the hospital authority can demonstrate the financial responsibility and capability of the hospital authority to fulfill its obligations with respect to such contract or borrowing. The Local Government Commission may approve the application without other findings, if it finds that (i) the proposed project or the purpose of the borrowing is necessary and expedient, (ii) the contract or the borrowing, under the circumstances, is preferable to a bond issue for the same purpose, (iii) the sums to fall due under the contract or borrowing are adequate and not excessive for the proposed purpose, (iv) the authority's debt management procedures are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law and (v) the authority is not in default on any of its debt service obligations. Any contract or borrowing subject to this subsection requiring the approval of the Local Government Commission that does not bear the secretary's certificate thereon shall be void, and it shall be unlawful for any officer, employee or agent of a hospital authority to make any payments of money thereunder. An order of the Local Government Commission approving any such contract or borrowing shall not be regarded as an approval of the legality of the contract or borrowing in any respect.

(d) The seven hundred fifty thousand dollars ($750,000) amount referred to in G.S. 131E-32(b) shall be in effect from July 15, 1983 through September 30, 1984. For each twelve-month period thereafter, the seven hundred fifty thousand dollar ($750,000) amount shall be the figure in effect for the preceding twelve-month period, adjusted to reflect the change in the preceding twelve-month period in the Department of Commerce Composite Construction Cost Index.

(e) For purposes of G.S. 131E-32(b), the "total operating revenues" of a hospital authority for a fiscal year means patient revenue, less provisions for contractual adjustments, uncompensated care and bad debts, plus other operating revenues, all as determined in accordance with generally accepted accounting principles. (1983, c. 775, s. 1.)

§ 131E-33. Part controlling.

Insofar as the provisions of this Part are inconsistent with the provisions of any other law, the provisions of this Part shall be controlling; however this Part shall not be construed as preventing a city, town, or county from establishing and operating a hospital under the authority of any other law now or hereafter in effect. (1943, c. 780, s. 28; 1971, c. 799; 1983, c. 775, s. 1.)

§ 131E-34. Part applicable to City of High Point.

All the provisions of this Part shall apply to the City of High Point, Guilford County, North Carolina, as fully as if the population of the city exceeded 75,000 inhabitants. (1947, c. 349; 1971, c. 799; 1983, c. 775, s. 1.)

§§ 131E-35 through 131E-39: Reserved for future codification purposes.

Part 3. Hospital District Act.

§ 131E-40. Title and purpose.

(a) This Part shall be known as the "Hospital District Act."

(b) It is the purpose of this Part to authorize the creation of hospital districts to furnish hospital, clinical and similar services to the people of this State.

(c) This Part provides an additional and alternative method for the provision of hospital, clinical and similar services.

(d) This Part shall be construed liberally to effect its purposes. (1983, c. 775, s. 1.)

Editor's Note. — Session Laws 1983, c. 775, s. 3, provided: "Notwithstanding the foregoing, any unit of government, or units of government acting jointly, that as of December 31, 1983, is operating a hospital or hospitals pursuant to Articles 2 or 2A of Chapter 131 of the General Statutes may continue to operate pursuant to the provisions of those Articles as they existed on December 31, 1983, to the extent that those Articles are inconsistent with this Chapter. However, a unit of government that has been operating a hospital pursuant to those Articles may choose to continue operations under the provisions of one of the Parts of Article 2 of this Chapter by adopting an appropriate resolution and by satisfying all other requirements of the relevant Part of Article 2 of this Chapter."

Session Laws 1989, c. 283, ss. 1 and 2, effective June 12, 1989, amended G.S. 131-7. Chapter 131 was repealed by Session Laws 1983, c. 775, s. 1, effective January 1, 1984. However, Session Laws 1983, c. 775, s. 3 contained a savings provision for certain units of government.

Session Laws 1989, c. 283, ss. 1 and 2 provided: "Section 1. G.S. 131-7, as it applies to hospitals continuing to operate under Article 2, Chapter 131 of the North Carolina General Statutes pursuant to Section 3, Chapter 775 of the 1983 Session Laws, is amended by rewriting the first sentence to read: 'Should a majority of the qualified voters upon the question be in favor of establishing such county, township, or town hospital, the governing body shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, township or town, who shall constitute a board of trustees for such public hospital.'

"Sec. 2. G.S. 131-7 is amended by deleting the phrase 'No practicing physician may serve as a trustee.', and substituting 'One practicing physician may serve as a trustee'."

CASE NOTES

As to the constitutionality of former statutory provisions, see Williamson v. Snow, 239 N.C. 493, 80 S.E.2d 262 (1954).

§ 131E-41. Methods of creation of a hospital district.

(a) The voters of an area may petition their county board of commissioners and the North Carolina Medical Care Commission for the creation of a hospital district. All of the area proposed to be included within a hospital district must be located within one county. The petition shall be signed by at least 500 voters of the area described in the petition. However, if the area has less than 1,100 voters, then the minimum number of petitioners shall be 250 voters. The petition shall set forth:

(1) A description of the area to be included within the proposed hospital district;

(2) The names of all municipalities located in whole or in part in the proposed hospital district;

(3) The names of all publicly owned hospitals in the proposed hospital district;

(4) The purpose or purposes sought to be accomplished by the creation of the hospital district; and

(5) The proposed name of the hospital district.

The petition shall be delivered to the county board of commissioners of the county in which the proposed hospital district would be located. If the county board of commissioners approves the creation of the hospital district, they shall have the petition delivered to the North Carolina Medical Care Commission for review under G.S. 131E-42.

(b) In the alternative, the county board of commissioners, in its discretion, may create a hospital district by resolution. This authority exists only when one hospital district already exists in the county, or when a special tax levy for hospital purposes has been authorized or is now authorized with respect to a portion of the county. This power is limited to establishing a hospital district in the area lying outside the existing hospital district or outside the portion of the county in which a hospital tax levy has been or is now authorized. When a county board of commissioners exercises its power under this subsection, all other provisions of this Part shall be applicable, except as modified by this subsection. (1949, c. 766, s. 5; 1953, c. 1045, s. 1; 1959, cc. 877, 1074; 1971, c. 780, s. 37.4; 1973, c. 476, s. 152; c. 494, s. 45; c. 1090, s. 1; 1983, c. 775, s. 1.)

§ 131E-42. Hearing and determination.

(a) After receipt of a petition for the creation of a hospital district that meets the requirements of G.S. 131E-41(a) and that has been approved by the county board of commissioners, the North Carolina Medical Care Commission shall give notice of a hearing on the creation of a hospital district. The notice of hearing shall be posted at the county courthouse door and at three public places within the proposed district. In addition, notice of hearing shall be published at least once for three successive weeks in a newspaper circulating in the proposed district. The notice of hearing shall specify:

(1) The date of hearing which shall not be earlier than 20 days after the first posting and publication of notice;

(2) The location of the hearing, which shall be within the county in which the proposed district would be located; and

(3) That any interested person may appear and be heard at the hearing.

(b) At the time and place specified in the notice of hearing, the North Carolina Medical Care Commission, or its designee, shall hear all interested persons, and, if necessary, adjourn and reconvene at a later time.

(c) After the hearing, the North Carolina Medical Care Commission shall determine if it is in the public interest and beneficial to the residents of the area to create a hospital district, and, if it is, shall adopt a resolution creating the hospital district. The resolution shall define the area to be included in the hospital district. The area shall either be the one described in the petition or a part of that area. However, no municipality, in whole or in part, shall be included in a hospital district unless the governing body of the municipality shall have approved by resolution the inclusion and shall have filed a certified copy of the resolution with the North Carolina Medical Care Commission.

(d) Each hospital district shall be designated by the North Carolina Medical Care Commission as the "____________ Hospital District of ____________ County," inserting in the blank spaces a name identifying the locality and the name of the county.

(e) The North Carolina Medical Care Commission shall give notice of the creation of a hospital district. The notice shall be published at least once for two successive weeks in the newspaper in which the notice of hearing required by G.S. 131E-42(a) was published. A notice substantially in the following form, the blanks first being properly filled in, with the printed or written signature of the executive secretary of the North Carolina Medical Care Commission appended, shall be published with the resolution:

> The foregoing resolution was passed by the North Carolina Medical Care Commission on the ________ day of ____________, ________; it was first published on the ________ day of ____________, ________.
>
> Any action or proceeding questioning the validity of the resolution or creation of the ____________ Hospital District of ____________. County or the inclusion in the district of any of the areas described in the resolution must be commenced within thirty days after the first publication of this resolution.
>
> ______________________________
> Secretary
> North Carolina Medical
> Care Commission.

(1943, c. 766, s. 5; 1951, c. 805; 1953, c. 1045, ss. 1, 2; 1959, c. 877; 1973, c. 476, s. 152; c. 1090, s. 1; 1983, c. 775, s. 1; 1999-456, s. 59.)

CASE NOTES

Resolution of Commission. — The provision in former similar section requiring the adoption of a resolution "determining that the residents of all the territory to be included in such district will be benefited by the creation of such district" was nothing more than a requirement that the Medical Care Commission, before creating a hospital district, should determine that a hospital was needed in the area included within the boundaries of such proposed hospital district. Williamson v. Snow, 239 N.C. 493, 80 S.E.2d 262 (1954).

§ 131E-43. Limitation of actions.

Any action or proceeding in any court to set aside a resolution of the North Carolina Medical Care Commission creating any hospital district, or questioning the validity of the resolution, or the creation of any hospital district, or the inclusion in the district of any of the territory described in the resolution creating the district, must be commenced within 30 days after the first publication of the resolution and notice required by G.S. 131E-42(e). Thereafter, no right of action or defense founded upon the invalidity of a resolution or the creation of a district or the inclusion of any territory in the district shall be asserted, nor shall the validity of the resolution or the creation of the district or the inclusion of any territory be open to question in any court upon any ground, except in any action or proceeding commenced within the 30-day period. (1949, c. 766, s. 5; 1951, c. 805; 1953, c. 1045, s. 2; 1973, c. 476, s. 152; c. 1090, s. 1; 1983, c. 775, s. 1.)

§ 131E-44. General powers.

(a) The inhabitants of a hospital district are a body corporate and politic by the name specified by the North Carolina Medical Care Commission. Under that name they:

(1) Are vested with all the property and rights of property belonging to any corporation;
(2) Have perpetual succession;
(3) May sue or be sued;
(4) May contract;
(5) May acquire any real or personal property;
(6) May hold, invest, sell or dispose of property;
(7) May have a seal and alter and renew it; and
(8) May exercise the powers conferred upon them by this Part.

(b) A hospital district is vested with all the powers necessary or convenient to carry out the purposes of this Part, including the following powers, which are in addition to the powers granted elsewhere:

(1) Those powers granted under the Municipal Hospital Act, Chapter 131E of the General Statutes, Article 2, Part 1;
(2) To issue general obligation and revenue bonds and bond anticipation notes pursuant to the Local Government Finance Act, Chapter 159 of the General Statutes;
(3) To issue tax and revenue anticipation notes pursuant to Chapter 159 of the General Statutes, Article 9, Part 2; and
(4) All other powers as are necessary and incidental to the exercise of the powers of this Part. (1971, c. 780, s. 37.4; 1973, c. 476, s. 152; c. 494, s. 45; 1983, c. 775, s. 1.)

§ 131E-45. County taxes.

The county board of commissioners may levy a tax for the financing of the operation, equipment, and maintenance of any hospital operated by the district, including any public or nonprofit hospital, if the tax is approved by a majority of the qualified voters of the hospital district who shall vote on the question of levying the tax. The county board of commissioners shall determine the rate or amount of taxes that will be levied if approved by the voters of the district. The election on the question of levying the tax may be held at any time fixed by the county board of commissioners and shall be conducted in the same manner as bond elections held under G.S. 159-61. (1949, c. 766, s. 5; 1953, c. 1045, s. 6; 1983, c. 775, s. 1.)

§ 131E-46. Referendum on repeal of tax levy.

(a) The board of commissioners of the county in which a hospital district was created under the provisions of this Part may, if a tax levy was authorized by referendum under G.S. 131E-45, call a referendum on the repeal of the authority to levy a tax. Such referendum may be called only if there are no outstanding general obligation bonds of the district.

(b) The question on the ballot shall be:

"☐ FOR removal of the right of the board of county commissioners to levy and collect a tax in ________ Hospital District of ________ County,
"☐ AGAINST removal of the right of the board of county commissioners to levy and collect a tax in ________ Hospital District of ________ County."

(c) The referendum shall be conducted in the same manner as bond elections held under G.S. 159-61. No new registration of voters shall be required.

(d) If a majority of the votes cast are in favor of the question, then beginning on the first day of the fiscal year following the date of the referendum, the board of county commissioners shall have no authority to levy a tax in the hospital district unless the voters approve under G.S. 131E-45. No referendum may be held within one year of the date of a referendum under this section. (1983, c. 775, s. 1.)

§ 131E-47. Governing body.

The board of county commissioners of the county in which a hospital district is located shall be the governing body of the district. All of the provisions of the Municipal Hospital Act, Chapter 131E, Article 2, Part 1, shall apply to the hospital district and to the county board of commissioners as the governing body. (1953, c. 1045, s. 7; 1983, c. 775, s. 1.)

Part 4. Limited Liability.

§ 131E-47.1. Limited liability.

(a) A person serving as a director, trustee, or officer of a public hospital as defined in G.S. 159-39, or as a commissioner, member, or officer of a hospital authority established under Part 1 or 2 of this Article, or as a director, trustee, or officer of North Carolina Memorial Hospital, shall be immune individually from civil liability for monetary damages, except to the extent covered by insurance, for any act or failure to act arising out of this service, except where the person:

(1) Is compensated for his services beyond reimbursement for expenses,
(2) Was not acting within the scope of his official duties,
(3) Was not acting in good faith,
(4) Committed gross negligence or willful or wanton misconduct that resulted in the damage or injury,
(5) Derived an improper personal financial benefit from the transaction,
(6) Incurred the liability from the operation of a motor vehicle, or
(7) Is defendant in an action brought under G.S. 55A-28.1 or 55A-28.2.

(b) The immunity in subsection (a) is personal to the directors, trustees, officers, commissioners, and members, and does not immunize the hospital or hospital authority for liability for the acts or omissions of the directors, trustees, or officers. (1987 (Reg. Sess., 1988), c. 1057, s. 1; c. 1100, s. 39.2.)

ARTICLE 2A.

Garnishment for Debts Owed Public Hospitals.

§ 131E-48. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Disposable earnings" means that part of the compensation paid or payable for personal services, including wages, salary, commission, bonus, payments to a pension or retirement program, and other similar payments that remain after the deduction of any amounts required by law to be withheld.
(2) "Family" means a parent or parents and minor children or spouses that reside together.
(3) "Family income of the debtor" means family income as set out in the annual federal poverty guidelines issued by the United States Depart-

ment of Health and Human Services in effect at the time of the hearing, less the amount of the costs of the family's reasonable ongoing medical needs.

(4) "Garnishee" means an employer liable for compensation for personal services rendered or to be rendered by a person who is indebted to a public hospital for hospital services.

(5) "Hospital services" means services rendered only by the public hospital. Hospital services shall include professional charges of any physician or medical student, but only if the physician or student is an employee of the public hospital.

(6) "Public hospital" means any hospital facility operated on a nonprofit basis, any hospital that is owned or operated by the State, or any hospital as defined in G.S. 159-39(a). (1987 (Reg. Sess., 1988), c. 880, s. 1.)

§ 131E-49. Procedure for garnishment.

(a) A public hospital may move the court in the county wherein the debtor resides for an order for garnishment of the disposable earnings of the debtor after 10 days following the entry of a judgment for a sum certain for hospital services rendered if the following conditions have been met:

(1) The public hospital has made reasonable efforts to collect the bill from any third-party payors;

(2) The public hospital has waited for a period of at least 120 days following the mailing of the bill for hospital services rendered to the debtor's last known address; and

(3) The public hospital has sent a certified letter to the debtor's last known address which includes information that the debtor's disposable earnings may be subject to wage garnishment unless the debtor shows the hospital that his family income is at or below two hundred percent (200%) of the annual federal poverty guidelines. The letter shall include the definition of family, family income, the current federal poverty guidelines in effect at the time of the letter, and the procedures to contest the proposed garnishment.

(b) The court may enter an order of garnishment following notice requirements set forth in this Article and a hearing held pursuant to the motion for garnishment. Provided, however, that the court shall not enter an order of garnishment unless the court makes findings of fact that the current family income of the debtor, at the time of the hearing, exceeds two hundred percent (200%) of the guidelines. The notice of the motion for garnishment shall include information that the debtor's disposable earnings shall not be garnished if the debtor shows that his current family income is at or below two hundred percent (200%) of the annual federal poverty guidelines and the definition of family, family income, and the guidelines shall be attached to such notice. The notice shall also state the procedures and duties applicable under this Article, including the procedures the debtor should follow to contest the proposed garnishment. The court shall presume that the current family income of the debtor exceeds two hundred percent (200%) of the federal poverty guidelines if the debtor or his representative fails to appear at the hearing held on the motion for garnishment. If an order for garnishment is entered, a copy of the order shall be served on the debtor and the garnishee either personally or by certified or registered mail, return receipt requested.

(c) The court shall not enter an order of garnishment if the debtor is making regular payments to the public hospital that are equal to ten percent (10%) of the debtor's monthly disposable earnings. Further, the court shall not enter an order of garnishment if the debtor satisfactorily shows that he is making a good faith effort to obtain payment for hospital services from a third-party payor.

(d) The court shall not enter an order of garnishment which exceeds ten percent (10%) of the debtor's monthly disposable earnings. The court shall not enter an order of garnishment which is in effect for a period in excess of 60 months from the date of the initial order of garnishment.

(e) The amount garnished shall be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the garnishee for each payment under the order.

(f) The garnishment order shall be subject to review for modification or dissolution upon the filing of a motion in the cause. The garnishment order shall be dissolved upon a showing by the debtor that his current family income equals or is less than two hundred percent (200%) of the annual federal poverty guidelines issued by the United States Department of Health and Human Services in effect at the time of the hearing on the motion.

(g) Upon receipt of an order of garnishment, the garnishee shall transmit the amount ordered by the court to be garnished to the clerk of court who shall disburse it to the public hospital. The garnishee shall not be required to change normal pay cycles, but shall make every effort to ensure that payments are received as soon as practicable. The garnishment order shall simplify the withholding process for garnishees to the extent possible. (1987 (Reg. Sess., 1988), c. 880, s. 1.)

§ 131E-50. Penalties.

No employee may be discharged from employment or suffer any disciplinary action because he has been subject to garnishment of his wages if one of the garnishments was under this Article. An employee who believes that this provision has been violated may bring an action against the employer. In any such action, the court for cause shown shall restrain violations and order payment of damages, including backpay, reinstatement, and all other appropriate relief, including payment of the employee's reasonable costs and attorney's fees. (1987 (Reg. Sess., 1988), c. 880, s. 1.)

§ 131E-51. Applicability.

Garnishment of disposable earnings under this Article is in lieu of any other execution against the property of the debtor. Upon the satisfaction of the judgment or the expiration of the order of garnishment or 60 months from the date of the entry of the order of garnishment, whichever occurs first, the clerk shall mark the judgment paid and satisfied. (1987 (Reg. Sess., 1988), c. 880, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 36.)

§§ 131E-52 through 131E-54: Reserved for future codification purposes.

ARTICLE 3.

North Carolina Specialty Hospitals.

Part 1. Lenox Baker Children's Hospital.

§§ 131E-55 through 131E-58: Repealed by Session Laws 1987, c. 856, s. 13.

Editor's Note. — Session Laws 1987, c. 856, s. 13 repealed G.S. 131E-55 to 131E-58.

Session Laws 1987, c. 856, s. 20 provided that ss. 1 through 19 would be effective only upon agreement by Duke University to the terms of ss. 21 through 26 of the act and certification of that fact by the Secretary of the Department of Human Resources to the Governor, and that ss. 12 to 17 would be effective on the date of the transfer. Section 20 further provided that any disputes arising out of the transfer would be resolved by the Director of Budget.

The letter of certification from the Secretary of the Department of Human Resources was dated October 5, 1988, but it appears that this was a typographical error and that October 5, 1987, was the correct date.

Sections 21 through 26 of the act provided terms for the transfer of the Lenox Baker Hospital to Duke University.

Session Laws 1987, c. 279 amended repealed G.S. 131E-56.

§§ 131E-59 through 131E-64: Reserved for future codification purposes.

Part 2. Other Programs Controlled by the Department.

§ 131E-65. Alcohol Detoxification Program.

There shall be no reduction of services offered, no contracting of primary services, nor removal of this facility from Buncombe County without prior approval of the General Assembly. (1983, c. 775, s. 1.)

§ 131E-66: Repealed by Session Laws 1985, c. 589, s. 40.

§ 131E-67. Specialty hospitals.

All functions, powers, duties, and obligations heretofore vested in the Board of Directors of the North Carolina Specialty Hospitals and Eastern North Carolina Hospital are hereby transferred to and vested in the Department. All appropriations heretofore made to such Board of Directors or to any of the hospitals are hereby transferred to the Department. The Secretary of the Department shall have the power and duty to adopt rules for the operation of these facilities. (1979, c. 838, s. 46; 1983, c. 775, s. 1.)

§§ 131E-68, 131E-69: Reserved for future codification purposes.

ARTICLE 4.

Construction and Enlargement of Hospitals.

§ 131E-70. Construction and enlargement of local hospitals.

(a) The Department is authorized to continue surveys of all counties in the State to determine:

(1) The hospital needs of the county;
(2) The economic ability of various areas to support adequate hospital service;
(3) What assistance by the State, if any, is necessary to supplement other available funds; to finance the construction of new hospitals and health centers, additions to existing hospitals and health centers; and to finance equipment necessary to provide adequate hospital service for the citizens of the county;

and to periodically report this information, together with its recommendations, to the Governor, who shall transmit the reports to the General Assembly for any legislative action necessary to ensure an adequate statewide hospital program.

(b) The Department is authorized to act as the agency of the State to develop and administer a statewide plan in accordance with rules adopted by the Medical Care Commission for the construction and maintenance of hospitals, public health centers and related facilities and to receive and administer funds which may be provided by the General Assembly and by the federal government.

(c) The Department is authorized to develop statewide plans for the construction and maintenance of hospitals, medical centers and related facilities, or other plans necessary in order to meet the requirements and receive the benefits of applicable federal legislation.

(d) The Department is authorized to adopt rules to carry out the intent and purposes of this Article.

(e) The Department shall be responsible for doing all acts necessary to authorize the State to receive the full benefits of any federal statutes enacted for the construction and maintenance of hospitals, health centers or allied facilities.

(f) The Medical Care Commission shall make grants-in-aid to counties, cities, towns and subdivisions of government to acquire real estate and construct hospital facilities, including the reconstruction, remodeling or addition to any hospital facilities acquired by municipalities or subdivisions of government for use as community hospitals. These appropriations and funds made available by the State shall be allocated, apportioned and granted for the purposes of this Article and for other purposes in accordance with the rules adopted by the Medical Care Commission. The Medical Care Commission may furnish financial and other types of aid and assistance to any nonprofit hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual, upon the same terms and conditions as this aid and financial assistance is granted to municipalities and subdivisions of government.

(g) The Department may make available to any eligible hospital, clinic, or other medical facility operated by the State any unallocated federal sums or balances remaining after all grants-in-aid for local approvable projects made by the Department have been completed, disbursed or encumbered. (1945, c. 1096; 1947, c. 933, ss. 3, 5; 1949, c. 592; 1951, c. 1183, s. 1; 1971, c. 134; 1973, c. 476, s. 152; c. 1090, s. 1; 1979, c. 504, ss. 8, 14; 1983, c. 775, s. 1.)

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

§§ 131E-71 through 131E-74: Reserved for future codification purposes.

ARTICLE 5.

Hospital Licensure Act.

Part 1. Article Title and Definitions.

§ 131E-75. Title; purpose.

(a) This Article shall be known as the "Hospital Licensure Act."

(b) The purpose of this article is to establish hospital licensing requirements which promote public health, safety and welfare and to provide for the development, establishment and enforcement of basic standards for the care and treatment of patients in hospitals. (1947, c. 933, s. 6; 1983, c. 775, s. 1.)

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

CASE NOTES

This Act does not authorize a private enforcement action against a hospital which refused medical care to a non-Indian; the legislature provided for enforcement of this Act only by the North Carolina Department of Health and Human Services. Williams v. United States, 242 F.3d 169, 2001 U.S. App. LEXIS 3126 (4th Cir. 2001).

Cited in Fowler v. Worsley, 158 N.C. App. 128, 580 S.E.2d 74, 2003 N.C. App. LEXIS 946 (2003).

§ 131E-76. Definitions.

As used in this article, unless otherwise specified:

(1) "Commission" means the North Carolina Medical Care Commission.

(1a) "Critical access hospital" means a hospital which has been designated as a critical access hospital by the North Carolina Department of Health and Human Services, Office of Research, Demonstrations and Rural Health Development. To be designated as a critical access hospital under this subdivision, the hospital must be certified as a critical access hospital pursuant to 42 CFR Part 485 Subpart F. The North Carolina Department of Health and Human Services, Office of Research, Demonstrations, and Rural Health Development may designate a hospital located in a Metropolitan Statistical Area as a rural hospital for the purposes of the critical access hospital program if the hospital is located in a county with twenty-five percent (25%) or more rural residents as defined by the most recent United States decennial census.

(1b) through (1d) Reserved for future codification purposes.

(1e) "Gastrointestinal endoscopy room" means a room used for the performance of procedures that require the insertion of a flexible endoscope into a gastrointestinal orifice to visualize the gastrointestinal lining and adjacent organs for diagnostic or therapeutic purposes.

(2) "Governing body" means the Board of Trustees, Board of Directors, partnership, corporation, association, person or group of persons who maintain and control the hospital. The governing body may or may not be the owner of the properties in which the hospital services are provided.

(3) "Hospital" means any facility which has an organized medical staff and which is designed, used, and operated to provide health care, diagnostic and therapeutic services, and continuous nursing care primarily to inpatients where such care and services are rendered under the supervision and direction of physicians licensed under Chapter 90 of the General Statutes, Article 1, to two or more persons over a period in excess of 24 hours. The term includes facilities for the diagnosis and treatment of disorders within the scope of specific health specialties. The term does not include private mental facilities licensed under Article 2 of Chapter 122C of the General Statutes, nursing homes licensed under G.S. 131E-102, and adult care homes licensed under G.S. 131D-2.

(4) "Infirmary" means a unit of a school, or similar educational institution, which has the primary purpose to provide limited short-term health and nursing services to its students.

(5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
   a. A committee of a state or local professional society.
   b. A committee of a medical staff of a hospital.
   c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
   d. A committee of a peer review corporation or organization.

(6) Renumbered.

(6a) "Operating room" means a room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room.

(7) "Rural hospital network" means an alliance of members that shall include at least one critical access hospital and one other hospital. To qualify as a rural hospital network, the critical access hospital must submit a comprehensive, written memorandum of understanding to the Department of Health and Human Services, Office of Research, Demonstrations and Rural Health Development, for the Department's approval. The memorandum of understanding must include provisions for patient referral and transfer, a plan for network-wide emergency services, and a plan for sharing patient information and services between hospital members including medical staff credentialing, risk management, quality assurance, and peer review. (1947, c. 933, s. 6; 1949, c. 920, s. 1; 1955, c. 369; 1961, c. 51, s. 1; 1973, c. 476, s. 152; 1983, c. 775, s. 1; 1985, c. 589, s. 41; 1993, c. 321, s. 245; 1995, c. 535, s. 20; 1997-443, s. 11A.118(a); 2004-149, ss. 1.1, 2.4; 2004-199, s. 49; 2005-346, ss. 1, 2.)

Editor's Note. — Session Laws 2004-161, ss. 34.1 through 34.5, create the Health Care Workforce Study Commission. The Commission is to report its findings to the 2006 Regular Session of the 2005 General Assembly and will terminate upon the earlier of the filing of the final report or April 30, 2006. Section 34.2 of Session Laws 2004-161 provides: "The purpose of the Commission is to determine methods to increase the number of people providing health and dental care in this State and to overcome existing barriers contributing to the health care provider shortages."

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

Legal Periodicals. — For comment, "Civil Procedure — Discovery of Medical Records in a Corporate Negligence Action," see 10 Campbell L. Rev. 193 (1987).

For survey on the medical review committee privilege, see 67 N.C.L. Rev. 79 (1988).

CASE NOTES

A board of trustees is not within the contemplation of subdivision (5), which defines a medical review committee. Shelton v. Morehead Mem. Hosp., 76 N.C. App. 253, 332 S.E.2d 499 (1985), modified on other grounds, 318 N.C. 76, 347 S.E.2d 824 (1986).

A board of trustees of a hospital is not a medical review committee, even though the board may review personnel recommendations of the medical review committees and has ultimate decision-making authority upon these recommendations by virtue both of the hospital's bylaws and G.S. 131E-85. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Applied in Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Cited in Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989); In re B.D.N., — N.C. App. —, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007).

Part 2. Hospital Licensure.

§ 131E-77. Licensure requirement.

(a) No person or governmental unit shall establish or operate a hospital in this state without a license. An infirmary is not required to obtain a license under this Part.

(b) The Commission shall prescribe by rule that any licensee or prospective applicant seeking to make specified types of alteration or addition to its facilities or to construct new facilities shall submit plans and specifications before commencement to the Department for preliminary inspection and approval or recommendations with respect to compliance with the applicable rules under this Part.

(c) An applicant for licensing under this Part shall provide information related to hospital operations as requested by the Department. The required information shall be submitted by the applicant on forms provided by the Department and established by rule.

(d) Upon receipt of an application for a license, the Department shall issue a license if it finds that the applicant complies with the provisions of this Article and the rules of the Commission. The Department shall renew each license in accordance with the rules of the Commission. The Department shall charge the applicant a nonrefundable annual base license fee plus a nonrefundable annual per-bed fee as follows:

Facility Type	**Number of Beds**	**Base Fee**	**Per-Bed Fee**
General Acute Hospitals:	1-49 beds	$250.00	$12.50
	50-99 beds	$350.00	$12.50
	100-199 beds	$450.00	$12.50
	200-399 beds	$550.00	$12.50
	400-699 beds	$750.00	$12.50
	700+ beds	$950.00	$12.50
Other Hospitals:		$500.00	$12.50

(e) The Department shall issue the license to the operator of the hospital who shall not transfer or assign it except with the written approval of the Department. The license shall designate the number and types of inpatient beds, the number of operating rooms, and the number of gastrointestinal endoscopy rooms.

(f) The operator shall post the license on the licensed premises in an area accessible to the public. (1947, c. 933, s. 6; 1949, c. 920, ss. 3, 4; 1963, c. 66; 1973, c. 476, s. 152; c. 1090, s. 1; 1975, c. 718, s. 2; 1983, c. 775, s. 1; 2003-284, s. 34.2(a); 2005-276, s. 41.2(b); 2005-346, s. 3.)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

CASE NOTES

Requirement to Exhaust Administrative Remedies. — Trial court properly dismissed appeal by hospital joint venture and a town from denial of a certificate of need to construct a new hospital under the exemption provisions of G.S. 131E-184(a); the equal protection claim under N.C. Const. art. I, § 19 and U.S. Const. amend. XIV was properly dismissed as it failed to state a claim upon which relief could be granted in that it failed to allege the lack of a rational basis. Good Hope Hosp., Inc. v. N.C. HHS, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 131E-78. Adverse action on a license.

(a) The Department shall have the authority to deny, suspend, revoke, annul, withdraw, recall, cancel, or amend a license in any case when it finds a substantial failure to comply with the provisions of this Part or any rule promulgated under this Part.

(b) Repealed by Session Laws 2007-444, s. 1, effective August 23, 2007.

(b1) The Secretary may suspend the admission of any new patients to specific areas of a hospital or suspend specific services of a hospital licensed under this Article where the conditions of the hospital constitute a substantial failure to comply with the provisions of this Part or any rule adopted under this Part and are dangerous to the health or safety of the patients. When the Secretary suspends admissions or specific services, the suspension shall be limited to the smallest possible components of the hospital. The Department shall provide consultation to assist the hospital in correcting the conditions that led to the suspension in order that the suspension can be lifted at the earliest possible time after the Secretary is satisfied that conditions or circumstances merit removal of the suspension. In determining whether to suspend admissions or services under this subsection, the Secretary shall consider the following factors:

(1) The character and degree of impact of the conditions at the hospital on the health and safety of its patients.

(2) The character and degree of impact that the proposed suspension of admissions or services would have on the functionality of the hospital and the availability of services necessary to the community or to current patients of the hospital.

(3) Whether all other reasonable means for correcting the problem have been exhausted and no less restrictive alternative to suspension of admissions or service exists.

(c) Repealed by Session Laws 2007-444, s. 1, effective August 23, 2007.

(c1) A hospital may contest any adverse action on its license under this section in accordance with Chapter 150B of the General Statutes. (1947, c. 933, s. 6; 1973, c. 476, s. 152; c. 1090, s. 1; 1981, c. 614, ss. 16, 17; 1983, c. 775, s. 1; 1987, c. 827, s. 1; 2007-444, s. 1.)

Effect of Amendments. — Session Laws 2007-444, s. 1, effective August 23, 2007, deleted subsections (b) and (c) related to hearings for application denials; and added subdivisions (b1) and (c1).

CASE NOTES

Exhaustion of Administrative Remedies. — Trial court properly dismissed the constitutional claims, under 42 U.S.C.S. § 1983, after it dismissed the appeal from denial of an application to build a new hospital because the plaintiffs, a town and a joint venture, failed to exhaust their administrative remedies by pursuing an administrative review hearing as provided by G.S. 131E-78(b)(1). Good Hope Hosp., Inc. v. N.C. HHS, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 131E-79. Rules and enforcement.

(a) The Commission shall promulgate rules necessary to implement this Article.

(b) The Department shall enforce this Article and the rules of the Commission. (1947, c. 933, s. 6; 1973, c. 476, s. 152; 1983, c. 775, s. 1.)

CASE NOTES

Cited in Williams v. United States, 242 F.3d 169, 2001 U.S. App. LEXIS 3126 (4th Cir. 2001).

§ 131E-79.1. Counseling patients regarding prescriptions.

(a) Any hospital or other health care facility licensed pursuant to this Chapter or Chapter 122C of the General Statutes, health maintenance organization, local health department, community health center, medical office, or facility operated by a health care provider licensed under Chapter 90 of the General Statutes, providing patient counseling by a physician, a registered nurse, or any other appropriately trained health care professional shall be deemed in compliance with the rules adopted by the North Carolina Board of Pharmacy regarding patient counseling.

(b) As used in this section, "patient counseling" means the effective communication of information to the patient or representative in order to improve therapeutic outcomes by maximizing proper use of prescription medications and devices. (1993, c. 529, s. 7.7.)

§ 131E-80. Inspections.

(a) The Department shall make or cause to be made inspections as it may deem necessary. Any hospital licensed under this Part shall at all times be subject to inspections by the Department according to the rules of the Commission.

(b) The Department may delegate to any state officer or agency the authority to inspect hospitals. The Department may revoke this delegated authority at its discretion and make its own inspections.

(c) Authorized representatives of the Department shall have at all times the right of proper entry upon any and all parts of the premises of any place in which entry is necessary to carry out the provisions of this Part or the rules adopted by the Commission; and it shall be unlawful for any person to resist a proper entry by such authorized representative upon any premises other than a private dwelling. However, no representative shall, by this entry onto the premises, endanger the health or well being of any patient being treated in the hospital.

(d) To enable the Department to determine compliance with this Part and the rules promulgated under the authority of this Part and to investigate complaints made against a hospital licensed under this Part, while maintaining the confidentiality of the complainant, the Department shall have the authority to review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been patients of the hospital licensed under this Part and the personnel records of those individuals employed by the licensed hospital. The examinations of these records is permitted notwithstanding the provisions of G.S. 8-53, "Communications between physician and patient," or any other provision of law relating to the confidentiality of communications between physician and patient. Proceedings of medical review committees are exempt from the provisions of this section. The hospital, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information to the Department. Any confidential or privileged information received from review of records or interviews shall be kept confidential by the Department and not disclosed without written authorization of the patient, employee or legal representative, or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning a hospital without the consent of that person. Any officer, administrator, or employee of the Department who willfully discloses confidential or privileged information without appropriate authorization or court order shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($500.00). Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1, "Public Records" defined.

(e) Information received by the Commission and the Department through filed reports, license applications, or inspections that are required or authorized by the provisions of this Part, may be disclosed publicly except where this disclosure would violate the confidential relationship existing between physician and patient. However, no such public disclosure shall identify the patient involved without permission of the patient or court order. (1947, c. 933, s. 6; 1973, c. 476, s. 152; c. 1090, s. 1; 1981, c. 586, s. 3; 1983, c. 775, s. 1; 1993, c. 539, s. 957; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 131E-81. Penalties.

(a) Any person establishing, conducting, managing, or operating any hospital without a license shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be liable for a fine of not more than fifty dollars ($50.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. Each day of a continuing violation after conviction shall be considered a separate offense.

(b) Except as otherwise provided in this Part, any person who willfully violates any provision of this Part or who willfully fails to perform any act required, or who willfully performs any act prohibited by this Part, shall be guilty of a Class 1 misdemeanor. However, any person who willfully violates any rule adopted by the Commission under this Part or who willfully fails to perform any act required by, or who willfully does any act prohibited by, these rules shall be guilty of a Class 3 misdemeanor. (1947, c. 933, s. 6; 1983, c. 775, s. 1; 1993, c. 539, s. 958; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 131E-82. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management or operation of a hospital without a license.

(b) If any person shall hinder the proper performance of duty of the Secretary or a representative in carrying out the provisions of this Part, the Secretary may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance, irrespective of all other remedies at law.

(c) Actions under this section shall be in accordance with Article 37 of Chapter 1 of the General Statutes, and Rule 65 of the Rules of Civil Procedure. (1947, c. 933, s. 6; 1973, c. 476, s. 152; 1983, c. 775, s. 1.)

§ 131E-83. Temporary change of hospital bed capacity.

A hospital may temporarily increase its bed capacity by up to ten percent (10%) over its licensed bed capacity by utilizing observation beds for hospital inpatients if the hospital notifies and obtains the approval of the Division of Health Service Regulation. For purposes of this section, "temporarily" means not longer than 60 consecutive days. (2001-410, s. 1; 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services."

§ 131E-84. Waiver of rules for hospitals that provide temporary shelter or temporary services during a disaster or emergency.

(a) The Division of Health Service Regulation may temporarily waive, during disasters or emergencies declared in accordance with Article 1 of Chapter 166A of the General Statutes, any rules of the Commission pertaining to a hospital to the extent necessary to allow the hospital to provide temporary shelter and temporary services requested by the emergency management agency. The Division may identify, in advance of a declared disaster or emergency, rules that may be waived, and the extent to which the rules may be waived, upon a declaration of disaster or emergency in accordance with Article 1 of Chapter 166A of the General Statutes. The Division may also waive rules under this subsection during a declared disaster or emergency upon the request of an emergency management agency and may rescind the waiver if, after investigation, the Division determines the waiver poses an unreasonable risk to the health, safety, or welfare of any of the persons occupying the hospital. The emergency management agency requesting temporary shelter or temporary services shall notify the Division within 72 hours of the time the preapproved waivers are deemed by the emergency management agency to apply.

(b) As used in this section, "emergency management agency" is as defined in G.S. 166A-4. (2007-444, s. 2.)

Editor's Note. — Session Laws 2007-444, s. 6, made this section effective August 23, 2007.

Part 3. Hospital Privileges.

§ 131E-85. Hospital privileges and procedures.

(a) The granting or denial of privileges to practice in hospitals to physicians licensed under Chapter 90 of the General Statutes, Article 1, dentists, optometrists, and podiatrists and the scope and delineation of such privileges shall be determined by the governing body of the hospital on a non-discriminatory basis. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, in which privileges are sought. Nothing in this Part shall be deemed to mandate hospitals to grant or deny to any such individuals or others privileges to practice in hospitals, or to offer or provide any type of care.

(b) The procedures to be followed by a licensed hospital in considering applications of dentists, optometrists, and podiatrists for privileges to practice in such hospitals shall be similar to those applicable to applications of physicians licensed under Chapter 90 of the General Statutes, Article 1. Such procedures shall be available upon request.

(c) In addition to the granting or denial of privileges, the governing body of each hospital may suspend, revoke, or modify privileges.

(d) All applicants or individuals who have privileges shall comply with all applicable medical staff bylaws, rules and regulations, including the policies and procedures governing the qualifications of applicants and the scope and delineation of privileges.

(e) The Department shall not issue or renew a license under this Article unless the applicant has demonstrated that the procedures followed in determining hospital privileges are in accordance with this Part and rules of the Department. (1981, c. 659, s. 10; 1983, c. 775, s. 1; 1987, c. 859, s. 18; 1989, c. 446; 1997-75, s. 2.)

CASE NOTES

Reasonableness of Qualifications Is Only Question Before Court. — The court is charged with the narrow responsibility of assuring that the qualifications imposed by the board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982), decided under former G.S. 131-126.11A, 131-126.11B.

No court should substitute its evaluation for that of the hospital board. It is the board, not the court, which is charged with the responsibility of providing a competent staff of doctors. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982), decided under former G.S. 131-126.11A, 131-126.11B.

A hospital's governing body has statutory authority to make decisions concerning the scope and range of privileges that will be extended to physicians and others at the hospital. Cohn v. Wilkes Gen. Hosp., 767 F. Supp. 111 (W.D.N.C. 1991), aff'd, 953 F.2d 154 (4th Cir. 1991), cert. denied, 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992).

Patient's Freedom of Choice Is Subject to Hospital's Staff Privilege Standards. — The right to enjoy hospital staff privileges is not absolute; it is subject to the standards set by the hospital's governing body. This is implicit in the language of G.S. 90-202.12, especially in view of the policy of this State as currently stated by this section. G.S. 90-202.12 does not require a hospital to grant staff privileges regardless of the standards set by its board of trustees which are reasonably related to the operation of the hospital. Generally, the protection offered by G.S. 90-202.12 is for patients to have the freedom to choose a qualified "provider of care or service." Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982), decided under former G.S. 131-126.11A, 131-126.11B.

Medical Practitioner's Right to Have Application for Staff Privileges Considered by Hospital. — A medical practitioner is not granted the right to have his application for staff privileges considered by a hospital if the hospital's governing board has made a decision to deny further staff privilege requests which is reasonably related to the operation of the hospital, is consistent with its responsibility as a community hospital, and is administered fairly;

however, if the defendant hospital's actions are determined to be unreasonable or irrational, the plaintiff is entitled under this section to have his application for staff privileges reviewed and a decision, granting or denying him staff privileges, based on the other criteria provided in this section. Claycomb v. HCA-Raleigh Community Hosp., 76 N.C. App. 382, 333 S.E.2d 333 (1985), cert. denied, 315 N.C. 586, 341 S.E.2d 23 (1986), decided under former G.S. 131-126.11A.

Hospital Board's Discretion Regarding Chiropractors. — The legislature did not intend to take away the discretion afforded hospital boards to make decisions regarding health care providers not included in subsection (a) of this section, such as chiropractics. Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

A board of trustees of a hospital is not a medical review committee, even though the board may review personnel recommendations of the medical review committees and has ultimate decision-making authority upon these recommendations by virtue both of the hospital's bylaws and this section. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Hearing Under Subsection (a). — Subsection (a) of this section does not require a hearing if hospital's decision to limit the number of physicians using its equipment is based upon the reasonable objectives required by the statute. Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986).

Waiver of Irregularities. — A doctor's letter to the chairman of the county hospital authority stating that she was formally withdrawing her application for permanent medical staff privileges and a hearing in relation to the loss of those privileges was effective as a waiver of any procedural irregularities that might have existed in connection with the revoking and failing to renew of her staff privileges. Paine v. Brunswick County Hosp. Auth., 470 F. Supp. 28 (E.D.N.C. 1978), decided under former G.S. 131-22.

Suspension Upheld. — Where the doctor's medical staff privileges were suspended due to the doctor's failure to obtain a patient's consent prior to scheduling a consultation for amputation of the patient's leg and the doctor's failure to communicate with a patient's primary physician upon changing the patient's code status, the hospital's corrective action against the doctor did not violate G.S. 131E-85. Lohrmann v. Iredell Mem'l Hosp., Inc., 174 N.C. App. 63, 620 S.E.2d 258, 2005 N.C. App. LEXIS 2287 (2005), cert. denied, — N.C. —, 629 S.E.2d 853 (2006).

Immunity of Hospital from Federal Antitrust Liability. — In restricting privileges to its inhouse radiologists, county hospital complied with this section. If it engaged in anticompetitive activity, it did so under a law passed to promote greater hospital self-governance. The hospital was therefore immune from federal antitrust liability. Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986).

Contract Between Hospital and Physician. — If the privilege to practice at a hospital is offered and accepted, each confers a benefit on the other and these benefits constitute sufficient and legal consideration for the performance of the agreement. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 71, 488 S.E.2d 284 (1997), cert. granted, 347 N.C. 675, 500 S.E.2d 95 (1998).

The mere enactment of a set of bylaws pursuant to the statute is a preexisting duty and cannot itself constitute consideration for the formation of a contract; however, when a hospital offers the privilege to practice in that hospital to a physician it goes beyond its statutory duty. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 71, 488 S.E.2d 284 (1997), cert. granted, 347 N.C. 675, 500 S.E.2d 95 (1998).

Cited in Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986).

§ 131E-86. Limited privileges.

(a) It shall be unlawful for an individual who is not licensed under Chapter 90 of the General Statutes, Article 1, to admit a patient to a hospital without written proof in accordance with the policy of the governing body of the hospital that a physician licensed under Chapter 90 of the General Statutes, Article 1, who is a member of the medical staff will be responsible for the performance of a basic medical appraisal and for the medical needs of the patient. The governing body of a hospital may waive this requirement for a dentist licensed under Chapter 90 of the General Statutes, Article 2, to the extent authorized by this statute, who has successfully completed a postgraduate program in oral and maxillofacial surgery accredited by the American Dental Association.

(b) The governing body of each hospital shall not grant privileges that exceed the scope of a license. (1983, c. 775, s. 1.)

§ 131E-87. Reports of disciplinary action; immunity from liability.

The chief administrative officer of each licensed hospital in the State shall report to the appropriate occupational licensing board the details, as prescribed by the board, of any revocation, suspension, limitation, or voluntary reduction of privileges of a health care provider to practice in that hospital. Each hospital shall also report to the board its medical staff resignations. Reports concerning physician privileges and resignations shall be made in accordance with G.S. 90-14.13. Any person making a report required by this section shall be immune from any resulting criminal prosecution or civil liability unless the person knew the report was false or acted in reckless disregard of whether the report was false. (1983, c. 775, s. 1; 1987, c. 859, s. 16; 2006-144, s. 9.)

Effect of Amendments. — Session Laws 2006-144, s. 9, effective October 1, 2006, substituted "limitation, or voluntary reduction" for "or limitation" in the first sentence; and added the third sentence.

§§ 131E-88, 131E-89: Reserved for future codification purposes.

Part 4. Discharge from Hospital.

§ 131E-90. Authority of administrator; refusal to leave after discharge.

The case of a patient who refuses or fails to leave the hospital upon discharge by the attending physician shall be reviewed by two physicians licensed to practice medicine in this State, one of whom may be the attending physician. If in the opinion of the physicians, the patient should be discharged as cured or as no longer needing treatment or for the reason that treatment cannot benefit the patient's case or for other good and sufficient reasons, the patient's refusal to leave shall constitute a trespass. The patient shall be guilty of a Class 3 misdemeanor. (1965, c. 258; 1983, c. 775, s. 1; 1993, c. 539, s. 959; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For survey on the medical review committee privilege, see 67 N.C.L. Rev. 179 (1988).

§ 131E-91. Itemized charges on discharged patient's bill.

All hospitals and ambulatory surgical facilities licensed pursuant to this Chapter shall, upon request of the patient within 30 days of discharge, present an itemized list of charges to all discharged patients.

The Commission shall adopt rules to ensure that this section is properly implemented and that patient bills which are not itemized include notification to the patient of his right to request an itemized bill. The Department shall not issue nor renew a license under this Chapter unless the applicant has demonstrated that the requirements of this section are being met. (1991, c. 310, s. 1.)

§§ 131E-92 through 131E-94: Reserved for future codification purposes.

Part 5. Medical Review Committee.

§ 131E-95. Medical review committee.

(a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a hospital, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings.

(c) Information that is confidential and is not subject to discovery or use in civil actions under this section may be released to a professional standards review organization that performs any accreditation or certification including the Joint Commission on Accreditation of Healthcare Organizations, or to a patient safety organization or its designated contractors. Information released under this subsection shall be limited to that which is reasonably necessary and relevant to the standards review organization's determination to grant or continue accreditation or certification, or the patient safety organization's or its contractors' analysis of patient safety and health care quality. Information released under this subsection retains its confidentiality and is not subject to discovery or use in any civil actions as provided under this section, and the standards review or patient safety organization shall keep the information confidential subject to this section, except as necessary to carry out the organization's patient safety, accreditation, or certification activities. For the purposes of this section, "patient safety organization" means an entity that collects and analyzes patient safety or health care quality data of providers for the purpose of improving patient safety and the quality of health care delivery and includes, but is not limited to, an entity formed pursuant to Public Law No. 109-41. (1973, c. 1111; 1981, c. 725; 1983, c. 775, s. 1; 1999-222, s. 2; 2002-179, s. 19; 2004-149, s. 2.5; 2006-144, s. 3.2.)

Effect of Amendments. — Session Laws 2006-144, s. 3.2, effective July 19, 2006, in subsection (c), added "or to a patient safety organization or its designated contractors" at the end of the first sentence, added "or the patient safety organization's or its contractors' analysis of patient safety and health care quality" at the end of the second sentence, inserted "or patient safety" in the third sentence, added "except as necessary to carry out the organization's patient safety, accreditation, or certification activities" at the end of the fourth sentence, and added the last sentence.

Legal Periodicals. — For comment, "Civil Procedure — Discovery of Medical Records in a Corporate Negligence Action," see 10 Campbell L. Rev. 193 (1987).

For recent development, "The Medical Peer Review Privilege After Virmani," see 80 N.C.L. Rev. 1860 (2002).

CASE NOTES

Purpose. — Former G.S. 131-170 (similar to subsection (b) of this section) was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The purpose of this section is to promote candor in peer review proceedings. Whisenhunt v. Zammit, 86 N.C. App. 425, 358 S.E.2d 114 (1987).

The public's qualified constitutional right to attend civil court proceedings did not preclude the trial court, under the facts presented, from giving effect to the protections of this section by sealing peer review materials and closing court proceedings concerning those materials. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Policy Grounded in Common Law. — Policy enunciated by former G.S. 131-170 (similar to subsection (b) of this section) is grounded in the common law. Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

This section is designed to encourage candor and objectivity in the internal workings of medical review committees. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

This section supplants any North Carolina common law right of public access to information regarding medical committee proceedings and related materials, and newspaper/appellant had, therefore, no common law right of access to such information. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Presentation to Review Committee Does Not Render Information Immune. — Under this section, information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Permitting access to information not generated by the committee itself but merely presented to it does not impinge on the statutory purpose of this section. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Physician, as an original source, could not invoke G.S. 131E-95(b) and G.S. 90-21.22A(c) to shield himself from answering deposition questions during a malpractice suit regarding the details of his drug abuse merely because he disclosed those details during credentialing committee proceedings and the details were presumably included in the committee's records. Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Documents in the possession of and information known to the hospital's board are not thereby rendered immune from discovery and use as evidence under this section. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Immunity Does Not Extend to Allegations of Malice. — In doctor's lawsuit alleging racial discrimination under 42 U.S.C.S. § 1981, members of a hospital medical executive committee were not entitled to immunity under the North Carolina Hospital Licensure Act, G.S. 131E-95(a), because the doctor alleged that their actions were willful and malicious, and the statutory immunity only extended to actions without malice. Mbadiwe v. Union Mem. Reg'l Med. Ctr., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 31674 (W.D.N.C. Nov. 28, 2005).

Scope of Privilege Under This Section. — Nonpublic documents in the possession of defendant/hospital, pertaining to defendant/doctor's participation in a physician's impairment treatment program, were privileged; the legislature intended to create a broader privilege to information in G.S. 90-21.22 than in peer review statutes such as this section. Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

What Section Protects. — This section protects only a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

The protection afforded by this section is not compromised by merely identifying existing documents and giving pertinent information concerning their custodians. It is the contents of the documents which the statute may or may not protect from discovery. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Hospital "credentialing records" pertaining to a physician were confidential and privileged. Whisenhunt v. Zammit, 86 N.C. App. 425, 358 S.E.2d 114 (1987).

Documents Furnished by Applicants for Hospital Privileges. — This section offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Peer review materials submitted by hospital directly to the judge as "confidential," and not filed with the clerk of the court, were properly treated by the trial court, which ordered them sealed and included in the record, thereby providing a record for appellate review. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Peer Review Privilege Denied in Discrimination Action. — In an action by a physician against a health services corporation, alleging discrimination on the basis of his race and national origin, in which plaintiff sought to obtain all peer review records related to all reviews of physicians for any reason, during the 20 years preceding his request, the appellate court declined to recognize a peer review privilege, holding that the interest in obtaining probative evidence in an action for discrimination outweighs the interest that would be furthered by recognition of a privilege for medical peer review materials. Virmani v. Novant Health, Inc., 259 F.3d. 284, 2001 U.S. App. LEXIS 17123 (4th Cir. 2001).

Records Produced During Quality Assurance. — The records of a hospital review committee were not "otherwise available" and were properly protected from disclosure, where records concerning whether to seek evaluation of defendant physician's performance by outside experts were "produced" during quality assurance or credentialing activities. Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999).

Documents filed as exhibits attached to plaintiff's complaint entered the public domain for purposes of the Public Records Act, G.S. 132-1 et seq., and the public's right to inspect court records under G.S. 7A-109, and became "public records" once the complaint was filed with the clerk of the court, even though these exhibits would otherwise have been shielded by subsection (b) of this section. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Hospital's chief executive officer may be examined about information he received solely in his capacity as CEO so long as this material is not otherwise protected by this section. Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986).

Records of Board of Trustees. — A trial court erred in its conclusion that the minutes and records of the board of trustees of a hospital were barred from discovery pursuant to this section; the members of the board of trustees were not charged with peer review functions. Shelton v. Morehead Mem. Hosp., 76 N.C. App. 253, 332 S.E.2d 499, modified and aff'd, 318 N.C. 76, 347 S.E.2d 824 (1986).

Matter to Be Presented in Open Court. — This statute only prohibits a court from restricting the publication of reports regarding matter presented "in open court"; thus, although court records may generally be public records under G.S. 132-1, a trial court may shield portions of court proceedings and records from public view subject to statutory and constitutional limitation. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Applied in McKeel v. Armstrong, 96 N.C. App. 401, 386 S.E.2d 60 (1989).

Cited in Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989).

Part 6. Risk Management.

§ 131E-96. Risk management programs.

(a) Each hospital shall develop and maintain a risk management program which is designed to identify, analyze, evaluate, and manage risks of injury to patients, visitors, employees, and property through loss reduction and prevention techniques and quality assurance activities, as prescribed in rules promulgated by the Commission.

(b) The Department shall not issue or renew a license under this Article unless the applicant is in compliance with this section. (1987, c. 859, s. 17.)

Part 7. Confidential Information.

§ 131E-97. Confidentiality of patient information.

(a) Medical records compiled and maintained by health care facilities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

(b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by health care facilities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes. (1993 (Reg. Sess., 1994), c. 570, s. 10.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 570, s. 10, created Part F entitled Confidential Information in Article 5 of Chapter 131E; Part F with the same title was previously added in 1993.

CASE NOTES

Cited in Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

§ 131E-97.1. Confidentiality of personnel information.

(a) Except as provided in subsection (b) of this section, the personnel files of employees or former employees, and the files of applicants for employment maintained by a public hospital as defined in G.S. 159-39 or maintained by a hospital that has been sold or conveyed pursuant to G.S. 131E-8 are not public records as defined by Chapter 132 of the General Statutes.

(b) Repealed by Session Laws, 1997-517, s. 3, effective September 17, 1997.

(c) Information regarding the qualifications, competence, performance, character, fitness, or conditions of appointment of an independent contractor who provides health care services under a contract with a public hospital as defined in G.S. 159-39, or with a hospital which has been sold or conveyed pursuant to G.S. 131E-8, is not a public record as defined by Chapter 132 of the General Statutes. Information regarding a hearing or investigation of a complaint, charge, or grievance by or against an independent contractor who provides health care services under a contract with a public hospital as defined in G.S. 159-39 or with a hospital which has been sold or conveyed pursuant to G.S. 131E-8, is not a public record as defined by Chapter 132 of the General Statutes. Final action making an appointment or discharge or removal by a public hospital having final authority for the appointment or discharge or removal shall be taken in an open meeting, unless otherwise exempted by law. The following information with respect to each independent contractor of health care services of a public hospital, as defined by G.S. 159-39, is a matter of public record: name; age; date of original contract; beginning and ending dates; position title; position descriptions; and total compensation of current and former positions; and the date of the most recent promotion, demotion, transfer, suspension, separation, or other change in position classification.

(1993 (Reg. Sess., 1994), c. 570, s. 10; 1995, c. 99, s. 1; c. 509, s. 135.2(q); 1997-517, s. 3.)

CASE NOTES

Cited in Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

§ 131E-97.2. Confidentiality of credentialing information.

Information acquired by a public hospital, as defined in G.S. 159-39, a hospital that has been sold or conveyed pursuant to G.S. 131E-8, a State-owned or State-operated hospital, or by persons acting for or on behalf of a hospital, in connection with the credentialing and peer review of persons having or applying for privileges to practice in the hospital is confidential and is not a public record under Chapter 132 of the General Statutes; provided that information otherwise available to the public shall not become confidential merely because it was acquired by the hospital or by persons acting for or on behalf of the hospital. (1993 (Reg. Sess., 1994), c. 570, s. 10; 1995, c. 509, s. 135.2(r).)

CASE NOTES

Information not immune from discovery. — Physician could not invoke the G.S. 131E-97.2 privilege to shield himself from answering deposition questions during a malpractice suit regarding the details of his drug abuse as the privilege was inapplicable because the physician was not acting on behalf of the hospital in connection with a credentialing committee's review; the physician did not acquire knowledge of the details of his drug abuse through the credentialing committee's proceedings. Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

§ 131E-97.3. Confidentiality of competitive health care information.

(a) For the purposes of this section, competitive health care information means information relating to competitive health care activities by or on behalf of hospitals and public hospital authorities. Competitive health care information shall be confidential and not a public record under Chapter 132 of the General Statutes; provided that any contract entered into by or on behalf of a public hospital or public hospital authority, as defined in G.S. 159-39, shall be a public record unless otherwise exempted by law, or the contract contains competitive health care information, the determination of which shall be as provided in subsection (b) of this section.

(b) If a public hospital or public hospital authority is requested to disclose any contract which the hospital or hospital authority believes in good faith contains or constitutes competitive health care information, the hospital or hospital authority may either redact the portions of the contract believed to constitute competitive health care information prior to disclosure, or if the entire contract constitutes competitive health care information, refuse disclosure of the contract. The person requesting disclosure of the contract may institute an action pursuant to G.S. 132-9 to compel disclosure of the contract or any redacted portion thereof. In any action brought under this subsection, the issue for decision by the court shall be whether the contract, or portions of the contract withheld, constitutes competitive health care information, and in making its determination, the court shall be guided by the procedures and standards applicable to protective orders requested under Rule 26(c)(7) of the Rules of Civil Procedure. For the purposes of this section, competitive health care information includes, but is not limited to, contracts entered into by or on behalf of a public hospital or public hospital authority to purchase a medical practice. Before rendering a decision, the court shall review the contract in camera and hear arguments from the parties. If the court finds that the contract constitutes or contains competitive health care information, the court may either deny disclosure or may make such other appropriate orders as are permitted under Rule 26(c) of the Rules of Civil Procedure.

(c) Nothing in this section shall be deemed to prevent an elected public body, in closed session, which has responsibility for the hospital, the Attorney General, or the State Auditor from having access to this confidential information. The disclosure to any public entity does not affect the confidentiality of the information. Members of the public entity shall have a duty not to further disclose the confidential information. (1993 (Reg. Sess., 1994), c. 570, s. 10; 2001-516, s. 5; 2007-508, s. 8.5.)

Effect of Amendments. — Session Laws 2007-508, s. 8.5, effective August 30, 2007, in subsection (a), inserted "For the purposes of this section, competitive health care information means" at the beginning and substituted "authorities. Competitive health care information shall" for "authorities shall"; and added the fourth sentence in subsection (b).

CASE NOTES

Cited in Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Contract to Buy Practice Not Competitive Health Care Information. — Because nothing suggested that other hospitals or entities were competing for a doctor's medical practice or that a medical center's contract to buy the doctor's practice contained "financial terms" or health care information directly related to financial terms, the contract was not confidential as "competitive health care information" pursuant to G.S. 131E-97.3. Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 178 N.C. App. 621, 633 S.E.2d 682, 2006 N.C. App. LEXIS 1653 (2006).

§ 131E-98. Inmate medical records.

Notwithstanding any other provision of law, a hospital does not breach patient confidentiality by providing the Department of Correction with the medical records of inmates who receive medical treatment at the hospital while in the custody of the Department. A hospital complying with a request from the Department of Correction or its agent for a copy of the medical records of an inmate who received medical services while in custody shall be immune from liability in any civil action for the release of the inmate's medical record. (1993, c. 321, s. 178(b).)

Editor's Note. — This section was enacted as G.S. 131E-99.2, and was recodified as G.S. 131E-98 by the Revisor of Statutes.

§ 131E-99. Confidentiality of health care contracts.

The financial terms and other competitive health care information directly related to the financial terms in a health care services contract between a hospital or a medical school and a managed care organization, insurance company, employer, or other payer is confidential and not a public record under Chapter 132 of the General Statutes. Nothing in this section shall prevent an elected public body which has responsibility for the hospital or medical school from having access to this confidential information in a closed session. The disclosure to a public body does not affect the confidentiality of the information. Members of the public body shall have a duty not to further disclose the confidential information. (1995 (Reg. Sess., 1996), c. 713, s. 2; 1997-123, ss. 1, 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

CASE NOTES

Cited in Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Contract to Buy Practice Not Competitive Health Care Information. — Because nothing suggested that other hospitals or entities were competing for a doctor's medical practice or that a medical center's contract to buy the doctor's practice contained "financial terms" or health care information directly related to financial terms, the contract was not confidential as "competitive health care information" pursuant to G.S. 131E-97.3. Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 178 N.C. App. 621, 633 S.E.2d 682, 2006 N.C. App. LEXIS 1653 (2006).

ARTICLE 6.

Health Care Facility Licensure Act.

Part 1. Nursing Home Licensure Act.

§ 131E-100. Title; purpose.

(a) This Part shall be known as the "Nursing Home Licensure Act."

(b) The purpose of the Nursing Home Licensure Act is to establish authority and duty for the Department to inspect and license private nursing homes. (1983, c. 775, s. 1.)

Editor's Note. — Session Laws 2001-385, ss. 2(a) through (e), provide: "Section 2.(a) The Department of Health and Human Services shall establish a Skilled Nursing Facility Quality Improvement Consultation Project to assist providers in the development of quality improvement plans for each long-term care facility and program that offers skilled nursing services to the public. In order to avoid conflict with federal regulations, the Department shall locate the project in a section of the Division of Facility Services [now the Division of Health Service Regulation] other than the Licensure and Certification Section. Project staff shall include nurses who have previous experience in long-term care. Staff shall be available to all licensed nursing facilities and, upon request of the facility, shall provide on-site consultation in at least the following areas:

"(1) Analysis of recent survey results in order to assist the facility with its efforts to correct problems or deficiencies identified by the survey.

"(2) Training for in-house quality improvement programs.

"(3) Specific area or issues of concern raised by the facility.

"(4) Best practices information. The Department may contract with a private entity to assist in the implementation of the project.

"Section 2.(b) The Department of Health and Human Services shall offer joint training of survey team members and nursing home providers. The training shall be offered no fewer than two times per year, and subject matter of the training should be based on one or more of the 10 deficiencies cited most frequently in the State during the immediately preceding calendar year. The joint training shall be designed to reduce inconsistencies experienced by providers in the survey process, to increase objectivity by survey team members in conducting surveys, and to promote a higher degree of understanding between facility staff and survey team members in what is expected during the survey process.

"Section 2.(c) The Department of Health and Human Services shall require survey team members who have no previous nursing home experience to spend part of their basic training in a nursing home observing operations of the nursing home. On-site training should be designed to provide the survey team member with experience in the actual operation of a nursing facility outside of the survey process and to achieve a general understanding of the following facility functions: administration, nursing, personal care services, and dietary services. On-site training requirement shall be for a minimum of three days and must be completed before the survey team member assumes survey work or oversight responsibilities. In addition to on-site training, at least fifty percent (50%) of the annual continuing education requirement of survey team members shall be in the subject area of geriatric care.

"Section 2.(d) The Department of Health and Human Services shall convene a Skilled Nursing Facility Quality of Standards Work Group to explore alternatives to existing oversight and survey practices that will ensure quality in skilled nursing facilities. The Work Group shall do the following:

"(1) Clarify and provide guidance on terms applicable in the survey and oversight process to ensure uniformity. Terms that should be clarified include 'immediate jeopardy', 'harm', 'potential harm', 'avoidable', and 'unavoidable'. The Department shall ensure that clarification of terms is included in basic and continuing survey training.

"(2) Identify rules that impede the direct care of patients and develop a proposal for repeal of those rules, including any necessary repeal of, or amendment to, current law that is the basis for the rule.

"(3) Examine possible incentives for providers such as extended survey period, increased reimbursement rates, accreditation, and deemed status. The Work Group shall consider all available quality measurements in developing recommendations for incentives. The Work Group shall also identify changes in current law necessary to implement incentives.

"(4) Explore aspects of quality assessment/monitoring that should be changed to facilitate improvements and determine if a waiver from the Health Care Financing Administration is necessary to implement innovative approaches to the delivery and monitoring of long-term care in this State.

"The Work Group shall consist of representatives of the Division of Facility Services [now the Division of Health Service Regulation] of the Department of Health and Human Services and the North Carolina Health Care Facilities Association.

"Section 2.(e) The Department of Health and Human Services of the Department of Health and Human Services shall report to the Joint Legislative Health Care Oversight Committee and the North Carolina Study Commission on Aging on the status of implementation of this section. The report shall be submitted on October 1, 2001, and March 1, 2002."

Session Laws 2005-23, s. 1, provides: "The Department of Health and Human Services, Adult Protective Services Task Force, shall collaborate with stakeholders and other persons interested in improving adult protective services and report its findings and recommendations to the North Carolina Study Commission on Aging and to the Legislative Study Commission on State Guardianship Laws on or before April 1, 2006."

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

§ 131E-101. Definitions.

As used in this Part, unless otherwise specified:

(1) "Adult care home", as distinguished from a nursing home, means a facility operated as a part of a nursing home and which provides residential care for aged or disabled persons whose principal need is a home with the shelter or personal care their age or disability requires. Medical care in an adult care home is usually occasional or incidental, such as may be required in the home of any individual or family, but the administration of medication is supervised. Continuing planned medical and nursing care to meet the resident's needs may be provided under the direct supervision of a physician, nurse, or home health agency. Adult care homes are to be distinguished from nursing homes subject to licensure under this Part.

(1a) "Combination home" means a nursing home offering one or more levels of care, including any combination of skilled nursing, intermediate care, and adult care home.

(2) "Commission" means the North Carolina Medical Care Commission.

(3) "Community advisory committee" means a nursing home advisory committee established for the statutory purpose of working to carry out the intent of the Nursing Home Patients' Bill of Rights (Chapter 131E, Article 6, Part 2) in accordance with G.S. 143B-181.1.

(4) Repealed by Session Laws 1995, c. 535, s. 21.

(5) "Medical review committee" means a committee of a State or local professional society, of a medical staff of a licensed hospital, of physicians having privileges within the nursing home or of a peer review corporation or organization which is formed for the purpose of evaluating the quality, cost of or necessity for health care services under applicable federal statutes.

(6) "Nursing home" means a facility, however named, which is advertised, announced, or maintained for the express or implied purpose of providing nursing or convalescent care for three or more persons unrelated to the licensee. A "nursing home" is a home for chronic or convalescent patients, who, on admission, are not as a rule, acutely ill and who do not usually require special facilities such as an operating room, X-ray facilities, laboratory facilities, and obstetrical facilities. A "nursing home" provides care for persons who have remedial ailments or other ailments, for which medical and nursing care are indicated; who, however, are not sick enough to require general hospital care. Nursing care is their primary need, but they will require continuing medical supervision.

(7) "Peer review committee" means any committee appointed in accordance with G.S. 131E-108, "Peer review."

(8) "Quality assurance committee" means a committee, agency, or department of a state or local professional organization, of a medical staff of a licensed hospital, nursing home, of nurses or aides on the staff of a nursing home, or adult care home, of physicians having privileges within the nursing home, or adult care home, or of a peer review corporation or organization that is formed for the purpose of evaluating the quality, cost of, or necessity for health care services under applicable federal and State statutes, regulations, and rules. (1961, c. 51, s. 3; 1981, c. 833; 1983, c. 775, s. 1; 1995, c. 535, s. 21; 2004-149, s. 2.1.)

Editor's Note. — Subdivisions (1) and (1a) were redesignated at the direction of the Revisor of Statutes, the original designations having been (4) and (1).

§ 131E-102. Licensure requirements.

(a) No person shall operate a nursing home without a license obtained from the Department. Any person may operate a nursing home or a combination home, as defined in this Part, in the same building or in two or more buildings adjoining or next to each other on the same site. Both a nursing home and a combination home must be licensed by the Department under this Part.

(b) Applications shall be available from the Department, and each application filed with the Department shall contain all necessary and reasonable information that the Department may by rule require. A license shall be granted to the applicant upon a determination by the Department that the applicant has complied with the provisions of this Part and the rules promulgated under this Part. The Department shall charge the applicant a nonrefundable annual license fee in the amount of four hundred fifty dollars ($450.00) plus a nonrefundable annual per-bed fee of twelve dollars and fifty cents ($12.50).

(c) A license to operate a nursing home shall be annually renewed upon the filing and the Department's approval of the renewal application. A license shall not be renewed if outstanding fees and penalties imposed by the State against the home have not been paid. Fines and penalties for which an appeal is pending are exempt from consideration. The renewal application shall be available from the Department and shall contain all necessary and reasonable information that the Department may by rule require.

(d) Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable except with the written approval of the Department.

(e) In order for a nursing home to maintain its license it shall not intentionally impede the proper performance of the duties of a lawfully appointed community advisory committee as set forth in G.S. 131E-128(h). (1961, c. 51, s. 3; 1963, c. 859; 1983, c. 775, s. 1; 1993, c. 530, s. 1; 2003-284, s. 34.3(a); 2005-276, s. 41.2(c).)

Editor's Note. — Session Laws 2007-323, s. 10.12, provides: "The Department's Division of Aging and Adult Services shall develop a Quality Improvement Consultation Program for Adult Care Homes. The purpose of the Program is to promote better care and improve quality of life in a safe environment for residents in adult care homes through consultation and assistance with adult care home providers. The county departments of social services shall be responsible for implementation of the Program with all adult care homes located in the respective county, based on a timetable for statewide implementation.

"The Division of Aging and Adult Services shall consult with adult care home providers, county departments of social services, consumer advocates, and other interested stakeholders and parties in the development of the Quality Improvement Consultation Program for Adult Care Homes.

"The Program will address the following topics:

"(1) Principles and philosophies that are resident-centered and promote independence, dignity, and choice for residents;

"(2) Approaches to develop continuous quality improvement with a focus on resident satisfaction and optimal outcomes;

"(3) Dissemination of best practice models that have been used successfully elsewhere;

"(4) A determination of the availability of standardized instruments, and their use to the extent possible, to assess and measure adult care home performance according to quality of life indicators;

"(5) Utilization of quality improvement plans for adult care homes that identify and resolve issues that adversely affect quality of care and services to residents. The plans include agreed upon time frames for completion of improvements and identification of needed resources;

"(6) Training required to equip county departments of social services' staff to implement the Program;

"(7) A distinction of roles between the regulatory role of the Department's Division of Health Service Regulation and the quality improvement consultation and monitoring responsibilities of the county departments of social services; and

"(8) Identification of staffing and other resources needed to implement the Program.

"The Division of Aging and Adult Services shall conduct a pilot of the Quality Improvement Consultation Program for Adult Care Homes. No more than four county departments of social services shall participate in the pilot. The Division of Aging and Adult Services shall consider geographic balance and size in carrying out the pilot. At the conclusion of the pilot, the Division of Aging and Adult Services shall make recommendations regarding the effectiveness of the Quality Improvement Consultation Program for Adult Care Homes. If the Division recommends expansion of the pilot to other counties or statewide implementation of the Program, its report shall include the cost and a proposed timetable for implementing these recommendations, including the identification of any necessary statutory and administrative rule changes. The recommendations shall be made to the Secretary of the Department of Health and Human Services, the North Carolina Study Commission on Aging, the Senate Appropriations Committee on Health and Human Services, and the House of Representatives Subcommittee on Health and Human Services."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 131E-103. Adverse action on a license.

(a) Subject to subsection (b), the Department shall have the authority to deny a new or renewal application for a license, and to amend, recall, suspend or revoke an existing license upon a determination that there has been a substantial failure to comply with the provisions of this Part or the rules promulgated under this Part.

(b) The provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act, shall govern all administrative action and judicial review in cases where the Department has taken the action described in subsection (a). A petition for a contested case shall be filed within 20 days after the Department mails the licensee a notice of its decision to deny a renewal application, or to recall, suspend, or revoke an existing license. (1961, c. 51, s. 3; 1983, c. 775, s. 1; 1987, c. 827, s. 1; 1991, c. 143, s. 2; c. 761, s. 24.)

§ 131E-104. Rules and enforcement.

(a) The Commission is authorized to adopt, amend, and repeal all rules necessary for the implementation of this Part.

(b) The Commission shall adopt rules for the operation of the adult care portion of a combination home. The rules shall provide that for each requirement applicable to freestanding adult care homes or freestanding nursing homes, the combination home may choose to operate the adult care portion of the home in compliance with either the requirement applicable to freestanding adult care homes or the higher standard applicable to freestanding nursing homes.

(c) The Department shall enforce the rules adopted or amended by the Commission with respect to nursing homes. (1961, c. 51, s. 3; 1973, c. 476, s. 128; 1981, c. 614, s. 1; 1983, c. 775, s. 1; 1995, c. 535, s. 22; 2000-154, s. 6.1.)

Cross References. — As to provisions requiring that the North Carolina Medical Care Commission and the Social Services Commission draft rules containing state standards for special care units in nursing homes and rest homes for Alzheimer's and related dementia patients, see G.S. 143B-181.50 et seq.

§ 131E-105. Inspections.

(a) The Department shall inspect any nursing home and any adult care home operated as a part of a nursing home in accordance with rules adopted by the Commission.

(b) Notwithstanding the provisions of G.S. 8-53, "Communications between physician and patient," or any other provision of law relating to the confidentiality of communications between physician and patient, the representatives of the Department, when necessary for investigating compliance with this Part or rules promulgated by the Commission, may review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been patients of the facility being inspected unless that patient objects in writing to review of that patient's records. Physicians, psychologists, psychiatrists, nurses, and anyone else interviewed by representatives of the Department may disclose to these representatives information related to any inquiry, notwithstanding the existence of the physician-patient privilege in G.S. 8-53, "Communications between physician and patient," or any other rules of law, if the patient has not made written objection to this disclosure. The facility, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information which is provided without malice or fraud to the Department. Any confidential or privileged information received from review of records or interviews shall be kept confidential by the Department and not disclosed without written authorization of the patient or legal representative or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning a facility without consent of that person. Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1, "'Public records' defined." Prior to releasing any information or allowing any inspections referred to in this subsection, the patient must upon admission be advised in writing by the facility that the patient has the right to object in writing to the release of information or review of the records and that by an objection in writing the patient may prohibit the inspection or release of the records.

(c) Authorized representatives of the Department with identification to this effect shall have at all times the right of proper entry upon any and all parts of the premises of any place in which entry is necessary to carry out the provisions of this Part or the rules adopted by the Commission. It shall be unlawful for any person to resist a proper entry by an authorized representative upon any premises other than a private dwelling. (1981, c. 586, s. 1; c. 614, s. 1; 1983, c. 775, s. 1; 1995, c. 535, s. 23.)

§ 131E-106. Evaluation of residents in adult care homes.

The Department shall prescribe the method of evaluation of residents in the adult care portion of a combination home in order to determine when any of these residents is in need of professional medical and nursing care as provided in licensed nursing homes. (1963, c. 859; 1981, c. 833; 1983, c. 775, s. 1; 1995, c. 535, s. 24.)

§ 131E-107. Quality assurance, medical, or peer review committees.

(a) A member of a duly appointed quality assurance, medical or peer review committee shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee, if the committee member acts without malice or fraud, and if such peer review committee is approved and operates in accordance with G.S. 131E-108.

(b) The proceedings of a quality assurance, medical, or peer review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, "'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a nursing home or a provider of professional health services that results from matters that are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings. (1983, c. 775, s. 1; 2004-149, s. 2.2.)

CASE NOTES

Peer Review Reports. — G.S. 90-21.22A did not provide privilege protection to nursing homes; 2003 version of G.S. 131E-107 applied to nursing homes, but did not provide privilege from discovery for materials produced by peer review committees, so a trial court did not err in holding that nursing home peer review reports were not privileged. Windman v. Britthaven, Inc., 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

Incident Reports Not Privileged. — Incident reports prepared by nurses at a nursing home were not privileged under G.S. 90-21.22A and G.S. 131E-107, as the reports were not part of the proceedings of the home's quality improvement team, produced by the team, or considered by the team; the fact that the team could have reviewed the reports or might do so in the future did not make them privileged. Hayes v. Premier Living, Inc., — N.C. App. —, 641 S.E.2d 316, 2007 N.C. App. LEXIS 370 (2007).

§ 131E-108. Peer review.

It is not a violation of G.S. 131E-117(5) for medical records to be disclosed to a private peer review committee if:

(1) The peer review committee has been approved by the Department;
(2) The purposes of the peer review committee are to:
  a. Survey facilities to verify a high level of quality care through evaluation and peer assistance;
  b. Resolve written complaints in a responsible and professional manner; and
  c. Develop a basic core of knowledge and standards useful in establishing a means of measuring quality of care; and
(3) The peer review committee keeps such records confidential. (1979, c. 707; 1983, c. 775, s. 1; 1997-456, s. 27.)

Editor's Note. — Subdivisions (2)(a), (2)(b) and (2)(c) of this section were renumbered as subdivisions (2)a., (2)b., and (2)c. pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 131E-109. Penalties.

(a) Any person establishing, conducting, managing or operating any nursing home without a license shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be liable for a fine of not more than five hundred dollars ($500.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. Each day of a continuing violation after conviction shall be considered a separate offense.

(b) Any person acting under the authority of the Department who gives advance notice to an operator of a nursing home of the date or time that the nursing home is to be inspected shall be guilty of a Class 3 misdemeanor. The inspection of a nursing home for initial licensure shall be exempt from the prohibition of prior notice. All subsequent inspections must comply with the provisions of this subsection.

(c) The Secretary or a designee may suspend the admission of any new patients or residents at any nursing home or domiciliary home where the conditions of the nursing home or domiciliary home are detrimental to the health or safety of the patient or resident. This suspension shall remain in effect until the Secretary is satisfied that conditions or circumstances merit the removal of the suspension. This subsection shall be in addition to authority to suspend or revoke the license of the home. Any facility wishing to contest a suspension of admissions shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. The petition for a contested case shall be filed in the Office of Administrative Hearings within 20 days after the Department mails a written notice of suspension of admissions to the facility.

(d) Except as otherwise provided in this Part, any person who violates any provision of this Part or who willfully fails to perform any act required, or who willfully performs any act prohibited by this Part, shall be guilty of a Class 1 misdemeanor: Provided, however, that any person who willfully violates any rule adopted by the Commission under this Part or who willfully fails to perform any act required by, or who willfully performs any act prohibited by, these rules shall be guilty of a Class 3 misdemeanor.

(e) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1977, c. 656, ss. 1, 2; 1981, c. 667, ss. 1, 2; 1983, c. 775, s. 1; 1991, c. 143, s. 3; c. 761, s. 25; 1993, c. 539, s. 960; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 78(c).)

§ 131E-110. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person to restrain or prevent the establishment, conduct, management or operation of a nursing home without a license.

(b) If any person shall hinder the proper performance of duty of the Secretary or a representative in carrying out the provisions of this Part, the Secretary may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance, irrespective of all other remedies at law.

(c) Actions under this section shall be in accordance with Article 37 of Chapter 1 of the General Statutes and Rule 65 of the Rules of Civil Procedure. (1983, c. 775, s. 1.)

§ 131E-111: Recodified as G.S. 131E-255 by Session Laws 1995 (Reg. Sess., 1996), c. 713, s. 3(a), as amended by Session Laws 1995 (Reg. Sess., 1996), c. 713, s. 3(b), effective June 21, 1996.

§ 131E-112. Waiver of rules for health care facilities that provide temporary shelter or temporary services during a disaster or emergency.

(a) The Division of Health Service Regulation may temporarily waive, during disasters or emergencies declared in accordance with Article 1 of Chapter 166A of the General Statutes, any rules of the Commission pertaining to facilities or home care agencies to the extent necessary to allow the facility or home care agency to provide temporary shelter and temporary services requested by the emergency management agency. The Division may identify, in advance of a declared disaster or emergency, rules that may be waived, and the extent the rules may be waived, upon a disaster or emergency being declared in accordance with Article 1 of Chapter 166A of the General Statutes. The

Division may also waive rules under this subsection during a declared disaster or emergency upon the request of an emergency management agency and may rescind the waiver if, after investigation, the Division determines the waiver poses an unreasonable risk to the health, safety, or welfare of any of the persons occupying the facility. The emergency management agency requesting temporary shelter or temporary services shall notify the Division within 72 hours of the time the preapproved waivers are deemed by the emergency management agency to apply.

(b) As used in this section, "emergency management agency" is as defined in G.S. 166A-4(2). (1999-307, s. 1; 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" at the beginning of subsection (a).

§ 131E-113. Immunization of employees and residents.

(a) Except as provided in subsection (e) of this section, a nursing home licensed under this Part shall require residents and employees to be immunized against influenza virus and shall require residents to also be immunized against pneumococcal disease.

(b) Upon admission, a nursing home shall notify the resident of the immunization requirements of this section and shall request that the resident agree to be immunized against influenza virus and pneumococcal disease.

(b1) A nursing home shall notify every employee of the immunization requirements of this section and shall request that the employee agree to be immunized against influenza virus.

(c) A nursing home shall document the annual immunization against influenza virus and the immunization against pneumococcal disease for each resident and each employee, as required under this section. Upon finding that a resident is lacking one or both of these immunizations or that an employee has not been immunized against influenza virus, or if the nursing home is unable to verify that the individual has received the required immunization, the nursing home shall provide or arrange for immunization. The immunization and documentation required shall occur not later than November 30 of each year.

(d) For an individual who becomes a resident of or who is newly employed by the nursing home after November 30 but before March 30 of the following year, the nursing home shall determine the individual's status for the immunizations required under this section, and if found to be deficient, the nursing home shall provide the immunization.

(e) No individual shall be required to receive vaccine under this section if the vaccine is medically contraindicated, or if the vaccine is against the individual's religious beliefs, or if the individual refuses the vaccine after being fully informed of the health risks of not being immunized.

(f) Notwithstanding any other provision of law to the contrary, the Commission for Public Health shall have the authority to adopt rules to implement the immunization requirements of this section.

(g) As used in this section, "employee" means an individual who is a part-time or full-time employee of the nursing home. (2000-112, ss. 3, 4; 2007-182, s. 1.3.)

Editor's Note. — Session Laws 2000-112, s. 5, directs the Department of Health and Human Services to make available to nursing homes and adult care homes educational and informational materials pertaining to vaccinations required under the act.

Effect of Amendments. — Session Laws 2007-182, s. 1.3, effective July 5, 2007, substituted "Commission for Public Health" for "Health Services Commission" in subsection (f).

§ 131E-114. Special care units; disclosure of information required.

(a) A nursing home or combination home licensed under this Part that provides special care for persons with Alzheimer's disease or other dementias in a special care unit shall make the following disclosures pertaining to the special care provided that distinguishes the special care unit as being especially designed for residents with Alzheimer's disease or other dementias. The disclosure shall be made annually, in writing, to all of the following:

(1) The Department, as part of its licensing procedures.
(2) Each person seeking placement within a special care unit, or the person's authorized representative, prior to entering into an agreement with the person to provide special care.

(b) Information that must be disclosed in writing shall include, but is not limited to, all of the following:

(1) A statement of the overall philosophy and mission of the licensed facility and how it reflects the special needs of residents with dementia.
(2) The process and criteria for placement, transfer, or discharge to or from the special care unit.
(3) The process used for assessment and establishment of the plan of care and its implementation, as required under State and federal law.
(4) Typical staffing patterns and how the patterns reflect the resident's need for increased care and supervision.
(5) Dementia-specific staff training.
(6) Physical environment features designed specifically for the special care unit.
(7) Alzheimer's disease and other dementia-specific programming.
(8) Opportunities for family involvement.
(9) Additional costs or fees to the resident for special care.

(c) As part of its license renewal procedures and inspections, the Department shall examine for accuracy the written disclosures made by each licensed facility subject to this section.

(d) Nothing in this section shall be construed as prohibiting a nursing home or combination home that does not offer a special care unit from admitting a person with Alzheimer's disease or other dementias. The disclosures required by this section apply only to a nursing home or combination home that advertises, markets, or otherwise promotes itself as providing a special care unit for persons with Alzheimer's disease or other dementias.

(e) As used in this section, the term "special care unit" means a wing or hallway within a nursing home, or a program provided by a nursing home, that is designated especially for residents with Alzheimer's disease or other dementias, or other special needs disease or condition, as determined by the Medical Care Commission, which may include mental disabilities. (2000-154, s. 6.)

Editor's Note. — This section was enacted as G.S. 131E-113 by Session Laws 2000-154, s. 6. It has been redesignated as G.S. 131E-114 at the direction of the Revisor of Statutes.

§ 131E-114.1. Posting of information indicating number of staff on duty.

Every nursing home subject to licensure under this Part shall post in a conspicuous place in the nursing home information about required staffing that enables residents and their families to readily ascertain each day the number of direct care staff and supervisors that are required by law to be on duty for that day. (2001-85, s. 2; 2001-487, s. 85(b).)

§ 131E-114.2. Use of medication aides to perform technical aspects of medication administration.

(a) Facilities licensed and medication administration services provided under this Part may utilize medication aides to perform the technical aspects of medication administration consistent with G.S. 90-171.20(7) and (8), and G.S. 90-171.43.

(1) A medication aide who is employed in a facility licensed under Article 5 and Article 6, Part 1 of this Chapter shall be listed as a Nurse Aide I on the Nurse Aide I Registry in addition to being listed on the Medication Aide Registry.

(2) Medication administration as used in Article 5 and Article 6, Part 1 of this Chapter shall not include intravenous or injectable medication services.

(b) The Commission shall adopt rules to implement this section. Rules adopted by the Commission shall include:

(1) Training and competency evaluation of medication aides as provided for under this section.

(2) Requirements for listing under the Medication Aide Registry as provided for under G.S. 131E-270.

(3) Requirements for supervision of medication aides by licensed health professionals or appropriately qualified supervisory personnel consistent with this Part. (2005-276, s. 10.40C(a); 2007-444, s. 4(a).)

DHHS and Community Colleges Study Use of Medication Aides to Perform Technical Aspects of Medication Administration. — Session Laws 2005-276, s. 10.40D(a)-(d) provide: "(a) The Secretary of Health and Human Services and the President of the Community Colleges System shall jointly convene a study group to review and consider the use of medication aides to perform the technical aspects of medication administration. The study group shall consist of members representing at least the following entities and licensed health care facilities and providers:

"(1) Appointed by the Secretary of Health and Human Services:

"a. Adult care homes.

"b. Home care agencies.

"c. Ambulatory surgical centers.

"d. Hospitals.

"e. Facilities providing mental health, developmental disabilities, and substance abuse services.

"f. Nursing homes.

"g. The nursing profession, as recommended by the Board of Nursing.

"(2) Community colleges appointed by the President of the Community Colleges System.

"(3) The Secretary of the Department of Correction.

"(4) Others as may be appointed by the Secretary of Health and Human Services or the President of the Community Colleges System.

"(b) The study group shall address at least the following in its study and its recommendations regarding medication aide performance of the technical aspects of medication administration:

"(1) Training and competency evaluation of medication aides;

"(2) Training standards;

"(3) Ongoing review and evaluation of medication aide training; and

"(4) Requirements for supervision of medication aides.

"(c) The Secretary of Health and Human Services and the President of the Community Colleges System shall report the progress and recommendations of the study group to the 2006 Regular Session of the 2005 General Assembly upon its convening, and the 2007 General Assembly upon its convening. Recommendations to the 2006 Regular Session of the 2005 General Assembly may include proposed legislation. A copy of the report shall be provided to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division at the same time as the report is submitted to the General Assembly.

"(d) The Department of Health and Human Services shall continue its pilot program on the use of medication aides and shall report on the status of the pilot programs at the same time and to the same persons as the study group report to the General Assembly."

Editor's Note. — Session Laws 2005-276, s. 10.40C(d), provides: "This section becomes effective July 1, 2006. The North Carolina Board of Nursing and the Department of Health and Human Services shall report on the implementation of this act to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than March 1, 2006, and annually thereafter."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-444, s. 4(a), effective August 23, 2007, in subdivision (a)(1), substituted "Article 5 and Article 6, Part 1" for "Article 5, Article 6, Part 1, and Article 10"; in subdivision (a)(2), substituted "Article 5 and Article 6, Part 1" for "Article 5, Article 6, Part 1, and Article 10"; and in subsection (b)(2), substituted "G.S. 131E-270" for "G.S. 131E-271."

§ 131E-114.3. Smoking prohibited inside long-term care facilities; penalty.

(a) Except to the extent otherwise provided by federal law, smoking is prohibited inside long-term care facilities. As used in this section:

(1) "Long-term care facilities" include adult care homes, nursing homes, skilled nursing facilities, facilities licensed under Chapter 122C of the General Statutes, and other licensed facilities that provide long-term care services.

(2) "Smoking" means the use or possession of any lighted cigar, cigarette, pipe, or other lighted smoking product.

(3) "Inside" means a fully enclosed area.

(b) The person who owns, manages, operates, or otherwise controls a long-term care facility where smoking is prohibited under this section shall:

(1) Conspicuously post signs clearly stating that smoking is prohibited inside the facility. The signs may include the international 'No Smoking' symbol, which consists of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.

(2) Direct any person who is smoking inside the facility to extinguish the lighted smoking product.

(3) Provide written notice to individuals upon admittance that smoking is prohibited inside the facility and obtain the signature of the individual or the individual's representative acknowledging receipt of the notice.

(c) The Department may impose an administrative penalty not to exceed two hundred dollars ($200.00) for each violation on any person who owns, manages, operates, or otherwise controls the long-term care facility and fails to comply with subsection (b) of this section. A violation of this section constitutes a civil offense only and is not a crime. (2007-459, s. 2.)

Editor's Note. — Session Laws 2007-459, s. 5, made this section effective October 1, 2007, and applicable to violations committed on or after that date.

Session Laws 2007-459, s. 5, further provides, in part: "G.S. 131D-4.4(c)(3) 131E-114.3(b)(3), and 122C-6(b)(3), as enacted by this act, apply to individuals admitted to the facility on or after October 1, 2007."

Part 2. Nursing Home Patients' Bill of Rights.

§ 131E-115. Legislative intent.

It is the intent of the General Assembly to promote the interests and well-being of the patients in nursing homes and adult care homes licensed pursuant to G.S. 131E-102, and patients in a nursing home operated by a hospital which is licensed under Article 5 of Chapter 131E of the General Statutes. It is the intent of the General Assembly that every patient's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and that the facility shall encourage and assist the patient in the fullest possible exercise of these rights. (1977, c. 897, s. 1; 1983, c. 143, s. 2; c. 775, ss. 1, 6; 1995, c. 509, s. 72; c. 535, s. 25.)

CASE NOTES

The Nursing Home Patients' Bill of Rights does not set the standard to which nursing homes are held accountable in negligence damage actions. Such a holding would ignore the purpose of the negligence per se doctrine and the malpractice law of this State. It would permit the trier of fact to set its own standard of care for health care providers and speculate virtually without limits on the culpability of their conduct. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

The Nursing Home Patients' Bill of Rights is a laudable statement of policy and requirements imposed on licensed nursing homes, with a remedial enforcement scheme which provides for injunctive relief and/or license revocation and administrative penalties. It may be relevant in a negligence case to show very generally a patient's expectations from a nursing home, but it is not a substitute, through the doctrine of negligence per se, for the well-established standard of care to be applied in negligence actions for damages against health care providers. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

In negligence actions against health care providers, G.S. 90-21.12 sets the applicable standard of care. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

§ 131E-116. Definitions.

As used in this Part, unless otherwise specified:

(1) "Administrator" means an administrator of a facility.

(1a) "Commission" means the North Carolina Medical Care Commission.

(2) "Facility" means a nursing home and a home for the aged or disabled licensed pursuant to G.S. 131E-102, and also means a nursing home operated by a hospital which is licensed under Article 5 of G.S. Chapter 131E.

(3) "Patient" means a person who has been admitted to a facility.

(4) "Representative payee" means a person certified by the federal government to receive and disburse benefits for a recipient of governmental assistance. (1977, c. 897, s. 1; 1983, c. 143, s. 1; c. 775, ss. 1, 6; 1993, c. 499, s. 1.)

§ 131E-117. Declaration of patient's rights.

All facilities shall treat their patients in accordance with the provisions of this Part. Every patient shall have the following rights:

(1) To be treated with consideration, respect, and full recognition of personal dignity and individuality;

(2) To receive care, treatment and services which are adequate, appropriate, and in compliance with relevant federal and State statutes and rules;

(3) To receive at the time of admission and during the stay, a written statement of the services provided by the facility, including those required to be offered on an as-needed basis, and of related charges. Charges for services not covered under Medicare or Medicaid shall be specified. Upon receiving this statement, the patient shall sign a

written receipt which must be on file in the facility and available for inspection;

(4) To have on file in the patient's record a written or verbal order of the attending physician containing any information as the attending physician deems appropriate or necessary, together with the proposed schedule of medical treatment. The patient shall give prior informed consent to participation in experimental research. Written evidence of compliance with this subdivision, including signed acknowledgements by the patient, shall be retained by the facility in the patient's file;

(5) To receive respect and privacy in the patient's medical care program. Case discussion, consultation, examination, and treatment shall remain confidential and shall be conducted discreetly. Personal and medical records shall be confidential and the written consent of the patient shall be obtained for their release to any individual, other than family members, except as needed in case of the patient's transfer to another health care institution or as required by law or third party payment contract;

(6) To be free from mental and physical abuse and, except in emergencies, to be free from chemical and physical restraints unless authorized for a specified period of time by a physician according to clear and indicated medical need;

(7) To receive from the administrator or staff of the facility a reasonable response to all requests;

(8) To associate and communicate privately and without restriction with persons and groups of the patient's choice on the patient's initiative or that of the persons or groups at any reasonable hour; to send and receive mail promptly and unopened, unless the patient is unable to open and read personal mail; to have access at any reasonable hour to a telephone where the patient may speak privately; and to have access to writing instruments, stationery, and postage;

(9) To manage the patient's financial affairs unless authority has been delegated to another pursuant to a power of attorney, or written agreement, or some other person or agency has been appointed for this purpose pursuant to law. Nothing shall prevent the patient and facility from entering a written agreement for the facility to manage the patient's financial affairs. In the event that the facility manages the patient's financial affairs, it shall have an accounting available for inspection and shall furnish the patient with a quarterly statement of the patient's account. The patient shall have reasonable access to this account at reasonable hours; the patient or facility may terminate the agreement for the facility to manage the patient's financial affairs at any time upon five days' notice.

(10) To enjoy privacy in visits by the patient's spouse, and, if both are inpatients of the facility, they shall be afforded the opportunity where feasible to share a room;

(11) To enjoy privacy in the patient's room;

(12) To present grievances and recommend changes in policies and services, personally or through other persons or in combination with others, on the patient's personal behalf or that of others to the facility's staff, the community advisory committee, the administrator, the Department, or other persons or groups without fear of reprisal, restraint, interference, coercion, or discrimination;

(13) To not be required to perform services for the facility without personal consent and the written approval of the attending physician;

(14) To retain, to secure storage for, and to use personal clothing and possessions, where reasonable;

(15) To not be transferred or discharged from a facility except for medical reasons, the patient's own or other patients' welfare, nonpayment for the stay, or when the transfer or discharge is mandated under Title XVIII (Medicare) or Title XIX (Medicaid) of the Social Security Act. The patient shall be given at least five days' advance notice to ensure orderly transfer or discharge, unless the attending physician orders immediate transfer, and these actions, and the reasons for them, shall be documented in the patient's medical record;

(16) To be notified within 10 days after the facility has been issued a provisional license because of violation of licensure regulations or received notice of revocation of license by the North Carolina Department of Health and Human Services and the basis on which the provisional license or notice of revocation of license was issued. The patient's responsible family member or guardian shall also be notified. (1977, c. 897, s. 1; 1983, c. 775, s. 1; 1989, c. 75; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Applied in Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

§ 131E-118. Transfer of management responsibilities.

The patient's representative who has been given the power in writing by the patient to manage the patient's financial affairs or the patient's legal guardian as appointed by a court or the patient's attorney-in-fact as specified in the power of attorney agreement may sign any documents required by the provisions of this Part, may perform any other act, and may receive or furnish any information required by this Part. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-119. No waiver of rights.

No facility may require a patient to waive the rights specified in this Part. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-120. Notice to patient.

(a) A copy of G.S. 131E-115 through G.S. 131E-127 shall be posted conspicuously in a public place in all facilities. Copies of G.S. 131E-115 through G.S. 131E-127 shall be furnished to the patient upon admittance to the facility, to all patients currently residing in the facility, to the sponsoring agency, to a representative payee of the patient, or to any person designated in G.S. 131E-118, and to the patient's next of kin, if requested. Receipts for the statement signed by these persons shall be retained in the facility's files.

(b) The address and telephone number of the section in the Department responsible for the enforcement of the provisions of this Part shall be posted and distributed with copies of the Part. The address and telephone number of the county social services department shall also be posted and distributed. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-121. Responsibility of administrator.

Responsibility for implementing the provisions of this Part shall rest on the administrator of the facility. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-122. Staff training.

Each facility shall provide appropriate staff training to implement each patient's rights included in this Part. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-123. Civil action.

Every patient shall have the right to institute a civil action for injunctive relief to enforce the provisions of this Part. The Department, a general guardian, or any person appointed as guardian ad litem pursuant to law, may institute an action pursuant to this section on behalf of the patient or patients. Any agency or person named above may enforce the rights of the patient specified in this Part which the patient is unable to personally enforce. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

CASE NOTES

Applied in Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

§ 131E-124. Enforcement and investigation; confidentiality.

(a) The Department shall be responsible for the enforcement of the provisions of this Part. The Department shall investigate complaints made to it and reply within a reasonable time, not to exceed 60 days, upon receipt of a complaint.

(a1) When the Department receives a complaint alleging a violation of the provisions of this Part pertaining to patient care or patient safety, the Department shall initiate an investigation as follows:

(1) Immediately upon receipt of the complaint if the complaint alleges a life-threatening situation.
(2) Within 24 hours if the complaint alleges abuse of a resident as defined by G.S. 131D-20(1).
(3) Within 48 hours if the complaint alleges neglect of a resident as defined by G.S. 131D-20(8).
(4) Within two weeks in all other situations.

The investigation shall be completed within 30 days. The requirements of this section are in addition to and not in lieu of any investigatory requirements for adult protective services pursuant to Article 6 of Chapter 108A of the General Statutes.

(b) The Department is authorized to inspect patients' medical records maintained at the facility when necessary to investigate any alleged violation of this Part.

(c) The Department shall maintain the confidentiality of all persons who register complaints with the Department and of all medical records inspected by the Department. A person who has filed a complaint shall have access to information about a complaint investigation involving a specific resident if written authorization is obtained from the resident, legal representative, or responsible party. The designation of the responsible party shall be maintained by the nursing facility in the resident's medical record.

(d) Pursuant to 42 U.S.C. § 1395 and G.S. 131E-127, a nursing home as defined in G.S. 131E-101(6), is not in violation of any applicable statute, rule, or regulation for any action taken pursuant to a physician's order when the physician has determined that the action is medically necessary. (1977, c. 897, s. 1; 1983, c. 775, s. 1; 1999-113, s. 3; 1999-334, s. 1.9.)

CASE NOTES

Applied in Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

§ 131E-125. Revocation of a license.

(a) The Department shall have the authority to revoke a license issued pursuant to G.S. 131E-102 in any case where it finds that there has been a substantial failure to comply with the provisions of this Part or any failure that endangers the health, safety or welfare of patients.

A revocation shall be effected by mailing to the licensee by registered mail, or by personal service of, a notice setting forth the particular reasons for such action. Such revocation shall become effective 20 days after the mailing or service of the notice, unless the applicant or licensee, within such 20-day period, files a petition for a contested case, in which case the notice shall be deemed to be suspended. At any time at or prior to the hearing, the Department may rescind the notice of revocation upon being satisfied that the reasons for the revocation have been or will be removed.

(b) In the case of a nursing home operated by a hospital which is licensed under Article 5 of G.S. Chapter 131E, when the Department of Health and Human Services finds that there has been a substantial failure to comply with the provisions of this Part, it may issue an order preventing the continued operation of the home.

Such order shall be effected by mailing to the hospital by registered or certified mail, or by personal service of, a notice setting forth the particular reasons for such action. Such order shall become effective 20 days after the mailing of the notice, unless the hospital, within such 20-day period, files a petition for a contested case, in which case the order shall be deemed to be suspended. At any time at or prior to the hearing, the Department of Health and Human Services may rescind the order upon being satisfied that the reasons for the order have been or will be removed. (1977, c. 897, s. 1; 1983, c. 143, s. 3; c. 775, ss. 1, 6; 1987, c. 827, s. 251; 1997-443, s. 11A.118(a).)

CASE NOTES

Applied in Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

§ 131E-126: Repealed by Session Laws 1987, c. 600, s. 1.

Cross References. — As to present provisions relating to penalties, see G.S. 131E-129.

§ 131E-127. No interference with practice of medicine or physician-patient relationship.

Nothing in this Part shall be construed to interfere with the practice of medicine or the physician-patient relationship. (1977, c. 897, s. 1; 1983, c. 775, s. 1.)

§ 131E-128. Nursing home advisory committees.

(a) It is the purpose of the General Assembly that community advisory committees work to maintain the intent of this Part within the nursing homes in this State, including nursing homes operated by hospitals licensed under Article 5 of G.S. Chapter 131E. It is the further purpose of the General Assembly that the committees promote community involvement and cooperation with nursing homes and an integration of these homes into a system of care for the elderly.

(b)(1) A community advisory committee shall be established in each county which has a nursing home, including a nursing home operated by a hospital licensed under Article 5 of G.S. Chapter 131E, shall serve all the homes in the county, and shall work with each home in the best interest of the persons residing in each home. In a county which has one, two, or three nursing homes, the committee shall have five members. In a county with four or more nursing homes, the committee shall have one additional member for each nursing home in excess of three, and may have up to five additional members per committee at the discretion of the county commissioners.

(2) In each county with four or more nursing homes, the committee shall establish a subcommittee of no more than five members and no fewer than three members from the committee for each nursing home in the county. Each member must serve on at least one subcommittee.

(3) Each committee shall be appointed by the board of county commissioners. Of the members, a minority (not less than one-third, but as close to one-third as possible) must be chosen from among persons nominated by a majority of the chief administrators of nursing homes in the county and of the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes. If the nursing home administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes fail to make a nomination within 45 days after written notification has been sent to them by the board of county commissioners requesting a nomination, these appointments may be made by the board of county commissioners without nominations.

(c) Each committee member shall serve an initial term of one year. Any person reappointed to a second or subsequent term in the same county shall serve a three-year term. Persons who were originally nominees of nursing home chief administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes, or who were appointed by the board of county commissioners when the nursing home administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes failed to make nominations, may not be reappointed without the consent of a majority of the nursing home chief administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes within the county. If the nursing home chief administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes fail to approve or reject the reappointment within 45 days of being requested by the board of county commissioners, the commissioners may reappoint the member if they so choose.

(d) Any vacancy shall be filled by appointment of a person for a one-year term. Any person replacing a member nominated by the chief administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes or a person appointed when the chief administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes failed to make a nomination shall be selected from among persons nominated by the administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes, as provided in subsection (b). If the county commissioners fail to appoint members to a committee, or fail to fill a vacancy, the appointment may be made or vacancy filled by the Secretary or the Secretary's designee no sooner than 45 days after the commissioners have been notified of the appointment or vacancy if nomination or approval of the nursing home administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes is not required. If nominations or approval of the nursing home administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes is required, the appointment may be made or vacancy filled by the Secretary or the Secretary's designee no sooner than 45 days after the commissioners have received the nomination or approval, or no sooner than 45 days after the 45-day period for action by the nursing home administrators and the governing bodies of the hospitals licensed under Article 5 of G.S. Chapter 131E, which operate nursing homes.

(e) The committee shall elect from its members a chair, to serve a one-year term.

(f) Each member must be a resident of the county which the committee serves. No person or immediate family member of a person with a financial interest in a home served by a committee, or employee or governing board member or immediate family member of an employee or governing board member of a home served by a committee, or immediate family member of a patient in a home served by a committee may be a member of a committee. Membership on a committee shall not be considered an office as defined in G.S. 128-1 or G.S. 128-1.1. Any county commissioner who is appointed to the committee shall be deemed to be serving on the committee in an ex officio capacity. Members of the committee shall serve without compensation, but may be reimbursed for the amount of actual expenses incurred by them in the performance of their duties. The names of the committee members and the date of expiration of their terms shall be filed with the Division of Aging, which shall supply a copy to the Division of Health Service Regulation.

(g) The Division of Aging, Department of Health and Human Services, shall develop training materials which shall be distributed to each committee member and nursing home. Each committee member must receive training as specified by the Division of Aging prior to exercising any power under subsection (h) of this section. The Division of Aging, Department of Health and Human Services, shall provide the committees with information, guidelines, training, and consultation to direct them in the performance of their duties.

(h)(1) Each committee shall apprise itself of the general conditions under which the persons are residing in the homes, and shall work for the best interests of the persons in the homes. This may include assisting persons who have grievances with the home and facilitating the resolution of grievances at the local level.

(2) Each committee shall quarterly visit the nursing home it serves. For each official quarterly visit, a majority of the committee members shall be present. In addition, each committee may visit the nursing home it serves whenever it deems it necessary to carry out its duties. In counties with four or more nursing homes, the subcommittee assigned to a home shall perform the duties of the committee under

this subdivision, and a majority of the subcommittee members must be present for any visit.

(3) Each member of a committee shall have the right between 10:00 A.M. and 8:00 P.M. to enter into the facility the committee serves in order to carry out the members' responsibilities. In a county where subcommittees have been established, this right of access shall be limited to homes served by those subcommittees to which the member has been appointed.

(4) The committee or subcommittee may communicate through its chair with the Department or any other agency in relation to the interest of any patient. The identity of any complainant or resident involved in a complaint shall not be disclosed except as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq.

(5) Each home shall cooperate with the committee as it carries out its duties.

(6) Before entering into any nursing home, the committee, subcommittee, or member shall identify itself to the person present at the facility who is in charge of the facility at that time.

(i) Any written communication made by a member of a nursing home advisory committee within the course and scope of the member's duties, as specified in G.S. 131E-128, shall be privileged to the extent provided in this subsection. This privilege shall be a defense in a cause of action for libel if the member was acting in good faith and the statements or communications do not amount to intentional wrongdoing.

To the extent that any nursing home advisory committee or any member thereof is covered by liability insurance, that committee or member shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance. (1977, c. 897, s. 2; 1977, 2nd Sess., c. 1192, s. 1; 1983, c. 143, ss. 4-9; c. 775, ss. 1, 6; 1987, c. 682, s. 1; 1995, c. 254, s. 7; 1997-176, s. 1; 1997-443, s. 11A.118(a); 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" at the end of subsection (f).

§ 131E-128.1. Nursing home medication management advisory committee.

(a) Definitions. — As used in this section, unless the context requires otherwise, the term:

(1) "Advisory committee" means a medication management committee established under this section to advise the quality assurance committee.

(2) "Medication-related error" means any preventable medication-related event that adversely affects a patient in a nursing home and that is related to professional practice, or health care products, procedures, and systems, including prescribing, prescription order communications, product labeling, packaging and nomenclature, compounding, dispensing, distribution, administration, education, monitoring, and use.

(3) "Nursing home" means a nursing home licensed under this Chapter and includes an adult care home operated as part of a nursing home.

(4) "Potential medication-related error" means a medication-related error that has not yet adversely affected a patient in a nursing home, but that has the potential to if not anticipated or prevented or if left unnoticed.

(5) "Quality assurance committee" means a committee established in a nursing home in accordance with federal and State regulations to identify circumstances requiring quality assessment and assurance activities and to develop and implement appropriate plans of action to correct deficiencies in quality of care.

(b) Purpose. — It is the purpose of the General Assembly to enhance compliance with this Part through the establishment of medication management advisory committees in nursing homes. The purpose of these committees is to assist nursing homes to identify medication-related errors, evaluate the causes of those errors, and take appropriate actions to ensure the safe prescribing, dispensing, and administration of medications to nursing home patients.

(c) Advisory Committee Established; Membership. — Every nursing home shall establish a medication management advisory committee to advise the quality assurance committee on quality of care issues related to pharmaceutical and medication management and use in the nursing home. The nursing home shall maintain the advisory committee as part of its administrative duties. The advisory committee shall be interdisciplinary and consist of the nursing home administrator and at least the following members appointed by the nursing home administrator:

(1) The director of nursing.
(2) The consultant pharmacist.
(3) A physician designated by the nursing home administrator.
(4) At least three other members of the nursing home staff.

(d) Meetings. — The advisory committee shall meet as needed but not less frequently than quarterly. The Director of Nursing or Staff Development Coordinator shall chair the advisory committee. The nursing home administrator shall ensure that a record is maintained of each meeting.

(e) Confidentiality. — The meetings or proceedings of the advisory committee, the records and materials it produces, and the materials it considers, including analyses and reports pertaining to medication-related error reporting under G.S. 131E-128.2 and G.S. 131E-128.5 and pharmacy reports on drug defects and adverse reactions under G.S. 131E-128.4, shall be confidential and not be considered public records within the meaning of G.S. 132-1. The meetings or proceedings and records and materials also shall not be subject to discovery or introduction into evidence in any civil action against a nursing home or a provider of professional health services resulting from matters that are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall testify in any civil action as to any evidence or other matters produced or presented during the meetings or proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. Notwithstanding the foregoing:

(1) Information, documents, or records otherwise available, including any deficiencies found in the course of an inspection conducted under G.S. 131E-105, shall not be immune from discovery or use in a civil action merely because they were presented during meetings or proceedings of the advisory committee. A member of the advisory committee or a person who testifies before the committee may testify in a civil action but cannot be asked about that person's testimony before the committee or any opinion formed as a result of the committee meetings or proceedings.

(2) Information that is confidential and not subject to discovery or use in civil actions under this subsection may be released to a professional standards review organization that performs any accreditation or certification function. Information released to the professional stan-

dards review organization shall be limited to information reasonably necessary and relevant to the standards review organization's determination to grant or continue accreditation or certification. Information released to the standards review organization retains its confidentiality and is not subject to discovery or use in any civil action as provided under this subsection. The standards review organization shall keep the information confidential subject to this subsection.

(3) Information that is confidential and not subject to discovery or use in civil actions under this subsection may be released to the Department of Health and Human Services pursuant to its investigative authority under G.S. 131E-105. Information released to the Department shall be limited to information reasonably necessary and relevant to the Department's investigation of compliance with Part 1 of Article 6 of this Chapter. Information released to the Department retains its confidentiality and is not subject to discovery or use in any civil action as provided in this subsection. The Department shall keep the information confidential subject to this subsection.

(4) Information that is confidential and is not subject to discovery or use in civil actions under this subsection may be released to an occupational licensing board having jurisdiction over the license of an individual involved in an incident that is under review or investigation by the advisory committee. Information released to the occupational licensing board shall be limited to information reasonably necessary and relevant to an investigation being conducted by the licensing board pertaining to the individual's involvement in the incident under review by the advisory committee. Information released to an occupational licensing board retains its confidentiality and is not subject to discovery or use in any civil action as provided in this subsection. The occupational licensing board shall keep the information confidential subject to this subsection.

(f) Duties. — The advisory committee shall do the following:

(1) Assess the nursing home's pharmaceutical management system, including its prescribing, distribution, administration policies, procedures, and practices and identify areas at high risk for medication-related errors.

(2) Review the nursing home's pharmaceutical management goals and respond accordingly to ensure that these goals are being met.

(3) Review, investigate, and respond to nursing home incident reports, deficiencies cited by licensing or credentialing agencies, and resident grievances that involve actual or potential medication-related errors.

(4) Identify goals and recommendations to implement best practices and procedures, including risk reduction technology, to improve patient safety by reducing the risk of medication-related errors.

(5) Develop recommendations to establish a mandatory, nonpunitive, confidential reporting system within the nursing home of actual and potential medication-related errors.

(6) Develop specifications for drug dispensing and administration documentation procedures to ensure compliance with federal and State law, including the North Carolina Nursing Practice Act.

(7) Develop specifications for self-administration of drugs by qualified patients in accordance with law, including recommendations for assessment procedures that identify patients who may be qualified to self-administer their medications.

(g) Penalty. — The Department may take adverse action against the license of a nursing home upon a finding that the nursing home has failed to comply with this section, G.S. 131E-128.2, 131E-128.3, 131E-128.4, or 131E-128.5. (2003-393, s. 1.)

§ 131E-128.2. Nursing home quality assurance committee; duties related to medication error prevention.

Every nursing home administrator shall ensure that the nursing home quality assurance committee develops and implements appropriate measures to minimize the risk of actual and potential medication-related errors, including the measures listed in this section. The design and implementation of the measures shall be based upon recommendations of the medication management advisory committee and shall:

(1) Increase awareness and education of the patient and family members about all medications that the patient is using, both prescription and over-the-counter, including dietary supplements.
(2) Increase prescription legibility.
(3) Minimize confusion in prescription drug labeling and packaging, including unit dose packaging.
(4) Develop a confidential and nonpunitive process for internal reporting of actual and potential medication-related errors.
(5) To the extent practicable, implement proven medication safety practices, including the use of automated drug ordering and dispensing systems.
(6) Educate facility staff engaged in medication administration activities on similar-sounding drug names.
(7) Implement a system to accurately identify recipients before any drug is administered.
(8) Implement policies and procedures designed to improve accuracy in medication administration and in documentation by properly authorized individuals, in accordance with prescribed orders and stop order policies.
(9) Implement policies and procedures for patient self-administration of medication.
(10) Investigate and analyze the frequency and root causes of general categories and specific types of actual or potential medication-related errors.
(11) Develop recommendations for plans of action to correct identified deficiencies in the facility's pharmaceutical management practices. (2003-393, s. 1.)

§ 131E-128.3. Staff orientation on medication error prevention.

The nursing home administrator shall ensure that the nursing home provide a minimum of one hour of education and training in the prevention of actual or potential medication-related errors. This training shall be provided upon orientation and annually thereafter to all nonphysician personnel involved in direct patient care. The content of the training shall include at least the following:

(1) General information relevant to the administration of medications including terminology, procedures, routes of medication administration, potential side effects, and adverse reactions.
(2) Additional instruction on categories of medication pertaining to the specific needs of the patient receiving the medication.
(3) The facility's policy and procedures regarding its medication administration system.
(4) How to assist patients with safe and accurate self-administration of medication, where appropriate.
(5) Identifying and reporting actual and potential medication-related errors. (2003-393, s. 1.)

§ 131E-128.4. Nursing home pharmacy reports; duties of consultant pharmacist.

(a) The consultant pharmacist for a nursing home shall conduct a drug regimen review for actual and potential drug therapy problems in the nursing home and make remedial or preventive clinical recommendations into the medical record of every patient receiving medication. The consultant pharmacist shall conduct the review at least monthly in accordance with the nursing home's policies and procedures.

(b) The consultant pharmacist shall report and document any drug irregularities and clinical recommendations promptly to the attending physician or nurse-in-charge and the nursing home administrator. The reports shall include problems identified and recommendations concerning:

(1) Drug therapy that may be affected by biological agents, laboratory tests, special dietary requirements, and foods used or administered concomitantly with other medication to the same recipient.
(2) Monitoring for potential adverse effects.
(3) Allergies.
(4) Drug interactions, including interactions between prescription drugs and over-the-counter drugs, drugs and disease, and interactions between drugs and nutrients.
(5) Contraindications and precautions.
(6) Potential therapeutic duplication.
(7) Overextended length of treatment of certain drugs typically prescribed for a short period of time.
(8) Beer's listed drugs that are potentially inappropriate for use by elderly persons.
(9) Undertreatment or medical conditions that are suboptimally treated or not treated at all that warrant additional drug therapy to ensure quality of care.
(10) Other identified problems and recommendations.

(c) The consultant pharmacist shall report drug product defects and adverse drug reactions in accordance with the ASHSP-USP-FDA Drug Product Defect Reporting System and the USP Adverse Drug Reaction Reporting System. The term "ASHSP-USP-FDA" means American Society of Health System Pharmacists-United States Pharmacopoeia-Food and Drug Administration. Information released to the ASHSP-USP-FDA retains its confidentiality and is not subject to discovery or use in any civil action as provided under G.S. 131E-128.1.

(d) The consultant pharmacist shall ensure that all known allergies and adverse effects are documented in plain view in the patient's medical record, including the medication administration records, and communicated to the dispensing pharmacy. The specific medications and the type of allergy or adverse reaction shall be specified in the documentation.

(e) The consultant pharmacist shall ensure that drugs that are not specifically limited as to duration of use or number of doses shall be controlled by automatic stop orders. The consultant pharmacist shall further ensure that the prescribing provider is notified of the automatic stop order prior to the dispensing of the last dose so that the provider may decide whether to continue to use the drug.

(f) The consultant pharmacist shall, on a quarterly basis, submit a summary of the reports submitted under subsections (a) and (b) of this section to the medication management advisory committee established under G.S. 131E-128.1. The summary shall not include any information that would identify a patient, a family member, or an employee of the nursing home. The purpose of the summary shall be to facilitate the identification and analysis of weaknesses in the nursing home's pharmaceutical care system that have an adverse impact on patient safety. (2003-393, s. 1.)

§ 131E-128.5. Medication-related error reports.

(a) The Secretary of Health and Human Services shall contract with a public or private entity to develop and implement a Medication Error Quality Initiative. The Initiative would provide for, among other things, receipt and analysis by the contracting entity of annual reports from each nursing home on the nursing home's medication-related errors. The report submitted by the nursing home shall not contain information that would identify the patient, the individual reporting the error, or other persons involved in the occurrence. The report shall include the following:

(1) The total number of medication-related errors for the preceding year.
(2) A listing of the types of medication-related errors, the number of medication-related errors, the root cause analysis of each error, and the staff level involved.
(3) A listing of the types of injuries caused and the number of injuries occurring.
(4) The types of liability claims filed based on an adverse incident or reportable injury.

(b) The contracting entity shall provide for analysis of the medication-related error reports to determine trends in the incidence of medication-related errors in nursing homes. Information released to the contractor retains its confidentiality and is not subject to discovery or use in any civil action as provided under G.S. 131E-128.1, and the contractor shall keep the information confidential subject to that section. (2003-393, s. 1.)

Editor's Note. — Session Laws 2003-393, s. 2, provides: "The Department shall use available grants and federal funds to implement G.S. 131E-128.5 as enacted in this act."

§ 131E-129. Penalties.

(a) Violations classified. The Department shall impose an administrative penalty in accordance with provisions of this Part on any facility's licensee which is found to be in violation of the requirements of G.S. 131E-117 or applicable State and federal laws and regulations. Citations issued for violations shall be classified according to the nature of the violation as follows:

(1) "Type A Violation" means a violation by a facility's licensee of the regulations, standards, and requirements set forth in G.S. 131E-117, or applicable State or federal laws and regulations governing the licensure or certification of a facility which results in death or serious physical harm, or results in substantial risk that death or serious physical harm will occur. Type A Violations shall be abated or eliminated immediately. The Department shall require an immediate plan of correction for each Type A Violation. The person making the findings shall do the following:
    a. Orally and immediately inform the administrator of the facility of the specific findings and what must be done to correct them and set a date by which the violation must be corrected;
    b. Within 10 working days of the investigation, confirm in writing to the administrator the information provided orally under sub-subdivision a. of this subdivision; and
    c. Provide a copy of the written confirmation required under sub-subdivision b. of this subdivision to the Department.

The Department shall impose a civil penalty in an amount not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000) for each Type A Violation.

(2) "Type B Violation" means a violation by a facility's licensee of the regulations, standards and requirements set forth in G.S. 131E-117 or applicable State or federal laws and regulations governing the licensure or certification of a facility which presents a direct relationship to the health, safety, or welfare of any resident, but which does not result in substantial risk that death or serious physical harm will occur. The Department shall require a plan of correction for each Type B Violation and may require the facility to establish a specific plan of correction within a specific time period to address the violation.

(b) Penalties for failure to correct violations within time specified.

(1) Where a facility's licensee has failed to correct a Type A Violation, the Department shall assess the facility's licensee a civil penalty in the amount of up to five hundred dollars ($500.00) for each day that the deficiency continues beyond the time specified in the plan of correction approved by the Department or its authorized representative. The Department or its authorized representative shall ensure that the violation has been corrected.

(2) Where a facility's licensee has failed to correct a Type B Violation within the time specified for correction by the Department or its authorized representative, the Department shall assess the facility's licensee a civil penalty in the amount of up to two hundred dollars ($200.00) for each day that the deficiency continues beyond the time specified in the plan of correction approved by the Department or its authorized representative without just reason for such failure. The Department or its authorized representative shall ensure that the violation has been corrected.

(3) The Department shall impose a civil penalty on a facility's licensee which is treble the amount assessed under subdivision (1) of subsection (a) when a facility under the management, ownership, or control of that same licensee has received a citation and paid a penalty for violating the same specific provision of a statute or regulation for which the facility's licensee has received a citation during the previous 12 months. The counting of the 12-month period shall be tolled during any time when the facility is being operated by a court-appointed temporary manager pursuant to Article 13 of this Chapter.

(c) Factors to be considered in determining amount of initial penalty. In determining the amount of the initial penalty to be imposed under this section, the Department shall consider the following factors:

(1) The gravity of the violation, including the fact that death or serious physical harm to a resident has resulted; the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(1a) The gravity of the violation, including the probability that death or serious physical harm to a resident will result; the severity of the potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(1b) The gravity of the violation, including the probability that death or serious physical harm to a resident may result; the severity of the potential harm, and the extent to which the provisions of the applicable statutes or regulations were violated;

(2) The reasonable diligence exercised by the licensee to comply with G.S. 131E-256 and G.S. 131E-265 and other applicable State and federal laws and regulations;

(2a) Efforts by the licensee to correct violations;
(3) The number and type of previous violations committed by the licensee within the past 36 months;
(4) The amount of assessment necessary to insure immediate and continued compliance; and
(5) The number of patients put at risk by the violation.

(c1) The facts found to support the factors in subsection (c) of this section shall be the basis in determining the amount of the penalty. The Secretary shall document the findings in written record and shall make the written record available to all affected parties including:
(1) The penalty review committee;
(2) The local department of social services who is responsible for oversight of the facility involved;
(3) The licensee involved;
(4) The residents affected; and
(5) The family members or guardians of the residents affected.

(c2) Local county departments of social services and Division of Health Service Regulation personnel shall submit proposed penalty recommendations to the Department within 45 days of the citation of a violation.

(d) The Department shall impose a civil penalty on any facility's licensee which refuses to allow an authorized representative of the Department to inspect the premises and records of the facility.

(e) Any facility's licensee wishing to contest a penalty shall be entitled to an administrative hearing as provided in the Administrative Procedure Act, Chapter 150B of the General Statutes. At least the following specific issues shall be addressed at the administrative hearing:
(1) The reasonableness of the amount of any civil penalty assessed, and
(2) The degree to which each factor has been evaluated pursuant to subsection (c) of this section to be considered in determining the amount of an initial penalty.

If a civil penalty is found to be unreasonable or if the evaluation of each factor is found to be incomplete, the hearing officer may recommend that the penalty be adjusted accordingly.

(f) The Secretary may bring a civil action in the superior court of the county wherein the violation occurred to recover the amount of the administrative penalty whenever a facility's licensee:
(1) Which has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of the penalty; or
(2) Which has requested an administrative hearing fails to pay the penalty within 60 days after receipt of a written copy of the decision as provided in G.S. 150B-36.

(g) The penalty review committee established pursuant to G.S. 131D-34(h) shall review administrative penalties assessed pursuant to this section.

(g1) In lieu of assessing an administrative penalty, the Secretary may order a facility to provide staff training if:
(1) The cost of training does not exceed one thousand dollars ($1,000);
(2) The penalty would be for the facility's only violation within a 12-month period preceding the current violation and while the facility is under the same management; and
(3) The training is:
    a. Specific to the violation;
    b. Approved by the Department of Health and Human Services; and
    c. Taught by someone approved by the Department and other than the provider.

(h) The Department shall not assess an administrative penalty against a facility under this section if a civil monetary penalty has been assessed for the same violation under federal enforcement laws and regulations.

(i) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1987, c. 600, s. 2; 1989, c. 556, s. 2; 1993, c. 390, s. 2; 1995, c. 396, s. 1; 1995 (Reg. Sess., 1996), c. 602, s. 2; 1997-431, s. 2; 1997-443, s. 11A.122; 1998-215, s. 78(b); 2007-182, s. 1.1.)

Effect of Amendments. — Session Laws 2007-182, s. 1.1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facilities Services" in subsection (c2).

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ 131E-130. First available bed priority for certain nursing home patients.

(a) If a patient is temporarily absent, for no more than 15 days, from a nursing home to obtain medical treatment at a hospital other than a State mental hospital, the nursing home; (i) shall provide the patient with the first bed available at or after the time the nursing home receives written notification of the specific date of discharge from the hospital; and (ii) shall grant the patient priority of admission over applicants for admission to the nursing home.

The duration of the temporary absence shall be calculated from the day of the patient's admission to a hospital until the date the nursing home receives written notice of the specific date of discharge.

This subsection shall not apply in instances in which the patient's treatment can no longer be provided by the nursing home upon re-admission.

(b) If the Department finds that a nursing home has violated the provisions of subsection (a) of this section, the Department may assess a civil penalty of fifty dollars ($50.00) a day, up to a maximum of one thousand five hundred dollars ($1,500), against the nursing home, for each violation.

The clear proceeds of penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) The provisions of Chapter 150B of the General Statutes that govern contested cases apply to appeals from Department action pursuant to this section. (1987 (Reg. Sess., 1988), c. 1080, s. 1; 1998-215, s. 79.)

§ 131E-131. Rule-making authority; enforcement.

The Commission shall adopt rules necessary for the implementation of this Part.

The Department shall enforce the rules adopted by the Commission to implement this Part. (1993, c. 499, s. 2.)

§§ 131E-132 through 131E-134: Reserved for future codification purposes.

Part 3. Home Care Agency Licensure Act.

§ 131E-135. Title; purpose.

(a) This Part shall be known as "Home Care Agency Licensure Act."

(b) The purpose of this Part is to establish licensing requirements for home care agencies. (1983, c. 775, s. 1; 1991, c. 59, s. 1; c. 761, s. 34.)

Editor's Note. — Session Laws 2006-194, s. 1, provides: "The Department of Health and Human Services, Division of Medical Assistance, shall implement a pilot program to evaluate the use of telemonitoring equipment in home and community based services. As determined by the Division, the Department shall provide remuneration to home care agencies and other providers for participation in the pilot program. The pilot program shall be implemented by October 1, 2006, and shall evaluate the use of telemonitoring equipment as a tool to improve the health of home and community based recipients through increased monitoring and responsiveness, and resulting in increased stabilization rates and decreased hospitalization rates. The evaluation must include a representative number of older adults. The Department shall report to the Study Commission on Aging by August 1, 2007. The report shall include findings and recommendations on the cost-effectiveness of telemonitoring and the benefits to individuals and health care providers." Session Laws 2006-66, s. 10.9C authorized a similar study.

Session Laws 2006-194, s. 2, as amended by Session Laws 2007-125, s. 1, provides: "Beginning January 1, 2007, and for a period of two years thereafter, the Department of Health and Human Services shall not issue any licenses for new home care agencies that intend to offer in-home aide services. This shall not restrict the Department from issuing licenses to certified home health agencies that intend to offer in-home aide services or to agencies that need a new license for an existing home care agency being acquired. This will allow the Department more time to work with existing home care agencies to assure compliance with the newly adopted home care rules."

§ 131E-136. Definitions.

As used in this Part, unless otherwise specified:

(1) "Commission" means the North Carolina Medical Care Commission.

(1a) "Geographic service area" means the geographic area in which a licensed agency provides home care services.

(2) "Home care agency" means a private or public organization that provides home care services.

(2a) "Home care agency director" means the person having administrative responsibility for the operation of the licensed agency site.

(2b) "Home care client" means an individual who receives home care services.

(3) "Home care services" means any of the following services and directly related medical supplies and appliances, which are provided to an individual in a place of temporary or permanent residence used as an individual's home:

a. Nursing care provided by or under the supervision of a registered nurse;

b. Physical, occupational, or speech therapy, when provided to an individual who also is receiving nursing services, or any other of these therapy services, in a place of temporary or permanent residence used as the individual's home;

c. Medical social services;

d. In-home aide services that involve hands-on care to an individual;

e. Infusion nursing services; and

f. Assistance with pulmonary care, pulmonary rehabilitation or ventilation.

The term does not include: health promotion, preventative health and community health services provided by public health departments; maternal and child health services provided by public health departments, by employees of the Department of Health and Human Services under G.S. 130A-124, or by developmental evaluation centers under contract with the Department of Health and Human Services to provide services under G.S. 130A-124; hospitals licensed under Article 5 of Chapter 131E of the General Statutes when providing follow-up care initiated to patients within six months after their discharge from the hospital; facilities and programs operated under the authority of

G.S. 122C and providing services within the scope of G.S. 122C; schools, when providing services pursuant to Article 9 of Chapter 115C; the practice of midwifery by a person licensed under Article 10A of Chapter 90 of the General Statutes; hospices licensed under Article 10 of Chapter 131E of the General Statutes when providing care to a hospice patient; an individual who engages solely in providing his own services to other individuals; incidental health care provided by an employee of a physician licensed to practice medicine in North Carolina in the normal course of the physician's practice; or nursing registries if the registry discloses to a client or the client's responsible party, before providing any services, that (i) it is not a licensed home care agency, and (ii) it does not make any representations or guarantees concerning the training, supervision, or competence of the personnel provided.

(4) "Home health agency" means a home care agency which is certified to receive Medicare and Medicaid reimbursement for providing nursing care, therapy, medical social services, and home health aide services on a part-time, intermittent basis as set out in G.S. 131E-176(12), and is thereby also subject to Article 9 of Chapter 131E. (1971, c. 539, s. 1; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1022, s. 4; 1987, c. 34, s. 1; 1991, c. 59, s. 1; c. 761, s. 34; 1997-443, s. 11A.90; 2005-276, s. 10.40A(m).)

§ 131E-137. Services to be provided in all counties.

(a) Every county shall provide part-time, intermittent home care nursing services, and at least one of the following home care services: part-time, intermittent physical therapy, occupational therapy, speech therapy, medical social work, or home health aide services.

(b) Repealed by Session Laws 1991, c. 59, s. 1.

(c) These services shall be provided by a home care agency licensed under this Part. The county may provide these services by contract with another home care agency in another county.

(d) Repealed by Session Laws 1985, c. 8, s. 1. (1977, 2nd Sess., c. 1184; 1979, c. 754, s. 1; 1983, c. 775, s. 1; 1985, c. 8; 1991, c. 59, s. 1; c. 761, s. 34.)

§ 131E-138. Licensure requirements.

(a) No person or governmental unit shall operate a home care agency without a license obtained from the Department. Nothing in this Part shall be construed to extend or modify the licensing of individual health professionals by the licensing boards for their professions or to create any new professional license category.

(b) Repealed by Session Laws 1991, c. 59, s. 1.

(c) An application for a license shall be available from the Department, and each application filed with the Department shall contain all information requested by the Department. A license shall be granted to the applicant upon a determination by the Department that the applicant has complied with the provisions of this Part and the rules promulgated by the Commission under this Part. The Department shall charge the applicant a nonrefundable annual license fee in the amount of three hundred fifty dollars ($350.00).

(d) The Department shall renew the license in accordance with the rules of the Commission.

(e) Each license shall be issued only for the premises and persons named in the license and shall not be transferable or assignable except with the written approval of the Department.

(f) The license shall be posted in a conspicuous place on the licensed premises.

(g) The Commission shall adopt rules to ensure that a home care agency shall be deemed to meet the licensure requirements and issued a license without further review or inspection if: (i) the agency is already certified or accredited by the Joint Commission on Accreditation of Health Care Organizations, National League for Nursing, National Home Caring Council, North Carolina Accreditation Commission for In-Home Aide Services, or other entities recognized by the Commission and (ii) the agency is certified or accredited for all of the home care services that it provides; or (iii) in the case of continuing care retirement communities licensed by the North Carolina Department of Insurance under Article 64 of Chapter 58 which also have nursing beds licensed by the Department of Health and Human Services under Article 6 of Chapter 131E, the Department certifies, as part of its licensure review or survey of the nursing beds, that the facility also meets all of the rules and regulations adopted by the Commission pursuant to this Part. The Department may, at its discretion, determine the frequency and extent of the review and inspection of home health agencies already certified as meeting federal requirements, but not more frequently than on an annual basis for routine reviews. (1971, c. 539, s. 1; 1973, c. 476, s. 128; 1983, c. 775, s. 1; 1991, c. 59, s. 1; c. 761, s. 34; 1997-443, s. 11A.118(a); 2003-284, s. 34.4(a); 2005-276, s. 41.2(d).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

§ 131E-138.1. Licensure fees for nursing beds and adult care home beds in continuing care retirement communities.

The Department shall charge continuing care retirement communities licensed under Article 64 of Chapter 58 of the General Statutes that have nursing home beds or adult care home beds licensed by the Department a nonrefundable annual base license fee in the amount of four hundred fifty dollars ($450.00) plus a nonrefundable annual per-bed fee in the amount of twelve dollars and fifty cents ($12.50). (2003-284, s. 34.9(a); 2005-276, s. 41.2(i).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

§ 131E-139. Adverse action on a license.

(a) The Department may suspend, revoke, annul, withdraw, recall, cancel or amend a license when there has been a substantial failure to comply with the provisions of this Part or the rules promulgated under this Part.

(b) The provisions of Chapter 150B of the General Statutes, The Administrative Procedure Act, shall govern all administrative action and judicial review in cases where the Department has taken the action described in subsection (a). (1971, c. 539, s. 1; 1973, c. 476, s. 128; 1983, c. 775, s. 1; 1987, c. 827, s. 1; 1991, c. 59, s. 1; c. 761, s. 34.)

§ 131E-140. Rules and enforcement.

(a) The Commission may adopt, amend and repeal all rules necessary for the implementation of this Part and Part 3A of Article 6 of this Chapter. Provided, these rules shall not extend, modify, or limit the licensing of individual health professionals by their respective licensing boards; nor shall these rules in any way be construed to extend the appropriate scope of practice of any individual health care provider. Rules authorized under this section include rules:

(1) That recognize the different types of home care services and shall adopt specific requirements for the provision of each type of home care service.

(2) To establish staff qualifications, including professional requirements for home care agency staff. The rules may require that one or more staff of an agency be either licensed or certified. The rules may establish minimum training and education qualifications for staff and may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the North Carolina General Statutes provided that the professional board evaluates applicants on a basis that protects the public health, safety, or welfare.

(3) For the purpose of ensuring effective supervision of in-home aide staff and timely provision of services, the Commission shall adopt rules defining geographic service areas for in-home aide services and staffing qualifications for licensed home care agencies.

(4) Prohibiting licensed home care agencies from hiring individuals listed on the Health Care Personnel Registry in accordance with G.S. 131E-256(a)(1).

(5) Requiring applicants for home care licensure to receive training in the requirements for licensure, the licensure process, and the rules pertaining to the operation of a home care agency.

(a1) The Commission shall adopt rules defining the scope of permissible advertising and promotional practice by home care agencies.

(b) The Department shall enforce the rules adopted or amended by the Commission with respect to home care agencies and shall conduct an inspection of each agency at least every three years. (1971, c. 539, s. 1; 1973, c. 476, s. 128; 1983, c. 775, s. 1; 1991, c. 59, s. 1; c. 761, s. 34; 2005-276, ss. 10.40A(a), (o).)

§ 131E-141. Inspection.

(a) The Department shall inspect home care agencies in accordance with rules adopted by the Commission to determine compliance with the provisions of this Part and the rules established by the Commission.

(b) Notwithstanding the provisions of G.S. 8-53, "Communications between physician and patient," or any other provision of law relating to the confidentiality of communications between physician and patient, the representatives of the Department who make these inspections may review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been clients of the agency being inspected unless that client objects in writing to review of that client's records. Physicians, psychiatrists, nurses, and anyone else involved in giving treatment at or through an agency who may be interviewed by representatives of the Department may disclose to these representatives information related to any inquiry, notwithstanding the existence of the physician-patient privilege in G.S. 8-53, "Communication between physician and patient," or any other rule of law; provided the client has not made written objection to this disclosure. The agency, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information to the Department. Any confidential or privileged information received from review of records or interviews, except as noted in G.S. 131E-124(c), shall be kept confidential by the Department and not disclosed without written authorization of the client or legal representative, or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning an agency without the consent of that person. Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1, "'Public records' defined." Prior to releasing any information or allowing any inspections referred to in this section, the client must be advised in writing by the licensed agency that the client has the right to object in writing to release of information or review of the client's records and that by an objection in writing the client may prohibit the inspection or release of the records.

(c) An agency must provide each client with a written notice of the Division of Health Service Regulation hotline number in advance of furnishing care to the client or during the initial evaluation visit before the initiation of services. (1971, c. 539, s. 1; 1973, c. 476, s. 128; 1981, c. 586, s. 2; 1983, c. 775, s. 1; 1991, c. 59, s. 1; c. 761, s. 34; 1999-113, s. 4; 2005-276, s. 10.40A(b); 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subsection (c).

§ 131E-141.1. Penalties for violation.

Any person who knowingly and willfully establishes, conducts, manages or operates any home care agency without a license is guilty of a Class 3 misdemeanor and upon conviction is liable only for a fine of not more than five hundred dollars ($500.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. (1991, c. 59, s. 1; c. 761, s. 34; 1993, c. 539, s. 961; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 131E-142. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department shall, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management or operation of a home care agency without a license.

(b) If any person shall hinder the proper performance of duty of the Secretary or a representative in carrying out the provisions of this Part, the Secretary may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance irrespective of all other remedies at law.

(c) Actions under this section shall be in accordance with Article 37 of Chapter 1 of the General Statutes and Rule 65 of the Rules of Civil Procedure. (1983, c. 775, s. 1; 1991, c. 59, s. 1; c. 761, s. 34.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found at G.S. 1A-1.

§ 131E-143. Smoking prohibited; penalty.

(a) A home care agency shall prohibit its employees from smoking while providing services to an individual in the individual's home. The home care agency shall inform its clients that employees of the agency are prohibited from smoking in a client's home. As used in this section:

(1) "Employee" includes an individual under contract with the home care agency to provide home care services.

(2) "Smoking" means the use or possession of any lighted cigar, cigarette, pipe, or other lighted smoking product.

(b) The Department may impose an administrative penalty not to exceed two hundred dollars ($200.00) for each violation on any person who owns, manages, operates, or otherwise controls the home care agency and fails to comply with this section. A violation of this section constitutes a civil offense only and is not a crime. (2007-459, s. 4.)

Editor's Note. — Session Laws 2007-459, s. 5, made this section effective October 1, 2007, and applicable to violations committed on or after that date.

Session Laws 2007-459, s. 5, further provides: "G.S. 131D-4.4(c)(3) 131E-114.3(b)(3), and 122C-6(b)(3), as enacted by this act, apply to individuals admitted to the facility on or after October 1, 2007. G.S. 130A-493(c)(2), as enacted by this act, applies to individuals admitted to the hospital on or after January 1, 2008."

Part 3A. Home Care Clients' Bill of Rights.

§ 131E-144.1. Legislative intent.

It is the intent of the General Assembly to support an individual's desire to live at home and receive home care services. (2005-276, s. 10.40A(n).)

§ 131E-144.2. Definitions.

Unless otherwise specified, the definitions that are provided in Part 3 of Article 6 of this Chapter apply in this Part. (2005-276, s. 10.40A(n).)

§ 131E-144.3. Declaration of home care clients' rights.

Each client of a home care agency shall have the following rights:

(1) To be informed and participate in his or her plan of care.

(2) To be treated with respect, consideration, dignity, and full recognition of his or her individuality and right to privacy.

(3) To receive care and services that are adequate, appropriate, and in compliance with relevant federal and State laws and rules and regulations.

(4) To voice grievances about care and not be subjected to discrimination or reprisal for doing so.

(5) To have his or her personal and medical records kept confidential and not be disclosed without appropriate written consent.

(6) To be free of mental and physical abuse, neglect, and exploitation.
(7) To receive a written statement of services provided by the agency and the charges the client is liable for paying.
(8) To be informed of the process for acceptance and continuance of service and eligibility determination.
(9) To accept or refuse services.
(10) To be informed of the agency's on-call service.
(11) To be informed of supervisory accessibility and availability.
(12) To be advised of the agency's procedures for discharge.
(13) To receive a reasonable response to his or her requests of the agency.
(14) To be notified within 10 days when the agency's license has been revoked, suspended, canceled, annulled, withdrawn, recalled, or amended.
(15) To be advised of the agency's policies regarding patient responsibilities. (2005-276, s. 10.40A(n).)

§ 131E-144.4. Notice to client.

(a) During the agency's initial evaluation visit or before furnishing services, a home care agency shall provide each client with the following:
(1) A copy of the declaration of home care clients' rights.
(2) A copy of the agency's policies regarding client responsibilities as it relates to safety and care plan compliance.
(3) The address and telephone number for information, questions, or complaints about services provided by the agency.
(4) The address and telephone number of the section of the Department of Health and Human Services responsible for the enforcement of the provisions of this Part.

(b) Receipts for the declaration of home care clients' rights and contact information required in this section shall be signed by the client and shall be retained in the agency's files. (2005-276, s. 10.40A(n).)

§ 131E-144.5. Implementation.

Responsibility for implementing the provisions of this Part shall rest with the home care agency director. Each agency shall provide appropriate training to implement this Part. (2005-276, s. 10.40A(n).)

§ 131E-144.6. Enforcement and investigation.

(a) The Department of Health and Human Services shall be responsible for enforcing the provisions of this Part. The Department shall investigate complaints made to it and reply within a reasonable period of time, not to exceed 60 days.

(a1) When the Department of Health and Human Services receives a complaint alleging a violation of the provisions of this Part pertaining to client care or client safety, the Department shall initiate an investigation as follows:
(1) Immediately upon receipt of the complaint if the complaint alleges a life-threatening situation.
(2) Within 24 hours if the complaint alleges abuse of a client as defined by G.S. 131D-20(1).
(3) Within 48 hours if the complaint alleges neglect of a client as defined by G.S. 131D-20(8).
(4) Within two weeks in all other situations.

The investigation shall be completed within 30 days. The requirements of this section are in addition to and not in lieu of any investigatory and reporting requirements for health care personnel pursuant to Article 15 of this Chapter, or for adult protective services pursuant to Article 6 of Chapter 108A of the General Statutes.

(b) A home care agency shall investigate, within 72 hours, complaints made to the agency by a home care client or the client's family and must document both the existence of the complaint and the resolution of the complaint. (2005-276, s. 10.40A(n).)

§ 131E-144.7. Confidentiality.

(a) The Department of Health and Human Services may inspect home care clients' medical records maintained at the agency when necessary to investigate any alleged violation of this Part.

(b) The Department shall maintain the confidentiality of all persons who register complaints with the Department and of all medical records inspected by the Department. A person who has filed a complaint shall have access to information about a complaint investigation involving a specific home care client if written authorization is obtained from the client or legal representative. (2005-276, s. 10.40A(n).)

Part 4. Ambulatory Surgical Facility Licensure.

§ 131E-145. Title; purpose.

(a) This Part shall be known as the "Ambulatory Surgical Facility Licensure Act."

(b) The purpose of this Part is to provide for the development, establishment and enforcement of basic standards:

(1) For the care and treatment of individuals in ambulatory surgical facilities; and

(2) For the maintenance and operation of ambulatory surgical facilities so as to ensure safe and adequate treatment of such individuals in ambulatory surgical facilities. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1.)

CASE NOTES

A certificate of need is not dependent upon the requirement for a license; in fact, the statutes governing licensure of ambulatory surgical facilities (this section et seq.) and those governing certificates of need for new institutional health services (G.S. 131E-175 et seq.) are independent provisions. Christenbury Surgery Ctr. v. North Carolina Health & Human Servs., 138 N.C. App. 309, 531 S.E.2d 219, 2000 N.C. App. LEXIS 611 (2000).

§ 131E-146. Definitions.

As used in this Part, unless otherwise specified:

(1) "Ambulatory surgical facility" means a facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room as defined in subdivision (1c) of this section or at least one gastrointestinal endoscopy room as defined in subdivision (1b) of this section and at least one designated recovery room, have available the necessary equipment

and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part 4, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1a) and which are performed in a physician or dentist's office does not make that office an ambulatory surgical facility.

(1a) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery or gastrointestinal endoscopy, to be medically unnecessary.

(1b) "Gastrointestinal endoscopy room" means a room used for the performance of procedures that require the insertion of a flexible endoscope into a gastrointestinal orifice to visualize the gastrointestinal lining and adjacent organs for diagnostic or therapeutic purposes.

(1c) "Operating room" means a room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room.

(2) "Commission" means the North Carolina Medical Care Commission. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1064, s. 1; 1997-456, s. 49(a); 2001-242, s. 1; 2005-346, s. 4.)

Editor's Note. — Session Laws 1997-456, s. 49(b), effective August 29, 1997, provides: "This section conforms the definition of the term 'ambulatory surgical facility' in the Ambulatory Surgical Facility Licensure Act to the definition of the same term in G.S. 131E-176, to reflect the amendment made to that statute by Section 2 of Chapter 7 of the 1993 Session Laws. However, ambulatory surgical facilities with only one operating room developed prior to the effective date of Chapter 7 of the 1993 Session Laws may still be licensed as if this section had not been enacted."

Session Laws 2001-242, s. 5, provides: "This act is effective when it becomes law [June 23, 2001]. This act shall not apply to any project which was not a new institutional health service as defined in G.S. 131E-176(16) prior to the effective date of this act and for which there has been a capital expenditure exceeding fifty thousand dollars ($50,000) or there was a legally binding obligation for a capital expenditure exceeding fifty thousand dollars ($50,000) in effect on or before the effective date of this act and which was reasonably expected to be completed by December 31, 2002. A facility or office that was not licensed as an ambulatory surgical facility prior to the effective date of this act shall not become an ambulatory surgical facility by virtue of the amendment set forth in Sections 1 and 2 of this act [which amended G.S. 131E-146 and 131E-176] and may not be licensed as an ambulatory surgical facility under Part D of Article 6 of Chapter 131E of the General Statutes without a certificate of need."

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

§ 131E-147. Licensure requirement.

(a) No person shall operate an ambulatory surgical facility without a license obtained from the Department.

(b) Applications shall be available from the Department, and each application filed with the Department shall contain all necessary and reasonable information that the Department may by rule require. A license shall be granted to the applicant upon a determination by the Department that the applicant has complied with the provisions of this Part and the rules promulgated by the Commission under this Part. The Department shall charge the applicant a nonrefundable annual base license fee in the amount of seven hundred dollars ($700.00) plus a nonrefundable annual per-operating room fee in the amount of fifty dollars ($50.00).

(c) A license to operate an ambulatory surgical facility shall be annually renewed upon the filing and the department's approval of a renewal application. The renewal application shall be available from the Department and shall contain all necessary and reasonable information that the Department may by rule require.

(d) Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable except with the written approval of the Department.

(e) Licenses shall be posted in a conspicuous place on the licensed premises. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1; 2003-284, s. 34.5(a); 2005-276, s. 41.2(e).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

CASE NOTES

Expansion Required License But Not New Certificate of Need. — The defendant/center was not required to obtain a separate certificate of need to develop additional operating rooms, a recovery room, and necessary ancillary space at a second site within the service area for which it already held a certificate of need although it conceded it needed an additional license. The defendant's proposal was not a "new institutional health service" requiring a certificate of need, but rather, an expansion of an existing health service facility within the limitations permitted by statute. Christenbury Surgery Ctr. v. North Carolina Health & Human Servs., 138 N.C. App. 309, 531 S.E.2d 219, 2000 N.C. App. LEXIS 611 (2000).

§ 131E-148. Adverse action on a license.

(a) Subject to subsection (b), the Department is authorized to deny a new or renewal application for a license, and to amend, recall, suspend or revoke an existing license upon a determination that there has been a substantial failure to comply with the provisions of this Part or the rules promulgated under this Part.

(b) The provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act, shall govern all administrative action and judicial review in cases where the Department has taken the action described in subsection (a). (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1; 1987, c. 827, s. 1.)

§ 131E-149. Rules and enforcement.

(a) The Commission is authorized to adopt, amend and repeal all rules necessary for the implementation of this Part. These rules shall be no stricter than those issued by the Commission under G.S. 131E-79 of the Hospital Licensing Act.

(b) The Department shall enforce the rules adopted or amended by the Commission with respect to ambulatory surgical facilities. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1.)

§ 131E-150. Inspections.

(a) The Department shall make or cause to be made inspections of ambulatory surgical facilities as necessary. The Department is authorized to delegate to a State officer, agent, board, bureau or division of State government the authority to make inspections according to the rules adopted by the Commission. The Department may revoke this delegated authority in its discretion.

(b) Notwithstanding the provisions of G.S. 8-53, "Communications between physician and patient," or any other provision of law relating to the confidentiality of communications between physician and patient, the representatives of the Department who make these inspections may review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been patients of the facility being inspected unless that patient objects in writing to review of that patient's records. Physicians, psychologists, psychiatrists, nurses, and anyone else involved in giving treatment at or through a facility who may be interviewed by representatives of the Department may disclose to these representatives information related to an inquiry, notwithstanding the existence of the physician-patient privilege in G.S. 8-53, "Communication between physician and patient," or any other rule of law; Provided the patient has not made written objection to this disclosure. The facility, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information to the Department. Any confidential or privileged information received from review of records or interviews shall be kept confidential by the Department and not disclosed without written authorization of the patient or legal representative, or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning a facility without the consent of that person. Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1, "'Public records' defined." Prior to releasing any information or allowing any inspections referred to in this section, the patient must be advised in writing by the facility that the patient has the right to object in writing to this release of information or review of the records and that by objecting in writing, the patient may prohibit the inspection or release of the records. (1977, 2nd Sess., c. 1214, s. 1; 1981, c. 586, s. 5; 1983, c. 775, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Posting of sign concerning right to object to release of information is insufficient notice. — See Opinion of Attorney General to Mr. I. O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981), rendered under former G.S. 131B-7.

§ 131E-151. Penalties.

A person who owns in whole or in part or operates an ambulatory surgical facility without a license is guilty of a Class 3 misdemeanor, and upon conviction will be subject only to a fine of not more than fifty dollars ($50.00) for the first offense and not more than five hundred dollars ($500.00) for each subsequent offense. Each day of continuing violation after conviction is considered a separate offense. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1; 1993, c. 539, s. 962; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 131E-152. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may, in the manner provided by law, maintain an action in the name of the State for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management or operation of an ambulatory surgical facility without a license.

(b) If any person shall hinder the proper performance of duty of the Secretary or a representative in carrying out the provisions of this Part, the Secretary may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance, irrespective of all other remedies at law.

(c) Actions under this section shall be in accordance with Article 37 of Chapter 1 of the General Statutes and Rule 65 of the Rules of Civil Procedure. (1977, 2nd Sess., c. 1214, s. 1; 1983, c. 775, s. 1.)

§§ 131E-153, 131E-154: Reserved for future codification purposes.

Part 5. Nursing Pool Licensure Act.

§ 131E-154.1. Title; purpose.

(a) This Part shall be known as "Nursing Pool Licensure Act".

(b) The purpose of this Part is to establish licensing requirements for nursing pools. (1989, c. 744, s. 1.)

Editor's Note. — Session Laws 1989, c. 744, s. 3, provided in part: "Nothing in this act obligates the General Assembly to appropriate funds to implement its terms. The Department of Human Resources shall implement this act to the extent that funds are available within the Department's budget or are appropriated by the General Assembly. The Department of Human Resources shall report to the Joint Legislative Commission on Governmental Operations by April 1, 1990 on any funds expended in the implementation of this act and on projected costs for the full implementation of this act."

§ 131E-154.2. Definitions.

As used in this Part, unless the context clearly implies otherwise:

(1) "Commission" means the North Carolina Medical Care Commission.

(2) "Department" means the Department of Health and Human Services.

(3) "Health Care Facility" means a hospital, psychiatric facility; rehabilitation facility; long-term care facility; home health agency; intermediate care facility for the mentally retarded; chemical dependency treatment facility; and ambulatory surgical facility.

(4) "Nursing pool" means any person, firm, corporation, partnership, or association engaged for hire in the business of providing or procuring temporary employment in health care facilities for nursing personnel, including nurses, nursing assistants, nurses aides, and orderlies. "Nursing pool" does not include an individual who engages solely in providing his own services on a temporary basis to health care facilities.

(5) "Trauma" means acute physical injury to the human body that is judged, by the use of standardized field triage criteria (anatomic, physiologic, or mechanism of injury), to create a significant risk of mortality or major morbidity. (1989, c. 744, s. 1; 1993, c. 336, s. 2; 1997-443, s. 11A.118(a).)

§ 131E-154.3. Licensing.

(a) No person shall operate or represent himself to the public as operating a nursing pool without obtaining a license from the Department.

(b) The Department shall provide applications for nursing pool licensure. Each application filed with the Department shall contain all information requested. A license shall be granted to the applicant upon a determination by the Department that the applicant has complied with the provisions of this Part and with the rules adopted by the Commission. Each license shall be issued only for the premises and persons named, shall not be transferable or assignable except with the written approval of the Department, and shall be posted in a conspicuous place on the licensed premises.

(c) The Department shall renew the license in accordance with this Part and with rules adopted pursuant to it.

(d) Nursing pools administered by health care facilities and agencies licensed under Article 5 or 6 of Chapter 131E of the General Statutes shall not be required to be separately licensed under this Article. However, any facility or agency exempted from licensure as a nursing pool under this subsection shall be subject to rules adopted pursuant to this Article. (1989, c. 744, s. 1.)

§ 131E-154.4. Rules and enforcement.

(a) The Commission shall adopt, amend, and repeal all rules necessary for the implementation of this Part. These rules shall include the following requirements:

(1) The nursing pool shall document that each employee who provides care meets the minimum licensing, training, and continuing education standards for the position in which the employee will be working;

(2) The nursing pool shall comply with all other pertinent regulations relating to the health and other qualifications of personnel;

(3) The nursing pool shall carry general and professional liability insurance to insure against the loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in the provision of health care services by the nursing pool or its employees;

(4) The nursing pool shall have written administrative and personnel policies to govern the services that it provides. These policies shall include those concerning patient care, personnel, training and orientation, supervision, employee evaluation, and organizational structure; and

(5) Any other aspects of nursing pool services that may need to be regulated to protect the public.

(b) The Commission shall adopt no rules pertaining to the regulation of charges by the nursing pool or to wages paid by the nursing pool. (1989, c. 744, s. 1.)

§ 131E-154.5. Inspections.

The Department shall inspect all nursing pools that are subject to rules adopted pursuant to this Part in order to determine compliance with the provisions of this Part and with rules adopted pursuant to it. Inspections shall be conducted in accordance with rules adopted by the Commission. (1989, c. 744, s. 1.)

§ 131E-154.6. Adverse action on a license; appeal procedures.

(a) The Department may suspend, revoke, annul, withdraw, recall, cancel, or amend a license when there has been a substantial failure to comply with the provisions of this Part or with the rules adopted pursuant to it.

(b) The provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act, shall govern all administrative action and judicial review in cases in which the Department has taken the action described in subsection (a) of this section. (1989, c. 744, s. 1.)

§ 131E-154.7. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may maintain an action in the name of the State for injunctive relief or other process against any person to restrain or prevent the establishment, conduct, management, or operation of a nursing pool without a license or to restrain or prevent substantial noncompliance with this Part or the rules adopted pursuant to it.

(b) If any person hinders the proper performance of duty of the Department in carrying out the provisions of this Part, the Department may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance. (1989, c. 744, s. 1.)

§ 131E-154.8. Confidentiality.

(a) Notwithstanding G.S. 8-53 or any other law pertaining to confidentiality of communications between physician and patient, in the course of an inspection conducted pursuant to G.S. 131E-154.5:

(1) Department representatives may review any writing or other record concerning the admission, discharge, medication, treatment, medical condition, or history of any person who is or has been a nursing pool patient; and

(2) Any person involved in treating a patient at or through a nursing pool may disclose information to a Department representative unless the patient objects in writing to review of his records or disclosure of the information. A nursing pool shall not release any information or allow any inspections under this section without first informing each affected patient in writing of his right to object to and thus prohibit release of information or review of records pertaining to him.

A nursing pool, its employees, and any other person interviewed in the course of an inspection shall be immune from liability for damages resulting from disclosure of the information to the Department.

(b) The Department shall not disclose:

(1) Any confidential or privileged information obtained under this section unless the patient or his legal representative authorizes disclosure in writing or unless a court of competent jurisdiction orders disclosure; or

(2) The name of anyone who has furnished information concerning a nursing pool without that person's consent.

The Department shall institute appropriate policies and procedures to ensure that unauthorized disclosure does not occur. Any Department employee who willfully discloses this information without appropriate authorization or court order shall be guilty of a Class 3 misdemeanor and, upon conviction, only fined at the discretion of the court but not in excess of five hundred dollars ($500.00).

(c) All confidential or privileged information obtained under this section and the names of all persons providing this information are exempt from Chapter 132 of the General Statutes. (1989, c. 744, s. 1; 1993, c. 539, s. 963; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 131E-154.9 through 131E-154.11: Reserved for future codification purposes.

Part 6. North Carolina New Organizational Vision Award (NC NOVA) Special Licensure Designation.

§ 131E-154.12. Title; purpose.

(a) This Part shall be known as the "North Carolina New Organizational Vision Award (NC NOVA) Special Licensure Designation."

(b) The purpose of this Part is to establish special licensure designation requirements for nursing homes and home care agencies licensed pursuant to this Chapter and adult care homes licensed pursuant to Article 1 of Chapter 131D of the General Statutes. Application for the Special Licensure Designation is voluntary. (2006-104, s. 1.)

Editor's Note. — The preamble to Session Laws 2006-104, provides: "Whereas, 'direct care workers' is a nationally recognized term referring to those paraprofessionals that are employed as nurse aides, personal care aides, personal care attendants, home health aides, in-home aides, habilitation aides, and other assistive personnel who provide hands-on care; and

"Whereas, direct care workers are essential to the provision of care and an enhanced quality of life for long-term care consumers, whether they are receiving services provided in a home or community setting, or in a residential or institutional setting; and

"Whereas, North Carolina, like many states, is experiencing shortages of direct care workers; and

"Whereas, the need to attract and retain greater numbers of employees within this occupational category will continue for the foreseeable future; and

"Whereas, a well-qualified, satisfied, stable, and adequate supply of direct care workers is a shared concern for employers, employees, consumers, families, and private and public payors of long-term care services received in home care agencies, adult care homes, and nursing facilities; and

"Whereas, long-term care trade associations, providers, direct care workers, consumer advocacy organizations, researchers, the Department of Health and Human Services, and The Carolinas Center for Medical Excellence have worked together to develop a voluntary and comprehensive workplace culture change program known as the North Carolina New Organizational Vision Award (NC NOVA) to address known causes of direct care turnover for the purpose of improving the adequacy, stability, satisfaction, and quality of the direct care work; and

"Whereas, NC NOVA has been identified as a potential national model for replication to improve direct care workforce retention through a comprehensive and voluntary workplace culture program by the Institute for the Future of Aging Services, the program office for the national Better Jobs Better Care initiative funded by the Robert Wood Johnson Foundation, and The Atlantic Philanthropies; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2006-104, s. 2(a), provides: "In order to ensure continuity during the initial statewide implementation phase of NC NOVA, The Carolinas Center for Medical Excellence shall be designated as the independent review organization for NC NOVA through December 31, 2010. Beginning in 2009, the Division of Facility Services [now the Division of Health Service Regulation], with approval from the NC NOVA Partner Team, shall implement a competitive bid process to determine an independent review organization for a minimum of five years beginning in 2011."

Session Laws 2006-104, s. 2(b), provides: "During the period of January 1, 2007, through

December 31, 2010, in the event The Carolinas Center for Medical Excellence determines it cannot continue conducting independent reviews, The Carolinas Center for Medical Excellence shall provide the Partner Team with a 12-month written notice of such intent in order to ensure sufficient transition time to select another independent review entity without any disruption of the NC NOVA program."

Session Laws 2006-104, s. 3, made this part effective January 1, 2007.

§ 131E-154.13. Definitions.

The following definitions apply in this Part, unless otherwise specified:

(1) Independent Review Organization. — The organization responsible for the application, review, and determination process for NC NOVA designation.

(2) North Carolina New Organizational Vision Award (NC NOVA). — A special licensure designation for home care agencies and nursing homes licensed pursuant to this Chapter, and adult care homes licensed pursuant to Article 1 of Chapter 131D of the General Statutes, that have been determined through written and on-site review by an independent review organization to have met a comprehensive set of workplace related interventions intended to improve the recruitment and retention, quality, and job satisfaction of direct care staff and the care provided to long-term care clients and residents.

(3) NC NOVA Partner Team. — The entity responsible for developing the criteria and protocols for the NC NOVA special licensure designation. The Partner Team is inclusive of representatives from the following organizations: Association for Home and Hospice Care of North Carolina, Direct Care Workers Association of North Carolina, Duke University Gerontological Nursing Program, Friends of Residents in Long Term Care, North Carolina Assisted Living Association, North Carolina Association of Long Term Care Facilities, North Carolina Association of Non-Profit Homes for the Aging, North Carolina Department of Health and Human Services, North Carolina Foundation for Advanced Health Programs, North Carolina Health Care Facilities Association, The Carolinas Center for Medical Excellence, and the University of North Carolina at Chapel Hill — Institute on Aging.

(4) NC NOVA Provider Information Manual. — The document developed by the NC NOVA Partner Team that specifies the scope of criteria for NC NOVA designation as well as information and procedures pertaining to the application, review, determination, and termination process. (2006-104, s. 1.)

§ 131E-154.14. NC NOVA program established.

(a) The Department of Health and Human Services shall establish the NC NOVA program.

(b) The Department shall adopt rules to implement the NC NOVA program in accordance with the criteria and protocols established by the NC NOVA Partner Team and detailed in the NC NOVA Provider Information Manual.

(c) Any information submitted by applicants or obtained by the independent review organization related to NC NOVA, as well as annual turnover data voluntarily submitted by home care agencies, adult care homes, and nursing facilities for the purposes of assessing statewide turnover trends, shall not be considered a public record under G.S. 132-1.

(d) Any licensed home care agency, adult care home, or nursing home that is determined not to have met the criteria for NC NOVA designation may reapply at intervals specified by the NC NOVA Partner Team and detailed in the NC NOVA Provider Information Manual.

(e) The Department of Health and Human Services, Division of Health Service Regulation, shall issue a NC NOVA special licensure designation document to any licensed home care agency, adult care home, or nursing home that is determined by the independent review organization to have met the criteria for NC NOVA designation. The special licensure designation document shall be in addition to the operating license issued by the Division.

(f) The Division of Health Service Regulation shall issue the NC NOVA special licensure document to successful applicants within 30 days of notification by the independent review organization.

(g) The NC NOVA special licensure designation shall be in effect for a two-year period unless the provider has a change in ownership.

(1) Upon a change in ownership, if the new owner wishes to continue the NC NOVA designation, the new owner must communicate the desire in writing to the independent review organization within 30 days of the effective date of the change of ownership and proceed with an expedited review in accordance with procedures detailed by the NC NOVA Partner Team and included in the NC NOVA Provider Information Manual.
  a. If the new owner continues to meet the NC NOVA criteria, based upon the expedited review, the special licensure designation will remain in effect for the remainder of the two-year period.
  b. If the new owner fails to meet NC NOVA criteria, the special designation document shall be immediately returned to the Division of Health Service Regulation. The new owner may reapply for NC NOVA designation under subsection (e) of this section.

(2) Within 30 days of the effective date of the change of ownership, if the new owner fails to notify the independent review organization in writing of the desire to retain the special licensure designation by undergoing an expedited review, the designation will become null and void, and the special designation document must be immediately returned to the Division of Health Service Regulation. (2006-104, s. 1; 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subsections (e) and (f), and in subdivisions (g)(1)b and (g)(2).

ARTICLE 7.

Regulation of Emergency Medical Services.

§ 131E-155. Definitions.

As used in this Article, unless otherwise specified:

(1) "Ambulance" means any privately or publicly owned motor vehicle, aircraft, or vessel that is specially designed, constructed, or modified and equipped and is intended to be used for and is maintained or operated for the transportation of patients on the streets or highways, waterways or airways of this State.

(2) Repealed by Session Laws 1997-443, s. 11A.129C.

(3) Redesignated as subdivision (13a).

(4) "Commission" means the North Carolina Medical Care Commission.

(5) "Emergency medical dispatcher" means an emergency telecommunicator who has completed an educational program approved by the Department and has been credentialed as an emergency medical dispatcher by the Department.

(6) "Emergency medical services" means services rendered by emergency medical services personnel in responding to improve the health and wellness of the community and to address the individual's need for emergency medical care within the scope of practice as defined by the North Carolina Medical Board in accordance with G.S. 143-514 in order to prevent loss of life or further aggravation of physiological or psychological illness or injury.

(6a) "Emergency medical services instructor" means an individual who has completed educational requirements approved by the Department and has been credentialed as an emergency medical services instructor by the Department.

(6b) "Emergency Medical Services Peer Review Committee" means a panel composed of EMS program representatives to be responsible for analyzing patient care data and outcome measures to evaluate the ongoing quality of patient care, system performance, and medical direction within the EMS system. The committee membership shall include physicians, nurses, EMS personnel, medical facility personnel, and county government officials. Review of medical records by the EMS Peer Review Committee is confidential and protected under G.S. 143-518. An EMS Peer Review Committee, its members, proceedings, records and materials produced, and materials considered shall be afforded the same protections afforded Medical Review Committees, their members, proceedings, records, and materials under G.S. 131E-95.

(7) "Emergency medical services personnel" means all the personnel defined in subdivisions (5), (6a), (8), (9), (10), (12), (13), (14), and (15) of this section.

(8) "Emergency medical services-nurse practitioner" means a registered nurse who is licensed to practice nursing in North Carolina and approved to perform medical acts by the North Carolina Medical Board and the North Carolina Board of Nursing. Upon successful completion of an orientation program conducted under the authority of the medical director and approved by the Department, emergency medical services-nurse practitioners shall be approved by the medical director to issue instructions to EMS personnel. These instructions shall be in accordance with protocols approved by the EMS system and Office of Emergency Medical Services and under the direction of the medical director.

(9) "Emergency medical services-physician assistant" means a physician assistant who is licensed by the North Carolina Medical Board. Upon successful completion of an orientation program conducted under the authority of the medical director and approved by the Department, emergency medical services-physician assistants shall be approved by the medical director to issue instructions to EMS personnel. These instructions shall be in accordance with protocols approved by the EMS system and Office of Emergency Medical Services and under the direction of the medical director.

(10) "Emergency medical technician" means an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician by the Department.

(11) Repealed by Session Laws 2003-392, s. 2(a), effective August 7, 2003.

(12) "Emergency medical technician-intermediate" means an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician-intermediate by the Department.

(13) "Emergency medical technician-paramedic" means an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician-paramedic by the Department.

(13a) "EMS provider" means a firm, corporation or association which engages in or professes to provide emergency medical services.

(14) "Medical responder" means an individual who has completed an educational program in emergency medical care and first aid approved by the Department and has been credentialed as a medical responder by the Department.

(15) "Mobile intensive care nurse" means a registered nurse who is licensed to practice nursing in North Carolina and is approved by the medical director, following successful completion of an orientation program conducted under the authority of the medical director and approved by the Department, to issue instructions to EMS personnel. These instructions shall be in accordance with protocols approved by the EMS system and Office of Emergency Medical Services and under the direction of the medical director.

(16) "Patient" means an individual who is sick, injured, wounded, or otherwise incapacitated or helpless such that the need for some medical assistance might be anticipated.

(17) "Practical examination" means a test where an applicant for credentialing as an emergency medical technician, medical responder, emergency medical technician-intermediate, or emergency medical technician-paramedic demonstrates the ability to perform specified emergency medical care skills. (1983, c. 775, s. 1; 1997-443, s. 11A.129C; 2001-210, s. 1; 2003-392, s. 2(a).)

Cross References. — For the Statewide Trauma System Act of 1993, see G.S. 131E-162. For Emergency Medical Act of 1973, see G.S. 143-507 et seq.

Editor's Note. — Subdivision (7a) was redesignated as subdivision (6a) at the direction of the Revisor of Statutes. Subdivision (16a) was redesignated as subdivision (6b) at the direction of the Revisor of Statutes.

Subdivision (3), which had defined "Ambulance provider" and as amended by Session Laws 2001-210, now defines "EMS provider," has been redesignated as subdivision (13a) at the direction of the Revisor of Statutes, to preserve alphabetical order.

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

CASE NOTES

Cited in Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc., 959 F. Supp. 298 (E.D.N.C. 1997).

§ 131E-155.1. EMS Provider License required.

(a) No firm, corporation, or association shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to provide emergency medical services or transport patients upon the streets or highways, waterways, or airways in North Carolina unless a valid EMS Provider License has been issued by the Department.

(b) Before an EMS Provider License may be issued, the firm, corporation, or association seeking the license shall apply to the Department for this license. Application shall be made upon forms and according to procedures established by the Department. Prior to issuing an original or renewal EMS Provider License, the Department shall determine that the applicant meets all requirements for this license as set forth in this Article and in the rules adopted under this Article. EMS Provider Licenses shall be valid for a period specified by the Department, provided that the period shall be a minimum of four years unless action is taken under subsection (d) of this section.

(c) The Commission shall adopt rules setting forth the qualifications required for obtaining or renewing an EMS Provider License.

(d) The Department may deny, suspend, amend, or revoke an EMS Provider License in any case where the Department finds that there has been a substantial failure to comply with the provisions of this Article or the rules adopted under this Article. The Department's decision to deny, suspend, amend, or revoke an EMS Provider License may be appealed by the applicant or licensee pursuant to the provisions of Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.

(e) Operating as an EMS provider without a valid EMS Provider License is a Class 3 misdemeanor. Each day's operation as an EMS provider without a license is a separate offense. (1995, c. 413, s. 1; 2001-210, s. 1.)

§ 131E-156. Permit required to operate ambulance.

(a) No person, firm, corporation, or association, either as owner, agent, provider, or otherwise, shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to be engaged in the business or service of transporting patients upon the streets or highways, waterways or airways in North Carolina unless a valid permit from the Department has been issued for each ambulance used in the business or service.

(b) Before a permit may be issued for a vehicle to be operated as an ambulance, the EMS provider shall apply to the Department for an ambulance permit. Application shall be made upon forms and according to procedures established by the Department. Prior to issuing an original or renewal permit for an ambulance, the Department shall determine that the vehicle for which the permit is issued meets all requirements as to equipment, design, supplies and sanitation as set forth in this Article and in the rules of the Commission and that the EMS provider has the credentialed personnel necessary to operate the ambulance in accordance with this Article. Permits issued for ambulances shall be valid for a period specified by the Department, not to exceed four years.

(c) Duly authorized representatives of the Department may issue temporary permits for vehicles not meeting required standards for a period not to exceed 60 days, when it determines the public interest will be served.

(d) When a permit has been issued for an ambulance as specified by this Article, the vehicle and records relating to the maintenance and operation of the vehicle shall be open to inspection by duly authorized representatives of the Department at all reasonable times. (1967, c. 343, s. 3; 1973, c. 476, s. 128; c. 1224, s. 1; 1983, c. 775, s. 1; 2001-210, s. 1.)

§ 131E-157. Standards for equipment; inspection of equipment and supplies required for ambulances.

(a) The Commission shall adopt rules specifying equipment, sanitation, supply and design requirements for ambulances.

(b) The Department shall inspect each ambulance for compliance with the requirements set forth by the Commission and this Article when it deems an inspection is necessary. The Department shall maintain a record of the inspection.

(c) Upon a determination, based upon an inspection, that an ambulance fails to meet the requirements of this Article or rules adopted under this

Article, the Department may deny, suspend, or revoke the permit for the ambulance concerned until these requirements are met. (1967, c. 343, s. 3; 1973, c. 476, s. 128; c. 1224, s. 1; 1983, c. 775, s. 1; 2001-210, s. 1.)

§ 131E-158. Credentialed personnel required.

(a) Every ambulance when transporting a patient shall be occupied at a minimum by all of the following:

(1) At least one emergency medical technician who shall be responsible for the medical aspects of the mission prior to arrival at the medical facility, assuming no other individual with higher credentials is available.

(2) One medical responder who is responsible for the operation of the vehicle and rendering assistance to the emergency medical technician.

An ambulance owned and operated by a licensed health care facility that is used solely to transport sick or infirm patients with known nonemergency medical conditions between facilities or between a residence and a facility for scheduled medical appointments is exempt from the requirements of this subsection.

(b) The Commission shall adopt rules setting forth exemptions to the requirements stated in (a) of this section applicable to situations where exemptions are considered by the Commission to be in the public interest. (1967, c. 343, s. 3; 1973, c. 476, s. 128; c. 725; c. 1224, s. 1; 1975, c. 612; 1983, c. 775, s. 1; 1989, c. 300; 1997-443, s. 11A.129D; 2001-210, s. 1.)

CASE NOTES

Applied in Cape Med. Transp., Inc. v. N.C. HHS, 162 N.C. App. 14, 590 S.E.2d 8, 2004 N.C. App. LEXIS 17 (2004).

§ 131E-159. Credentialing requirements.

(a) Individuals seeking credentials as an emergency medical technician, emergency medical technician-intermediate, emergency medical technician-paramedic, medical responder, emergency medical dispatcher, or emergency medical services instructor shall apply to the Department using forms prescribed by that agency. The Department's representatives shall examine the applicant by either written, practical, or written and practical examination. The Department shall issue appropriate credentials to the applicant who meets all the requirements set forth in this Article and the rules adopted for this Article and who successfully completes the examinations required for credentialing. Emergency medical technician, medical responder, emergency medical dispatcher, emergency medical technician-intermediate, emergency medical technician-paramedic, and emergency medical services instructor credentials shall be valid for a period not to exceed four years and may be renewed if the holder meets the requirements set forth in the rules of the Commission. The Department is authorized to revoke or suspend these credentials at any time it determines that the holder no longer meets the qualifications prescribed.

(b) The Commission shall adopt rules setting forth the qualifications required for credentialing of medical responders, emergency medical technicians, emergency medical technician-intermediates, emergency medical technician-paramedics, emergency medical dispatchers, and emergency medical services instructors.

(c) Individuals currently credentialed as an emergency medical technician, emergency medical technician intermediate, emergency medical technician paramedic, medical responder, and emergency medical services instructor by the National Registry of Emergency Medical Technicians or by another state where the education/credentialing requirements have been approved for legal recognition by the Department of Health and Human Services, in accordance with rules promulgated by the Medical Care Commission, and who is either currently residing in North Carolina or affiliated with a permitted EMS provider offering service within North Carolina, may be eligible for credentialing as an emergency medical technician, emergency medical technician-intermediate, emergency medical technician-paramedic, medical responder, and emergency medical services instructor without examination. This credentialing shall be valid for a period not to exceed the length of the applicant's original credentialing or four years, whichever is less.

(d) An individual currently credentialed as an emergency medical dispatcher by a national credentialing agency, or by another state where the education/credentialing requirements have been approved for legal recognition by the Department of Health and Human Services, in accordance with rules issued by the Medical Care Commission, and who is either currently residing in North Carolina or affiliated with an emergency medical dispatcher program approved by the Department of Health and Human Services offering service within North Carolina, may be eligible for credentialing as an emergency medical dispatcher without examination. This credentialing shall be valid for a period not to exceed the length of the applicant's original credentialing or four years, whichever is less.

(e) Duly authorized representatives of the Department may issue temporary credentials with or without examination upon finding that this action will be in the public interest. Temporary credentials shall be valid for a period not exceeding 90 days.

(f) The Department may deny, suspend, amend, or revoke the credentials of a medical responder, emergency medical technician, emergency medical technician-intermediate, emergency medical technician-paramedic, emergency medical dispatcher, or emergency medical services instructor in any case in which the Department finds that there has been a substantial failure to comply with the provisions of this Article or the rules issued under this Article. Prior to implementation of any of the above disciplinary actions, the Department shall consider the recommendations of the EMS Disciplinary Committee pursuant to G.S. 143-519. The Department's decision to deny, suspend, amend, or revoke credentials may be appealed by the applicant or credentialed personnel pursuant to the provisions of Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.

(g) An individual who applies for EMS credentials, seeks to renew EMS credentials, or holds EMS credentials is subject to a criminal background review by the Department. At the request of the Department, the Emergency Medical Services Disciplinary Committee, established by G.S. 143-519, shall review criminal background information and make a recommendation regarding the eligibility of an individual to obtain initial EMS credentials, renew EMS credentials, or maintain EMS credentials. The Department and the Emergency Medical Services Disciplinary Committee shall keep all information obtained pursuant to this subsection confidential. The Medical Care Commission shall adopt rules to implement the provisions of this subsection, including rules to establish a reasonable fee to offset the actual costs of criminal history information obtained pursuant to G.S. 114-19.21. (1967, c. 343, s. 3; 1973, c. 476, s. 128; c. 725; c. 1224, s. 1; 1975, c. 612; 1983, c. 775, s. 1; 1987, c. 495, s. 2; 1993, c. 135, s. 1; 1997-443, ss. 11A.118(a), 11A.129E; 2001-210, s. 1; 2003-392, s. 2(b); 2007-411, s. 1.)

Effect of Amendments. — Session Laws 2007-411, s. 1, effective October 1, 2007, added subsection (g).

§ 131E-160. Exemptions.

All of the following vehicles are exempt from the provisions of this Article:

(1) Privately owned vehicles not used in the business of transporting patients.

(2) A vehicle rendering service as an ambulance in case of a major catastrophe or emergency, when the permitted ambulances based in the locality of the catastrophe or emergency are insufficient to render the services required.

(3) Any ambulance based outside this State, except that an ambulance which receives a patient within this State for transportation to a location within this State shall comply with the provisions of this Article.

(4) Ambulances owned and operated by an agency of the United States government.

(5) Vehicles owned and operated by rescue squads chartered by the State of North Carolina as nonprofit corporations or associations which are not regularly used to transport sick, injured, wounded or otherwise incapacitated or helpless persons except as a part of rescue operations. (1967, c. 343, s. 3; c. 1257, s. 2; 1983, c. 775, s. 1; 2001-210, s. 1.)

§ 131E-161. Violation declared misdemeanor.

It shall be the responsibility of the EMS provider to ensure that the ambulance operation complies with the provisions of this Article and all rules adopted for this Article. Upon the violation of any part of this Article or any rule adopted under authority of this Article, the Department shall have the power to deny, revoke, or suspend the permits of all vehicles owned or operated by the violator. The operation of an ambulance without a valid permit or after a permit has been denied, suspended, or revoked or without appropriate credentialed staffing as required by G.S. 131E-158, shall constitute a Class 1 misdemeanor. (1967, c. 343, s. 3; 1973, c. 476, s. 128; 1983, c. 775, s. 1; 1993, c. 539, s. 964; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.129F; 2001-210, s. 1.)

Article 7A.

Statewide Trauma System Act of 1993.

§ 131E-162. Statewide trauma system.

The Department shall establish and maintain a program for the development of a statewide trauma system. The Department shall consolidate all State functions relating to trauma systems, both regulatory and developmental, under the auspices of this program.

The Commission shall adopt rules to carry out the purpose of this Article. These rules shall be adopted with the advice of the State Emergency Medical Services Advisory Council and shall include the operation of a statewide trauma registry, statewide educational requirements fundamental to the implementation of the trauma system. The rules adopted by the Commission shall establish guidelines for monitoring and evaluating the system including standards and criteria for the denial, suspension, voluntary withdrawal, or revocation of credentials for trauma center designation, and the establishment of regional trauma peer review committees. Each regional trauma peer review committee shall be responsible for analyzing trauma patient care data and outcome measures to evaluate the ongoing quality of patient care, system performance, and medical direction within the regional trauma system. The committee membership shall include physicians, nurses, EMS personnel, trauma registrars, and hospital administrators. Review of medical records by the Trauma Peer Review Committee is confidential and protected under G.S. 143-518. A Trauma Peer Review Committee, its members, proceedings, records and materials produced, and materials considered shall be afforded the same protections afforded Medical Review Committees, their members, proceedings, records, and materials under G.S. 131E-95. The rules adopted by the Commission shall avoid duplication of reporting and minimize the cost to hospitals or other persons reporting under this section. The Office of Emergency Medical Services shall be the agency responsible for monitoring system development, ensuring compliance with rules, and overseeing system effectiveness.

With respect to collection of data and educational requirements regarding trauma, rules adopted by the Medical Care Commission shall limit the authority of the Department to hospitals and Emergency Medical Services providers. Nothing in this Article shall be interpreted so as to grant the Department authority to require private physicians, schools, or universities, except those participating in the trauma system, to provide information or data or to conduct educational programs regarding trauma. (1993, c. 336, s. 1; 2001-210, s. 2; 2003-392, s. 2(c).)

§§ **131E-163, 131E-164:** Reserved for future codification purposes.

ARTICLE 8.

Cardiac Rehabilitation Certification Program.

§ 131E-165. Title; purpose.

(a) This Article shall be known as the "Cardiac Rehabilitation Certification Program."

(b) The purpose of this Article is to provide for the development, establishment, and enforcement of rules and certification:

(1) For the care and treatment of individuals in outpatient cardiac rehabilitation programs; and

(2) For the maintenance and operation of cardiac rehabilitation programs to ensure safe and adequate treatment of individuals in cardiac rehabilitation programs. (1983, c. 775, s. 1; 1995, c. 182, s. 1.)

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

§ 131E-166. Definitions.

As used in this Article, unless otherwise specified:

(1) "Cardiac Rehabilitation Program" means a program certified under this Article for the delivery of cardiac rehabilitation services to outpatients and includes, but shall not be limited to, coordinated, physician-directed, individualized programs of therapeutic activity

and adaption designed to assist the cardiac patient in attaining the highest rehabilitative potential.

(2) "Certification" means the issuance of a certificate by the Department upon determination that cardiac rehabilitation services offered at a given program site meet all cardiac rehabilitation program rules. (1983, c. 775, s. 1; 1995, c. 182, s. 2.)

§ 131E-167. Certificate requirement.

(a) Applications for certification shall be available from the Department, and each application filed with the Department shall contain all necessary and reasonable information that the Department may by rule require. A certificate shall be granted to the applicant for a period not to exceed one year upon a determination by the Department that the applicant has substantially complied with the provisions of this Article and the rules promulgated by the Department under this Article. The Department shall charge the applicant a nonrefundable annual certification fee in the amount of two hundred fifty dollars ($250.00).

(b) A provisional certificate may be issued for a period not to exceed six months to a program:

(1) That does not substantially comply with the rules, when failure to comply does not endanger the health, safety, or welfare of the clients being served by the program;

(2) During the initial stages of operation if determined appropriate by the Department.

(c) Prior to offering a cardiac rehabilitation program as defined in this Article, such a program must be inspected, evaluated, and certified as having substantially met the rules adopted by the Department under this Article.

(d) A certificate to operate a Cardiac Rehabilitation Program shall be renewed upon the successful re-evaluation of the program as stated in the rules adopted pursuant to this Article.

(e) Each certificate shall be issued only for the premises and persons named in the application and shall not be transferable or assignable except with the written approval of the Department.

(f) A certificate shall be posted in a conspicuous place on the certified premises. (1983, c. 775, s. 1; 2003-284, s. 34.6(a); 2005-276, s. 41.2(f).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

§ 131E-168. Adverse action on a certificate.

(a) Subject to subsection (b), the Department is authorized to deny a new or renewal certificate and to suspend or revoke an existing certificate upon determination that there has been a substantial failure to comply with the provisions of this Article or the rules promulgated under this Article.

(b) The provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act, shall govern all administrative action and judicial review in cases where the Department has taken the action described in subsection (a). (1983, c. 775, s. 1; 1987, c. 827, s. 1.)

§ 131E-169. Rules and enforcement.

(a) The Department is authorized to adopt, amend, and repeal all rules as may be designed to further the accomplishment of this Article.

(b) The Department shall enforce the rules adopted for the certification of cardiac rehabilitation programs. (1983, c. 775, s. 1.)

§ 131E-170. Inspections.

(a) The Department shall make or cause to be made inspections of Cardiac Rehabilitation Programs as it deems necessary. The Department is empowered to delegate to a State officer, agent, board, bureau or division of State government the authority to make these inspections according to the rules promulgated by the Department. In addition, an individual who is not a State officer or agent and who is delegated the authority to make these inspections must be approved by the Department. The Department may revoke this delegated authority in its discretion.

(b) Notwithstanding the provisions of G.S. 8-53, "Communications between physician and patient," or any other provision of law relating to the confidentiality of communications between physician and patient, the representatives of the Department who make these inspections may review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been patients of the program being inspected unless that patient objects in writing to review of that patient's records. Physicians, psychiatrists, nurses, and anyone else involved in giving treatment at or through a program who may be interviewed by representatives of the Department may disclose to these representatives information related to any inquiry, notwithstanding the existence of the physician-patient privilege in G.S. 8-53, "Communication between physician and patient," or any other rule of law, provided the patient has not made written objection to this disclosure. The program, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information to the Department. Any confidential or privileged information received from review of records or interviews shall be kept confidential by the Department and not disclosed without written authorization of the patient or legal representative, or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning a facility without the consent of that person. Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1, "'Public records' defined." Prior to releasing any information or allowing any inspections referred to in this section, the patient must be advised in writing by the program that the patient has the right to object in writing to the release of information or review of the records and that by an objection in writing the patient may prohibit the inspection or release of the records. (1983, c. 775, s. 1.)

§§ 131E-171 through 131E-174: Reserved for future codification purposes.

ARTICLE 9.

Certificate of Need.

§ 131E-175. Findings of fact.

The General Assembly of North Carolina makes the following findings:

(1) That the financing of health care, particularly the reimbursement of health services rendered by health service facilities, limits the effect of free market competition and government regulation is therefore necessary to control costs, utilization, and distribution of new health service facilities and the bed complements of these health service facilities.

(2) That the increasing cost of health care services offered through health service facilities threatens the health and welfare of the citizens of this State in that citizens need assurance of economical and readily available health care.

(3) That, if left to the market place to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur and, further, less than equal access to all population groups, especially those that have traditionally been medically underserved, would result.

(3a) That access to health care services and health care facilities is critical to the welfare of rural North Carolinians, and to the continued viability of rural communities, and that the needs of rural North Carolinians should be considered in the certificate of need review process.

(4) That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services.

(5) Repealed by Session Laws 1987, c. 511, s. 1.

(6) That excess capacity of health service facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers.

(7) That the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Health and Human Services pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

(8) That because persons who have received exemptions under Section 11.9(a) of S.L. 2000-67, as amended, and under Section 11.69(b) of S.L. 1997-443, as amended by Section 12.16C(a) of S.L. 1998-212, and as amended by Section 1 of S.L. 1999-135, have had sufficient time to complete development plans and initiate construction of beds in adult care homes.

(9) That because with the enactment of this legislation, beds allowed under the exemptions noted above and pending development will count in the inventory of adult care home beds available to provide care to residents in the State Medical Facilities Plan.

(10) That because State and county expenditures provide support for nearly three-quarters of the residents in adult care homes through the State County Special Assistance program, and excess bed capacity increases costs per resident day, it is in the public interest to promote efficiencies in delivering care in those facilities by controlling and directing their growth in an effort to prevent underutilization and higher costs and provide appropriate geographical distribution.

(11) That physicians providing gastrointestinal endoscopy services in unlicensed settings should be given an opportunity to obtain a license to provide those services to ensure the safety of patients and the provision of quality care.

(12) That demand for gastrointestinal endoscopy services is increasing at a substantially faster rate than the general population given the procedure is recognized as a highly effective means to diagnose and prevent cancer. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 1; 1983, c. 775, s. 1; 1987, c. 511, s. 1; 1993, c. 7, s. 1; 1997-443, s. 11A.118(a); 2001-234, s. 1; 2005-346, s. 5.)

Editor's Note. — Session Laws 2005-276, s. 10.40B(a), provides: "Notwithstanding provisions to the contrary in Chapter 150B and Article 9 of Chapter 131E of the General Statutes, a licensed health care facility in operation on July 1, 2005, under a certificate of need issued by the Department of Health and Human Services prior to that date and subsequently invalidated based on a procedural defect in the awarding of the certificate of need, may remain in operation for the purpose of applying for a new certificate of need in accordance with Article 9 of Chapter 131E of the General Statutes. The health care facility may remain in operation for the period pending the decision of the Department on the application for the new certificate of need."

Session Laws 2005-276, s. 10.40B(b), provides: "This section expires 30 days from the date of the Department's decision on the new certificate of need or adjournment sine die of the 2005 General Assembly, whichever occurs later."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

Legal Periodicals. — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

For article, "In Defense of Aston Park: The Case for State Substantive Due Process Review of Health Care Regulation," see 68 N.C.L. Rev. 253 (1990).

CASE NOTES

The purpose behind enactment of the certificate of need law was to regulate health care, so that only those services which are needed and less costly but more effective are made available to the public. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175.

The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this State to those that the public needs and that can be operated efficiently and economically for their benefit. Humana Hosp. Corp. v. North Carolina Dep't of Human Resources, 81 N.C. App. 628, 345 S.E.2d 235 (1986), decided under former G.S. 131-175.

Expansive interpretation proposed by the Department of Human Resources which allowed micro-management over relatively minor capital expenditures did not effectuate the overriding legislative intent behind the certificate of need process, i.e., regulation of major capital expenditures which may adversely impact the cost of health care services to the patient. Cape Fear Mem. Hosp. v. North Carolina Dep't of Human Resources, 121 N.C. App. 492, 466 S.E.2d 299 (1996).

For discussion of the history and purpose of North Carolina certificate of need legislation, see North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985), decided under former G.S. 131-175 et seq.

The certificate of need requirements represent a clearly articulated policy by the State of North Carolina to regulate acquisitions of existing health care facilities which result in no change in services or bed capacity. North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985), decided under former G.S. 131-175 et seq.

North Carolina's certificate of need legislation shows that the North Carolina legislature was concerned about the unrelenting rise in the cost of health care, and about wasteful, duplicative major acquisitions by health care providers. North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984), cert. denied, 471 U.S. 1003, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985), decided under former G.S. 131-175 et seq.

In enacting the certificate of need law, the legislature found as facts that the forces of free market competition are largely absent in health care, and that government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that less costly and more effective alternatives are made available. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175 and 131-181.

A certificate of need is not dependent upon the requirement for a license; in fact, the statutes governing licensure of ambulatory surgical facilities (G.S. 131E-145 et seq.) and those governing certificates of need for new institutional health services (this section) are independent provisions. Christenbury Surgery Ctr. v. North Carolina Health & Human Servs., 138 N.C. App. 309, 531 S.E.2d 219, 2000 N.C. App. LEXIS 611 (2000).

Time Limitations for Acting on Applications for Certificates of Need. — When viewed in its entirety, Article 9 of Chapter 131E, the Certificate of Need Law, reveals the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay. The comprehensive legislative provisions controlling the times within which the Department must act on applications for certificates of need, set forth in Article 9, will be nullified if the Department is permitted to ignore those time limits with impunity. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Effect of Successive Certificate of Need Applications. — Issue of the denial of a hospital's 2003 application for a certificate of need (CON) for a replacement hospital was made moot by its 2005 application for a CON since the 2005 application covered the same facility and, compliant with G.S. 131E-175, G.S. 131E-183(a)(1), the State Medical Facilities Plan set maximum beds and operating rooms for the county. Good Hope Health Sys., L.L.C. v. N.C. HHS, 175 N.C. App. 296, 623 S.E.2d 307, 2006 N.C. App. LEXIS 62 (2006), review granted, cert. denied, 360 N.C. 479, 632 S.E.2d 171 rev'd and remanded, review improvidently granted, 360 N.C. 635, 637 S.E.2d 517 (2006) (rev'd as to mootness issue). See also Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, (2006).

Right to Fair Review Secured. — The certificate of need law secures to applicants the right to a fair review of an application and not the absolute right to a certificate of need. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175.

Scope and Standard of Review. — The 2003 version of G.S. 150B-34(c), which excluded the Certificate of Need Act, G.S. 131E-175 et seq., from the requirements of G.S. 150B-36(b), (b1), (b2), (b3), and (d) and G.S. 150B-51, left the scope and standard of review applied under the 1999 version of G.S. 150B-51 undisturbed. Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

Discretion of Agency. — In serving the purpose of the certificate of need law adjustments are often needed, and the agency has discretion to make them by granting only some of the things applied for and by imposing conditions not applied for. Humana Hosp. Corp. v. North Carolina Dep't of Human Resources, 81 N.C. App. 628, 345 S.E.2d 235 (1986), decided under former G.S. 131-175.

Agency acted arbitrarily and capriciously in its calculation of the number of beds made available for development under the 1987 State Medical Facilities Plan (SMFP) and in failing to consider the positive impact on health care costs which would result from hospital's proposed conversion of presently unused beds. Additionally, agency's refusal to consider the alleged need for 22 psychiatric beds to be located in the three-county area which hospital served was reversible error. Lenoir Mem. Hosp. v. North Carolina Dep't of Human Resources, 98 N.C. App. 178, 390 S.E.2d 448, cert. denied, 327 N.C. 430, 395 S.E.2d 682 (1990).

Allegation of Priority Status Without Merit. — The certificate of need Section should not be foreclosed from carrying out the purposes and intent of the certificate of need law by an alleged priority status obtained by an applicant being the only one of several applicants to exercise its rights to judicial review. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175 and 131-181.

Appeal of Denial Held Moot. — Appeal brought by hospital corporation seeking a certificate of need, in which appellant contended that the section committed violations of its own administrative procedures in a 1981 review process and in denying appellant's application for a reconsideration hearing on its 1981 application, was moot where appellant was afforded an adequate remedy for the alleged errors in the 1981 review process by its participation in a 1982 review process of an application requesting approval of a virtually identical proposal. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175.

Full Contested Case Hearing Not Precluded by the Statute. — In a Certificate of Need (CON) case, the CON Statute does not preclude a full contested case hearing where an ALJ recommended a summary judgment in a decision based only on each applicant's conformity with the criteria in G.S. 131E-183. A full hearing protects the applicant's due process rights, allows the record to be fully developed, and encourages judicial economy. Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000).

Hospital Granting Exclusive Privilege to Use Equipment Held Not Immune Under State Action Exemption. — In an antitrust action brought under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) brought by plaintiff physicians asserting that defendant hospital had improperly restricted use of its CAT Scan, defendant was held to have failed to show, in support of its motion to dismiss, that the General Assembly had authorized defendant to grant exclusive privileges to certain physicians to use its facilities with the intent to restrict competition, so as to render defendant immune from antitrust liability under the state action exemption. Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

Exemptions from Obtaining Certificate of Need. — Agency properly granted summary judgment to petitioners on the grounds that they were exempt from obtaining a certificate of need because they had entered into binding legal contacts to develop and offer a health service as contemplated by grandfather clause. Koltis v. North Carolina Dep't of Human Resources, 125 N.C. App. 268, 480 S.E.2d 702 (1997).

Hospital was not exempt under G.S. 131E-184 from the process of applying for a Certificate of Need to build a complete replacement hospital in the place of an existing hospital which it proposed to acquire. G.S. 131E-184(a)(5) allowed the replacement of an entire facility, but then only to replace or repair facilities destroyed or damaged by accident or natural disaster. Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, 2006 N.C. App. LEXIS 63 (2006), review denied, cert. denied, 360 N.C. 480, 632 S.E.2d 172 aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006).

Grandfather Clause. — To satisfy the requirements of grandfather clause, which would exempt one from obtaining a certificate of need, one need only show a binding legal contract to develop any service that was not a new institutional health service requiring a certificate of need prior to March 18, 1993. Koltis v. North Carolina Dep't of Human Resources, 125 N.C. App. 268, 480 S.E.2d 702 (1997).

Award of Certificate of Need Affirmed. — Decision of the North Carolina Department of Health and Human Services to award a certificate of need for new kidney dialysis machines to an applicant was affirmed as the agency's findings were supported by sufficient evidence, and it did not exceed its statutory authority in using enhanced competition and consumer choice as key factors in a comparative analysis. Total Renal Care of N.C., LLC v. N.C. HHS, 171 N.C. App. 734, 615 S.E.2d 81, 2005 N.C. App. LEXIS 1354 (2005).

Denial of Certificate of Need Affirmed. — Branch office proposed by a hospice was not located within the service area of the hospice, and therefore the proposed branch office was a new institutional health service for which the hospice had to obtain a certificate of need; moreover, the issuance of a "No Review" letter by the North Carolina DHHS, which resulted in the establishment of a new institutional health service without a prior determination of need, substantially prejudiced the health service provider already operating in the service area of the proposed office as a matter of law. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Agency Decision Reversed. — Final agency decision of the North Carolina Department of Health and Human Services (DHHS), which upheld two settlement agreements between the DHHS' Certificate of Need (CON) section and a group of medical centers and issued a CON to the group for a hospital project was reversed on appeal, because the DHHS failed to follow statutory procedure when it rejected an administrative law judge's recommendation to deny the CON applications of the group by erroneously considering new evidence, which it had no statutory authority to do.

Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

Cited in Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788 (1987); Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); Laurel Wood of Henderson, Inc. v. North Carolina Dep't of Human Resources, 117 N.C. App. 601, 452 S.E.2d 334 (1995); Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000); Carillon Assisted Living, L.L.C. v. N.C. HHS, 175 N.C. App. 265, 623 S.E.2d 629, 2006 N.C. App. LEXIS 60 (2006), cert. denied, 360 N.C. 531, 633 S.E.2d 675,676 (2006).

§ 131E-176. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Adult care home" means a facility with seven or more beds licensed under G.S. 131D-2 or Chapter 131E of the General Statutes that provides residential care for aged or disabled persons whose principal need is a home which provides the supervision and personal care appropriate to their age and disability and for whom medical care is only occasional or incidental.

(1a) (**See note**) "Air ambulance" means aircraft used to provide air transport of sick or injured persons between destinations within the State.

(1b) "Ambulatory surgical facility" means a facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room or gastrointestinal endoscopy room, as defined in Article 5 Part 1 and Article 6, Part 4 of this Chapter, and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part D, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1c) of this section and which are performed in a physician's or dentist's office does not make that office an ambulatory surgical facility.

(1c) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery or gastrointestinal endoscopy, to be medically unnecessary.

(2) "Bed capacity" means space used exclusively for inpatient care, including space designed or remodeled for licensed inpatient beds even though temporarily not used for such purposes. The number of beds to be counted in any patient room shall be the maximum number for which adequate square footage is provided as established by rules of the Department except that single beds in single rooms are counted even if the room contains inadequate square footage. The term "bed

capacity" also refers to the number of dialysis stations in kidney disease treatment centers, including freestanding dialysis units.

(2a) "Bone marrow transplantation services" means the process of infusing bone marrow into persons with diseases to stimulate the production of blood cells.

(2b) "Burn intensive care services" means services provided in a unit designed to care for patients who have been severely burned.

(2c) "Campus" means the adjacent grounds and buildings, or grounds and buildings not separated by more than a public right-of-way, of a health service facility and related health care entities.

(2d) "Capital expenditure" means an expenditure for a project, including but not limited to the cost of construction, engineering, and equipment which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance. Capital expenditure includes, in addition, the fair market value of an acquisition made by donation, lease, or comparable arrangement by which a person obtains equipment, the expenditure for which would have been considered a capital expenditure under this Article if the person had acquired it by purchase.

(2e) Repealed by Session Laws 2005-325, s. 1, effective for hospices and hospice offices December 31, 2005.

(2f) "Cardiac catheterization equipment" means the equipment used to provide cardiac catheterization services.

(2g) "Cardiac catheterization services" means those procedures, excluding pulmonary angiography procedures, in which a catheter is introduced into a vein or artery and threaded through the circulatory system into the heart specifically to diagnose abnormalities in the motion, contraction, and blood flow of the moving heart or to perform surgical therapeutic interventions to restore, repair, or reconstruct the coronary blood vessels of the heart.

(3) "Certificate of need" means a written order which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project.

(4) Repealed by Session Laws 1993, c. 7, s. 2.

(5) "Change in bed capacity" means (i) any relocation of health service facility beds, or dialysis stations from one licensed facility or campus to another, or (ii) any redistribution of health service facility bed capacity among the categories of health service facility bed as defined in G.S. 131E-176(9c), or (iii) any increase in the number of health service facility beds, or dialysis stations in kidney disease treatment centers, including freestanding dialysis units.

(5a) "Chemical dependency treatment facility" means a public or private facility, or unit in a facility, which is engaged in providing 24-hour a day treatment for chemical dependency or substance abuse. This treatment may include detoxification, administration of a therapeutic regimen for the treatment of chemically dependent or substance abusing persons and related services. The facility or unit may be:

a. A unit within a general hospital or an attached or freestanding unit of a general hospital licensed under Article 5, Chapter 131E, of the General Statutes,

b. A unit within a psychiatric hospital or an attached or freestanding unit of a psychiatric hospital licensed under Article 1A of General Statutes Chapter 122 or Article 2 of General Statutes Chapter 122C,

c. A freestanding facility specializing in treatment of persons who are substance abusers or chemically dependent licensed under Article

1A of General Statutes Chapter 122 or Article 2 of General Statutes Chapter 122C; and may be identified as "chemical dependency, substance abuse, alcoholism, or drug abuse treatment units," "residential chemical dependency, substance abuse, alcoholism or drug abuse facilities," or by other names if the purpose is to provide treatment of chemically dependent or substance abusing persons, but shall not include social setting detoxification facilities, medical detoxification facilities, halfway houses or recovery farms.

(5b) "Chemical dependency treatment beds" means beds that are licensed for the inpatient treatment of chemical dependency. Residential treatment beds for the treatment of chemical dependency or substance abuse are chemical dependency treatment beds. Chemical dependency treatment beds shall not include beds licensed for detoxification.

(6) "Department" means the North Carolina Department of Health and Human Services.

(7) To "develop" when used in connection with health services, means to undertake those activities which will result in the offering of institutional health service or the incurring of a financial obligation in relation to the offering of such a service.

(7a) "Diagnostic center" means a freestanding facility, program, or provider, including but not limited to, physicians' offices, clinical laboratories, radiology centers, and mobile diagnostic programs, in which the total cost of all the medical diagnostic equipment utilized by the facility which cost ten thousand dollars ($10,000) or more exceeds five hundred thousand dollars ($500,000). In determining whether the medical diagnostic equipment in a diagnostic center costs more than five hundred thousand dollars ($500,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

(7b) "Expedited review" means the status given to an application's review process when the applicant petitions for the review and the Department approves the request based on findings that all of the following are met:

a. The review is not competitive.
b. The proposed capital expenditure is less than five million dollars ($5,000,000).
c. A request for a public hearing is not received within the time frame defined in G.S. 131E-185.
d. The agency has not determined that a public hearing is in the public interest.

(7c) "Gamma knife" means equipment which emits photon beams from a stationary radioactive cobalt source to treat lesions deep within the brain and is one type of stereotactic radiosurgery.

(7d) "Gastrointestinal endoscopy room" means a room used for the performance of procedures that require the insertion of a flexible endoscope into a gastrointestinal orifice to visualize the gastrointestinal lining and adjacent organs for diagnostic or therapeutic purposes.

(8), (9) Repealed by Session Laws 1987, c. 511, s. 1.

(9a) "Health service" means an organized, interrelated medical, diagnostic, therapeutic, and/or rehabilitative activity that is integral to the prevention of disease or the clinical management of a sick, injured, or disabled person. "Health service" does not include administrative and other activities that are not integral to clinical management.

(9b) "Health service facility" means a hospital; long-term care hospital; psychiatric facility; rehabilitation facility; nursing home facility; adult care home; kidney disease treatment center, including freestanding hemodialysis units; intermediate care facility for the mentally retarded; home health agency office; chemical dependency treatment facility; diagnostic center; hospice office, hospice inpatient facility, hospice residential care facility; and ambulatory surgical facility.

(9c) "Health service facility bed" means a bed licensed for use in a health service facility in the categories of (i) acute care beds; (ii) psychiatric beds; (iii) rehabilitation beds; (iv) nursing home beds; (v) intermediate care beds for the mentally retarded; (vi) chemical dependency treatment beds; (vii) hospice inpatient facility beds; (viii) hospice residential care facility beds; (ix) adult care home beds; and (x) long-term care hospital beds.

(10) "Health maintenance organization (HMO)" means a public or private organization which has received its certificate of authority under Article 67 of Chapter 58 of the General Statutes and which either is a qualified health maintenance organization under Section 1310(d) of the Public Health Service Act or:

a. Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services: usual physician services, hospitalization, laboratory, X ray, emergency and preventive services, and out-of-area coverage;

b. Is compensated, except for copayments, for the provision of the basic health care services listed above to enrolled participants by a payment which is paid on a periodic basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent, or kind of health service actually provided; and

c. Provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organizations, or (ii) through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(10a) "Heart-lung bypass machine" means the equipment used to perform extra-corporeal circulation and oxygenation during surgical procedures.

(11) Repealed by Session Laws 1991, c. 692, s. 1.

(12) "Home health agency" means a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services.

Home health services" means items and services furnished to an individual by a home health agency, or by others under arrangements with such others made by the agency, on a visiting basis, and except for paragraph e. of this subdivision, in a place of temporary or permanent residence used as the individual's home as follows:

a. Part-time or intermittent nursing care provided by or under the supervision of a registered nurse;

b. Physical, occupational or speech therapy;

c. Medical social services, home health aid services, and other therapeutic services;

d. Medical supplies, other than drugs and biologicals and the use of medical appliances;

e. Any of the foregoing items and services which are provided on an outpatient basis under arrangements made by the home health agency at a hospital or nursing home facility or rehabilitation center and the furnishing of which involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual in his home, or which are furnished at such facility while he is there to receive any such item or service, but not including transportation of the individual in connection with any such item or service.

(13) "Hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes, except long-term care hospitals.

(13a) "Hospice" means any coordinated program of home care with provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

(13b) "Hospice inpatient facility" means a freestanding licensed hospice facility or a designated inpatient unit in an existing health service facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in an inpatient setting. For purposes of this Article only, a hospital which has a contractual agreement with a licensed hospice to provide inpatient services to a hospice patient as defined in G.S. 131E-201(4) and provides those services in a licensed acute care bed is not a hospice inpatient facility and is not subject to the requirements in G.S. 131E-176(5)(ii) for hospice inpatient beds.

(13c) "Hospice residential care facility" means a freestanding licensed hospice facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in a group residential setting.

(14) Repealed by Session Laws 1987, c. 511, s. 1.

(14a) "Intermediate care facility for the mentally retarded" means facilities licensed pursuant to Article 2 of Chapter 122C of the General Statutes for the purpose of providing health and habilitative services based on the developmental model and principles of normalization for persons with mental retardation, autism, cerebral palsy, epilepsy or related conditions.

(14b) Repealed by Session Laws 1991, c. 692, s. 1.

(14c) Reserved for future codification.

(14d) Repealed by Session Laws 2001-234, s. 2, effective January 1, 2002.

(14e) "Kidney disease treatment center" means a facility that is certified as an end-stage renal disease facility by the Centers for Medicare and Medicaid Services, Department of Health and Human Services, pursuant to 42 C.F.R. § 405.

(14f) Reserved for future codification.

(14g) "Linear accelerator" means a machine used to produce ionizing radiation in excess of 1,000,000 electron volts in the form of a beam of electrons or photons to treat cancer patients.
(14h) Reserved for future codification.
(14i) "Lithotriptor" means extra-corporeal shock wave technology used to treat persons with kidney stones and gallstones.
(14j) Reserved for future codification.
(14k) "Long-term care hospital" means a hospital that has been classified and designated as a long-term care hospital by the Centers for Medicare and Medicaid Services, Department of Health and Human Services, pursuant to 42 C.F.R. § 412.
(14*l*) Reserved for future codification.
(14m) "Magnetic resonance imaging scanner" means medical imaging equipment that uses nuclear magnetic resonance.
(14n) Reserved for future codification.
(14o) "Major medical equipment" means a single unit or single system of components with related functions which is used to provide medical and other health services and which costs more than seven hundred fifty thousand dollars ($750,000). In determining whether the major medical equipment costs more than seven hundred fifty thousand dollars ($750,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the major medical equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater. Major medical equipment does not include replacement equipment as defined in this section.
(15) Repealed by Session Laws 1987, c. 511, s. 1.
(15a) "Multispecialty ambulatory surgical program" means a formal program for providing on a same-day basis surgical procedures for at least three of the following specialty areas: gynecology, otolaryngology, plastic surgery, general surgery, ophthalmology, orthopedic, or oral surgery.
(15b) "Neonatal intensive care services" means those services provided by a health service facility to high-risk newborn infants who require constant nursing care, including but not limited to continuous cardiopulmonary and other supportive care.
(16) "New institutional health services" means any of the following:
  a. The construction, development, or other establishment of a new health service facility.
  b. The obligation by any person of a capital expenditure exceeding two million dollars ($2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds two million dollars ($2,000,000).
  c. Any change in bed capacity as defined in G.S. 131E-176(5).
  d. The offering of dialysis services or home health services by or on behalf of a health service facility if those services were not offered within the previous 12 months by or on behalf of the facility.
  e. A change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is

proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

f. The development or offering of a health service as listed in this subdivision by or on behalf of any person:
  1. Bone marrow transplantation services.
  2. Burn intensive care services.
  2a. Cardiac catheterization services, except cardiac catheterization services provided on equipment furnished by a person authorized to operate such equipment in North Carolina pursuant to either a certificate of need issued for mobile cardiac catheterization equipment or a settlement agreement executed by the Department for provision of cardiac catheterization services.
  3. Neonatal intensive care services.
  4. Open-heart surgery services.
  5. Solid organ transplantation services.

f1. The acquisition by purchase, donation, lease, transfer, or comparable arrangement of any of the following equipment by or on behalf of any person:
  1. Air ambulance.
  2. Repealed by Session Laws 2005-325, s. 1, effective for hospices and hospice offices December 31, 2005.
  3. Cardiac catheterization equipment.
  4. Gamma knife.
  5. Heart-lung bypass machine.
  5a. Linear accelerator.
  6. Lithotriptor.
  7. Magnetic resonance imaging scanner.
  8. Positron emission tomography scanner.
  9. Simulator.

g. to k. Repealed by Session Laws 1987, c. 511, s. 1.

l. The purchase, lease, or acquisition of any health service facility, or portion thereof, or a controlling interest in the health service facility or portion thereof, if the health service facility was developed under a certificate of need issued pursuant to G.S. 131E-180.

m. Any conversion of nonhealth service facility beds to health service facility beds.

n. The construction, development or other establishment of a hospice, hospice inpatient facility, or hospice residential care facility;

o. The opening of an additional office by an existing home health agency or hospice within its service area as defined by rules adopted by the Department; or the opening of any office by an existing home health agency or hospice outside its service area as defined by rules adopted by the Department.

p. The acquisition by purchase, donation, lease, transfer, or comparable arrangement by any person of major medical equipment.

q. The relocation of a health service facility from one service area to another.

r. The conversion of a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or the addition of a specialty to a specialty ambulatory surgical program.

s. The furnishing of mobile medical equipment to any person to provide health services in North Carolina, which was not in use in North Carolina prior to the adoption of this provision, if such equipment would otherwise be subject to review in accordance with G.S. 131E-176(16)(f1.) or G.S. 131E-176(16)(p) if it had been acquired in North Carolina.

t. Repealed by Session Laws 2001-242, s. 4, effective June 23, 2001.

u. The construction, development, establishment, increase in the number, or relocation of an operating room or gastrointestinal endoscopy room in a licensed health service facility, other than the relocation of an operating room or gastrointestinal endoscopy room within the same building or on the same grounds or to grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room or gastrointestinal endoscopy room is currently located.

v. The change in designation, in a licensed health service facility, of an operating room to a gastrointestinal endoscopy room or change in designation of a gastrointestinal endoscopy room to an operating room that results in a different number of each type of room than is reflected on the health service facility's license in effect as of January 1, 2005.

(17) "North Carolina State Health Coordinating Council" means the Council that prepares, with the Department of Health and Human Services, the State Medical Facilities Plan.

(17a) "Nursing care" means:

a. Skilled nursing care and related services for residents who require medical or nursing care;

b. Rehabilitation services for the rehabilitation of injured, disabled, or sick persons; or

c. Health-related care and services provided on a regular basis to individuals who because of their mental or physical condition require care and services above the level of room and board, which can be made available to them only through institutional facilities.

These are services which are not primarily for the care and treatment of mental diseases.

(17b) "Nursing home facility" means a health service facility whose bed complement of health service facility beds is composed principally of nursing home facility beds.

(18) To "offer," when used in connection with health services, means that the person holds himself out as capable of providing, or as having the means for the provision of, specified health services.

(18a) Repealed by Session Laws 2005-325, s. 1, effective for hospices and hospice offices December 31, 2005.

(18b) "Open-heart surgery services" means the provision of surgical procedures that utilize a heart-lung bypass machine during surgery to correct cardiac and coronary artery disease or defects.

(18c) "Operating room" means a room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room.

(19) "Person" means an individual, a trust or estate, a partnership, a corporation, including associations, joint stock companies, and insurance companies; the State, or a political subdivision or agency or instrumentality of the State.

(19a) "Positron emission tomography scanner" means equipment that utilizes a computerized radiographic technique that employs radioactive substances to examine the metabolic activity of various body structures.

(20) "Project" or "capital expenditure project" means a proposal to undertake a capital expenditure that results in the offering of a new institutional health service as defined by this Article. A project, or capital expenditure project, or proposed project may refer to the project from its earliest planning stages up through the point at which the specified new institutional health service may be offered. In the case of facility construction, the point at which the new institutional health service may be offered must take place after the facility is capable of being fully licensed and operated for its intended use, and at that time it shall be considered a health service facility.

(21) "Psychiatric facility" means a public or private facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes and which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.

(22) "Rehabilitation facility" means a public or private inpatient facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other services which are provided under competent, professional supervision.

(22a) "Replacement equipment" means equipment that costs less than two million dollars ($2,000,000) and is purchased for the sole purpose of replacing comparable medical equipment currently in use which will be sold or otherwise disposed of when replaced. In determining whether the replacement equipment costs less than two million dollars ($2,000,000), the costs of equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the replacement equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

(23) Repealed by Session Laws 1991, c. 692, s. 1.

(24) Repealed by Session Laws 1993, c. 7, s. 2.

(24a) "Service area" means the area of the State, as defined in the State Medical Facilities Plan or in rules adopted by the Department, which receives services from a health service facility.

(24b) "Simulator" means a machine that produces high quality diagnostic radiographs and precisely reproduces the geometric relationships of megavoltage radiation therapy equipment to the patient.

(24c) Reserved for future codification.

(24d) "Solid organ transplantation services" means the provision of surgical procedures and the interrelated medical services that accompany the surgery to remove an organ from a patient and surgically implant an organ from a donor.

(24e) Reserved for future codification.

(24f) "Specialty ambulatory surgical program" means a formal program for providing on a same-day basis surgical procedures for only the specialty areas identified on the ambulatory surgical facility's 1993 Application for Licensure as an Ambulatory Surgical Center and authorized by its certificate of need.

(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than

15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan.

(26) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1002, s. 9.

(27) Repealed by Session Laws 1987, c. 511, s. 1. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 1, 2; c. 1127, ss. 24-29; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1002, ss. 1-9; c. 1022, ss. 2, 3; c. 1064, s. 1; c. 1110, ss. 1, 2; 1985, c. 589, ss. 42, 43(a); c. 740, ss. 1, 2, 6; 1985 (Reg. Sess., 1986), c. 1001, s. 2; 1987, c. 34; c. 511, s. 1; 1991, c. 692, s. 1; c. 701, s. 1; 1993, c. 7, s. 2; c. 376, ss. 1-4; 1997-443, s. 11A.118(a); 2000-135, ss. 1, 2; 2001-234, s. 2; 2001-242, ss. 2, 4; 2003-229, s. 13; 2003-390, ss. 1, 2; 2005-325, s. 1; 2005-346, s. 6(a)-(d).)

Editor's Note. — Session Laws 1987, c. 511, s. 3, provided that the act, which amended this section, would become effective July 1, 1987, and would apply to all new institutional health services that are proposed on and after that date, but would not apply to applications for certificates of need which begin review, or to projects for which certificates of need were issued, before that date. Section 3 of Session Laws 1987, c. 511 further provided that the act would supersede all previous acts that were to become effective at any time after the effective date of the act (July 1, 1987). Thus an amendment by Session Laws 1985, c. 589, s. 43(b), which would have deleted "Article 1A of General Statutes Chapter 122" following "licensed under" in paragraph (5a)b and (5a)c, and was scheduled to become effective on January 1, 1988, was superseded and did not go into effect.

Session Laws 2001-242, s. 5, provides: "This act is effective when it becomes law [June 23, 2001]. This act shall not apply to any project which was not a new institutional health service as defined in G.S. 131E-176(16) prior to the effective date of this act and for which there has been a capital expenditure exceeding fifty thousand dollars ($50,000) or there was a legally binding obligation for a capital expenditure exceeding fifty thousand dollars ($50,000) in effect on or before the effective date of this act and which was reasonably expected to be completed by December 31, 2002. A facility or office that was not licensed as an ambulatory surgical facility prior to the effective date of this act shall not become an ambulatory surgical facility by virtue of the amendment set forth in Sections 1 and 2 of this act [which amended G.S. 131E-146 and 131E-176] and may not be licensed as an ambulatory surgical facility under Part D of Article 6 of Chapter 131E of the General Statutes without a certificate of need."

Chapter 122, referred to in this section, has been repealed. See now Chapter 122C.

The definitions contained in this section have been set out in the order above at the direction of the Revisor of Statutes.

Former subdivisions (1), (1a), and (1b) in this section were redesignated as present subdivisions (1a), (1b), and (1c), at the direction of the Revisor of Statutes to preserve alphabetical order of the definitions.

The reference to G.S. 131E-180, in sub-subdivision (16)*l* has been repealed by Session Laws 2005-325, s. 2, effective August 26, 2005.

Session Laws 2005-325, s. 6, provides: "G.S. 131E-176(2f) and (2g), as enacted in this act, shall not preclude the furnishing of cardiac catheterization equipment or the provision of cardiac catheterization services by a person authorized to furnish this equipment or provide these services pursuant to a settlement agreement between the person and the Department of Health and Human Services prior to the effective date of this act."

Session Laws 2005-325, s. 7, provides: G.S. 131E-176, as amended by Section 1 of this act, becomes effective for hospices and hospice offices December 31, 2005. The remainder of this act is effective when it becomes law.

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

CASE NOTES

The legislature did not intend to impose unreasonable limitations on maintaining or expanding presently offered health services. Cape Fear Mem. Hosp. v. North Carolina Dep't of Human Resources, 121 N.C. App. 492, 466 S.E.2d 299 (1996).

Amendments to the State Medical Facilities Plan. — The term "approved" in subdivision (25) gives the Governor the final authority to make substantive amendments to the State Medical Facilities Plan as part of the approval process. Frye Regional Medical Ctr., Inc. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999).

Dialysis firm challenging the refusal of the N.C. Department of Health and Human Services (DHHS), Division of Facility Services [now the Division of Health Service Regulation], Medical Facilities Planning Section, to amend a Semiannual Dialysis Report (SDR) did not have a remedy under the North Carolina Administrative Procedures Act or the North Carolina Declaratory Judgment Act since, inter alia: the enabling statute suggested that the North Carolina State Medical Facilities Plan (SMFP), which contained the SDR, was a snapshot in time intended to enable the DHHS to develop policy, criteria, and standards for health service facilities planning; and it was the role of the DHHS and the N.C. State Health Coordinating Council to develop the SMFP. Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006).

The opening of branch offices by an established home health agency within its current service area is not the construction, development or other establishment of a new health service facility under subdivision (16)(a) of this section; however, the question of whether extension of home health services to patients in counties outside an agency's current service area, or the expansion of branch offices of an established home health agency outside the agency's current service area would trigger the Certificate of Need requirement under this section has not been decided. Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990).

Expansion, Not "New Institutional Health Service". — The defendant/center was not required to obtain a separate certificate of need to develop additional operating rooms, a recovery room, and necessary ancillary space at a second site within the service area for which it already held a certificate of need. The defendant's proposal was not a "new institutional health service" requiring a certificate of need, but rather, an expansion of an existing health service facility within the limitations permitted by statute. Christenbury Surgery Ctr. v. North Carolina Health & Human Servs., 138 N.C. App. 309, 531 S.E.2d 219, 2000 N.C. App. LEXIS 611 (2000).

"New Institutional Health Service". — "New institutional health service" as defined in G.S. 131E-176(16) was interpreted to include a new hospital intended to replace an existing hospital. Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, 2006 N.C. App. LEXIS 63 (2006), review denied, cert. denied, 360 N.C. 480, 632 S.E.2d 172 aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006).

Existing institutional health service, including a hospice, had to obtain a new certificate of need (CON) to open a "branch office" outside its service area, because such an office, regardless of the label affixed by its developer, was a "new institutional health service" for which a CON is required under G.S. 131E-176. Hospice & Palliative Care Charlotte Region v. N.C. HHS, — N.C. App. —, 648 S.E.2d 284, 2007 N.C. App. LEXIS 1675 (2007).

Branch office proposed by a hospice was not located within the service area of the hospice; therefore, the proposed branch office was a new institutional health service for which the hospice had to obtain a certificate of need. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

No Exemption For Complete Replacement Hospital. — Hospital was not exempt under G.S. 131E-184 from the process of applying for a Certificate Of Need to build a complete replacement hospital in the place of an existing hospital which it proposed to acquire. G.S. 131E-184(a)(5) allowed the replacement of an entire facility, but then only to replace or repair facilities destroyed or damaged by accident or natural disaster. Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, 2006 N.C. App. LEXIS 63 (2006), review denied, cert. denied, 360 N.C. 480, 632 S.E.2d 172 aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006).

Cited in Rutherford Hosp. v. RNH Partnership, 168 F.3d 693 (4th Cir. 1999); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-177. Department of Health and Human Services is designated State Health Planning and Development Agency; powers and duties.

The Department of Health and Human Services is designated as the State Health Planning and Development Agency for the State of North Carolina, and is empowered to exercise the following powers and duties:

(1) To establish standards and criteria or plans required to carry out the provisions and purposes of this Article and to adopt rules pursuant to

Chapter 150B of the General Statutes, to carry out the purposes and provisions of this Article;

(2) Adopt, amend, and repeal such rules and regulations, consistent with the laws of this State, as may be required by the federal government for grants-in-aid for health service facilities and health planning which may be made available by the federal government. This section shall be liberally construed in order that the State and its citizens may benefit from such grants-in-aid;

(3) Define, by rule, procedures for submission of periodic reports by persons or health service facilities subject to agency review under this Article;

(4) Develop policy, criteria, and standards for health service facilities planning; shall conduct statewide registration and inventories of and make determinations of need for health service facilities, health services as specified in G.S. 131E-176(16)f., and equipment as specified in G.S. 131E-176(16)f1., which shall include consideration of adequate geographic location of equipment and services; and develop a State Medical Facilities Plan;

(5) Implement, by rule, criteria for project review;

(6) Have the power to grant, deny, or withdraw a certificate of need and to impose such sanctions as are provided for by this Article;

(7) Solicit, accept, hold and administer on behalf of the State any grants or bequests of money, securities or property to the Department for use by the Department in the administration of this Article; and

(8) Repealed by Session Laws 1987, c. 511, s. 1.

(9) Collect fees for submitting applications for certificates of need.

(10) The authority to review all records in any recording medium of any person or health service facility subject to agency review under this Article which pertain to construction and acquisition activities, staffing or costs and charges for patient care, including but not limited to, construction contracts, architectural contracts, consultant contracts, purchase orders, cancelled checks, accounting and financial records, debt instruments, loan and security agreements, staffing records, utilization statistics and any other records the Department deems to be reasonably necessary to determine compliance with this Article.

The Secretary of Health and Human Services shall have final decision-making authority with regard to all functions described in this section. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 1; 1983, c. 713, s. 96; c. 775, ss. 1, 6; 1987, c. 511, s. 1; 1991, c. 692, s. 2; 1993, c. 7, s. 3; c. 383, ss. 2, 3; 1997-443, s. 11A.118(a); 2007-323, s. 30.4(a).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.4(a), effective October 1, 2007, and applicable to applications submitted on or after October 1, 2007, rewrote subdivision (9).

CASE NOTES

Responsibility of Department. — While the hearing officer's recommendations are entitled to consideration, the responsibility for making the decision is that of the Department of Human Resources. Humana Hosp. Corp. v. North Carolina Dep't of Human Resources, 81 N.C. App. 628, 345 S.E.2d 235 (1986), decided under former G.S. 131-177.

Project analyst's request for documentation of petitioner's alleged support by professional groups and individuals was entirely reasonable and within Department of Human Resources' authority, in order to obtain the necessary information to properly review application. Charter Pines Hosp. v. North Carolina Dep't of Human Resources, 83 N.C. App. 161, 349 S.E.2d 639, cert. denied, 319 N.C. 105, 353 S.E.2d 106 (1987), decided under former G.S. 131-177 and 131-181.

Authority to Develop Policy, Criteria, and Standards. — Dialysis firm challenging the refusal of the N.C. Department of Health and Human Services (DHHS), Division of Facility Services [now the Division of Health Service Regulation], Medical Facilities Planning Section, to amend a Semiannual Dialysis Report (SDR) did not have a remedy under the North Carolina Administrative Procedures Act or the North Carolina Declaratory Judgment Act since, inter alia: the enabling statute suggested that the North Carolina State Medical Facilities Plan (SMFP), which contained the SDR, was a snapshot in time intended to enable the DHHS to develop policy, criteria, and standards for health service facilities planning; and it was the role of the DHHS and the N.C. State Health Coordinating Council to develop the SMFP. Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006).

Cited in Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990); Frye Regional Medical Ctr., Inc. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999).

§ 131E-178. Activities requiring certificate of need.

(a) No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department; provided, however, no person who provides gastrointestinal endoscopy procedures in one or more gastrointestinal endoscopy rooms located in a nonlicensed setting, shall be required to obtain a certificate of need to license that setting as an ambulatory surgical facility with the existing number of gastrointestinal endoscopy rooms, provided that:

(1) The license application is postmarked for delivery to the Division of Health Service Regulation by December 31, 2006;

(2) The applicant verifies, by affidavit submitted to the Division of Health Service Regulation within 60 days of the effective date of this act, that the facility is in operation as of the effective date of this act or that the completed application for the building permit for the facility was submitted by the effective date of this act;

(3) The facility has been accredited by The Accreditation Association for Ambulatory Health Care, The Joint Commission on Accreditation of Healthcare Organizations, or The American Association for Accreditation of Ambulatory Surgical Facilities by the time the license application is postmarked for delivery to the Division of Health Service Regulation of the Department; and

(4) The license application includes a commitment and plan for serving indigent and medically underserved populations.

All other persons proposing to obtain a license to establish an ambulatory surgical facility for the provision of gastrointestinal endoscopy procedures shall be required to obtain a certificate of need. The annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved.

(b) No person shall make an acquisition by donation, lease, transfer, or comparable arrangement without first obtaining a certificate of need from the Department, if the acquisition would have been a new institutional health service if it had been made by purchase. In determining whether an acquisition would have been a new institutional health service, the capital expenditure for the asset shall be deemed to be the fair market value of the asset or the cost of the asset, whichever is greater.

(c) No person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need from the Department. An obligation for a capital expenditure is incurred when:

(1) An enforceable contract, excepting contracts which are expressly contingent upon issuance of a certificate of need, is entered into by a

person for the construction, acquisition, lease or financing of a capital asset;

(2) A person takes formal action to commit funds for a construction project undertaken as his own contractor; or

(3) In the case of donated property, the date on which the gift is completed.

(d) Where the estimated cost of a proposed capital expenditure, including the fair market value of equipment acquired by purchase, lease, transfer, or other comparable arrangement, is certified by a licensed architect or engineer to be equal to or less than the expenditure minimum for capital expenditure for new institutional health services, such expenditure shall be deemed not to exceed the amount for new institutional health services regardless of the actual amount expended, provided that the following conditions are met:

(1) The certified estimated cost is prepared in writing 60 days or more before the obligation for the capital expenditure is incurred. Certified cost estimates shall be available for inspection at the facility and sent to the Department upon its request.

(2) The facility on whose behalf the expenditure was made notifies the Department in writing within 30 days of the date on which such expenditure is made if the expenditure exceeds the expenditure minimum for capital expenditures. The notice shall include a copy of the certified cost estimate.

(e) The Department may grant certificates of need which permit capital expenditures only for predevelopment activities. Predevelopment activities include the preparation of architectural designs, plans, working drawings, or specifications, the preparation of studies and surveys, and the acquisition of a potential site. (1977, 2nd Sess., c. 1182, s. 2; 1979, c. 876, s. 2; 1981, c. 651, s. 3; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1110, s. 3; 1985, c. 740, s. 3; 1985 (Reg. Sess., 1986), c. 1001, s. 1; 1987, c. 511, s. 1; c. 768; 1991, c. 692, s. 3; 1993, c. 7, s. 4; 2005-346, s. 7; 2007-182, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1110, s. 17, provided that the enactment of ss. 1 through 3 of the act (which amended G.S. 131E-176 and 131E-178) should not be construed as requiring a facility which had obtained prior to June 30, 1984, a certificate of need for such use under prior law to obtain a new certificate of need on account of the special inclusion of chemical dependency treatment facilities in Article 9 of Chapter 131E.

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subdivisions (a)(1), (a)(2), and (a)(3).

CASE NOTES

The opening of branch offices by an established home health agency within its current service area is not the construction, development or other establishment of a new health service facility under G.S. 131E-176(16)(a); however, the question of whether extension of home health services to patients in counties outside an agency's current service area, or the expansion of branch offices of an established home health agency outside the agency's current service area would trigger the Certificate of Need requirement under G.S. 131E-176 has not been decided. Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990).

Expansion, Not "New Institutional Health Service". — The defendant/center was not required to obtain a separate certificate of need to develop additional operating rooms, a recovery room, and necessary ancillary space at a second site within the service area for which it already held a certificate of need. The defendant's proposal was not a "new institutional health service" requiring a certificate of need, but rather, an expansion of an existing health service facility within the limitations permitted by statute. Christenbury Surgery Ctr. v. North Carolina Health & Human Servs., 138 N.C. App. 309, 531 S.E.2d 219, 2000 N.C. App. LEXIS 611 (2000).

Cited in Cape Fear Mem. Hosp. v. North Carolina Dep't of Human Resources, 121 N.C. App. 492, 466 S.E.2d 299 (1996); Koltis v. North Carolina Dep't of Human Resources, 125 N.C. App. 268, 480 S.E.2d 702 (1997); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-179. Research activities.

(a) Notwithstanding any other provisions of this Article, a health service facility may offer new institutional health services to be used solely for research, or incur the obligation of a capital expenditure solely for research, without a certificate of need, if the Department grants an exemption. The Department shall grant an exemption if the health service facility files a notice of intent with the Department in accordance with rules promulgated by the Department and if the Department finds that the offering or obligation will not:

(1) Affect the charges of the health service facility for the provision of medical or other patient care services other than services which are included in the research;
(2) Substantially change the bed capacity of the facility; or
(3) Substantially change the medical or other patient care services of the facility.

(b) After a health service facility has received an exemption pursuant to subsection (a) of this section, it shall not offer the new institutional health services, or use a facility acquired through the capital expenditure, in a manner which affects the charges of the facility for the provision of medical or other patient care services, other than the services which are included in the research and shall not charge patients for the use of the service for which an exemption has been granted, without first obtaining a certificate of need from the Department; provided, however, that any facility or service acquired or developed under the exemption provided by this section shall not be subject to the foregoing restrictions on its use if the facility or service could otherwise be offered or developed without a certificate of need.

(c) Any of the activities described in subsection (a) of this section shall be deemed to be solely for research even if they include patient care provided on an occasional and irregular basis and not as a part of the research program. (1983, c. 775, s. 1; 1987, c. 511, s. 1; 1991, c. 692, s. 4.)

CASE NOTES

Cited in Hospital Corp. v. Iredell County, 120 N.C. App. 445, 462 S.E.2d 675 (1995).

§ 131E-180: Repealed by Session Laws 2005-325, s. 2, effective August 26, 2005.

§ 131E-180.1. Expired.

Editor's Note. — Session Laws 1995, s. 2, provided that this section would expire when the Division of Facility Services completed and implemented the current rewrite of home care licensure rules, but that the expiration should be no earlier than February 1, 1996, and no later than June 30, 1996.

§ 131E-181. Nature of certificate of need.

(a) A certificate of need shall be valid only for the defined scope, physical

G.S. 131E-182(a) is set out twice. See note.

location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c).

(b) A recipient of a certificate of need, or any person who may subsequently acquire, in any manner whatsoever permitted by law, the service for which that certificate of need was issued, is required to materially comply with the representations made in its application for that certificate of need. The Department shall require any recipient of a certificate of need, or its successor, whose service is in operation to submit to the Department evidence that the recipient, or its successor, is in material compliance with the representations made in its application for the certificate of need which granted the recipient the right to operate that service. In determining whether the recipient of a certificate of need, or its successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the Department shall consider cost increases to the recipient, or its successor, including, but not limited to, the following:

(1) Any increase in the consumer price index;
(2) Any increased cost incurred because of Government requirements, including federal, State, or any political subdivision thereof; and
(3) Any increase in cost due to professional fees or the purchase of services and supplies.

(c) Whenever a certificate of need is issued more than 12 months after the application for the certificate of need began review, the Department shall adjust the capital expenditure amount proposed by increasing it to reflect any inflation in the Department of Commerce's Construction Cost Index that has occurred since the date when the application began review; and the Department shall use this recalculated capital expenditure amount in the certificate of need issued for the project.

(d) A project authorized by a certificate of need is complete when the health service or the health service facility for which the certificate of need was issued is licensed and certified and is in material compliance with the representations made in the certificate of need application. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 5; 1983, c. 775, s. 1; 1985, c. 521, s. 1; 1985 (Reg. Sess., 1986), c. 968, s. 1; 1987, c. 511, s. 1; 1989, c. 233; c. 751, s. 9(c); 1991, c. 692, s. 5; 1991 (Reg. Sess., 1992), c. 959, s. 85; 1993, c. 7, s. 5.)

CASE NOTES

Certificate of Need Required. — Branch office proposed by a hospice was not located within the service area of the hospice; therefore, the proposed branch office was a new institutional health service for which the hospice had to obtain a certificate of need. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Cited in Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res., 136 N.C. App. 307, 524 S.E.2d 352, 2000 N.C. App. LEXIS 20 (2000).

§ 131E-182. Application.

(a) **(For expiration date — see note)** The Department in its rules shall establish schedules for submission and review of completed applications. The schedules shall provide that applications for similar proposals in the same service area will be reviewed together. However, there shall not be a review scheduled prior to February 1, 2006, for submission and review of certificate of need applications that propose an increase in the number of licensed gastrointestinal endoscopy rooms. An applicant for a certificate of need to establish a licensed gastrointestinal endoscopy room shall show that it is

G.S. 131E-182(a) is set out twice. See note.

performing or reasonably projects to perform at least 1,500 gastrointestinal endoscopy procedures per gastrointestinal endoscopy room per year.

(a) **(For effective date — see note)** The Department in its rules shall establish schedules for submission and review of completed applications. The schedules shall provide that applications for similar proposals in the same service area will be reviewed together.

(b) An application for a certificate of need shall be made on forms provided by the Department. The application forms, which may vary according to the type of proposal, shall require such information as the Department, by its rules deems necessary to conduct the review. An applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

(c) An application fee is imposed on an applicant for a certificate of need. An applicant must submit the fee with the application. The fee is not refundable, regardless of whether a certificate of need is issued. Fees collected under this section shall be credited to the General Fund as nontax revenue. The application fee is five thousand dollars ($5,000) plus an amount equal to three-tenths of one percent (.3%) of the amount of the capital expenditure proposed in the application that exceeds one million dollars ($1,000,000). In no event may the fee exceed fifty thousand dollars ($50,000). (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 6; 1983, c. 713, s. 97; c. 775, ss. 1, 6; 1987, c. 511, s. 1; 2005-325, s. 3; 2005-346, s. 8; 2007-323, s. 30.4(b).)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until the effective date of administrative rules adopted consistent with the provisions of this act regarding the number of gastrointestinal endoscopy procedures performed or projected to be performed. The second version of subsection (a) is effective on that date.

Editor's Note. — Session Laws 1993, c. 561, s. 88, provides: "Those existing facilities that were granted a Certificate of Need to develop no more than 30 beds and that have applied for a Certificate of Need to expand to 32 beds prior to July 1, 1993, are exempt from the 30-bed limitation and may be issued a Certificate of Need for no more than 32 beds each. These additional beds for those facilities shall not be taken into account in deciding Certificate of Need allocations to other applicants in the same service area during the 1993 calendar year."

Session Laws 1993, c. 561, s. 23.1, as added by Session Laws 1994, Extra Session, c. 24, s. 54, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 2005-346, s. 9, provides: "Nothing in Sections 2 through 10 of this act shall be construed to represent legislative intent as to the circumstances under which Medicare or Medicaid certification may be obtained for a provider of ambulatory surgery services."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.4(b), effective October 1, 2007, and applicable to applications submitted on or after October 1, 2007, rewrote subsection (c).

CASE NOTES

Cited in Charter Pines Hosp. v. North Carolina Dep't of Human Resources, 83 N.C. App. 161, 349 S.E.2d 639 (1986); Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-183. Review criteria.

(a) The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.

(1) **(See note)** The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

(2) Repealed by Session Laws 1987, c. 511, s. 1.

(3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

(3a) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

(4) Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.

(5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

(6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

(7) The applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided.

(8) The applicant shall demonstrate that the provider of the proposed services will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services. The applicant shall also demonstrate that the proposed service will be coordinated with the existing health care system.

(9) An applicant proposing to provide a substantial portion of the project's services to individuals not residing in the health service area in which the project is located, or in adjacent health service areas, shall document the special needs and circumstances that warrant service to these individuals.

(10) When applicable, the applicant shall show that the special needs of health maintenance organizations will be fulfilled by the project. Specifically, the applicant shall show that the project accommodates:

a. The needs of enrolled members and reasonably anticipated new members of the HMO for the health service to be provided by the organization; and

- b. The availability of new health services from non-HMO providers or other HMOs in a reasonable and cost-effective manner which is consistent with the basic method of operation of the HMO. In assessing the availability of these health services from these providers, the applicant shall consider only whether the services from these providers:
  - 1. Would be available under a contract of at least five years' duration;
  - 2. Would be available and conveniently accessible through physicians and other health professionals associated with the HMO;
  - 3. Would cost no more than if the services were provided by the HMO; and
  - 4. Would be available in a manner which is administratively feasible to the HMO.

(11) Repealed by Session Laws 1987, c. 511, s. 1.

(12) Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

(13) The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show:

- a. The extent to which medically underserved populations currently use the applicant's existing services in comparison to the percentage of the population in the applicant's service area which is medically underserved;
- b. Its past performance in meeting its obligation, if any, under any applicable regulations requiring provision of uncompensated care, community service, or access by minorities and handicapped persons to programs receiving federal assistance, including the existence of any civil rights access complaints against the applicant;
- c. That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services; and
- d. That the applicant offers a range of means by which a person will have access to its services. Examples of a range of means are outpatient services, admission by house staff, and admission by personal physicians.

(14) The applicant shall demonstrate that the proposed health services accommodate the clinical needs of health professional training programs in the area, as applicable.

(15) through (18) Repealed by Session Laws 1987, c. 511, s. 1.

(18a) The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

(19) Repealed by Session Laws 1987, c. 511, s. 1.

(20) An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.

(21) Repealed by Session Laws 1987, c. 511, s. 1.

(b) The Department is authorized to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed. No such rule adopted by the Department shall require an academic medical center teaching hospital, as defined by the State Medical Facilities Plan, to demonstrate that any facility or service at another hospital is being appropriately utilized in order for that academic medical center teaching hospital to be approved for the issuance of a certificate of need to develop any similar facility or service.

(c) Repealed by Session Laws 1987, c. 511, s. 1. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 7; 1983, c. 775, s. 1; c. 920, s. 2; 1983 (Reg. Sess., 1984), c. 1002, s. 10; 1985, c. 445, s. 1; 1987, c. 511, s. 1; 1991, c. 692, s. 6; c. 701, s. 2; 1993, c. 7, s. 6; 2001-242, s. 3.)

Editor's Note. — Session Laws 2001-242, s. 5, provides: "This act is effective when it becomes law [June 23, 2001]. This act shall not apply to any project which was not a new institutional health service as defined in G.S. 131E-176(16) prior to the effective date of this act and for which there has been a capital expenditure exceeding fifty thousand dollars ($50,000) or there was a legally binding obligation for a capital expenditure exceeding fifty thousand dollars ($50,000) in effect on or before the effective date of this act and which was reasonably expected to be completed by December 31, 2002. A facility or office that was not licensed as an ambulatory surgical facility prior to the effective date of this act shall not become an ambulatory surgical facility by virtue of the amendment set forth in Sections 1 and 2 of this act [which amended G.S. 131E-146 and 131E-176] and may not be licensed as an ambulatory surgical facility under Part D of Article 6 of Chapter 131E of the General Statutes without a certificate of need."

CASE NOTES

Legislative Findings. — In enacting the certificate of need law, the legislature found as facts that the forces of free market competition are largely absent in health care, and that government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that less costly and more effective alternatives are made available. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175 and 131-181.

Review of Criteria by Agency. — The certificate of need law does not contemplate that the agency will review any criteria competitively, and subsequently find one applicant nonconforming to a criterion simply because another applicant is found conforming, as the intent of the legislature is to have the agency first ensure that each application comports with the statutory and regulatory criteria. Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

Full Contested Case Hearing Not Precluded by the Statute. — In a Certificate of Need (CON) case, the CON Statute does not preclude a full contested case hearing where an ALJ recommended a summary judgment in a decision based only on each applicant's conformity with the criteria in G.S. 131E-183. A full hearing protects the applicant's due process rights, allows the record to be fully developed, and encourages judicial economy. Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000).

Review of Criteria by Hearing Officer. — In a certificate of need case, the hearing officer may only consider evidence contained in an applicant's certificate of need application which was before the Certificate of Need Section when it made its initial decision. Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, 346 N.C. 267, 485 S.E.2d 294 (1997).

Statutory Criteria Met. — A challenged, successful Certificate of Need application did not violate State and federal Medicaid regulations by overstating its projected Medicaid revenues, nor did it fail in financial feasibility, cost effectiveness, or conformity to statutory criteria contained in this section. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

The N. C. Department of Health and Human Services adhered to the required procedures where it first analyzed each individual certificate of need application to determine the extent to which each application conformed to the statutory criteria, and then entered exhaustive findings with respect to the relative merits of the applications, comparing Medicaid access, costs for services, operating costs, types of services, staffing, and location before concluding that the successful application was comparatively superior. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Decision of the North Carolina Department of Health and Human Services to award a certificate of need for new kidney dialysis machines to an applicant was affirmed as the agency's findings were supported by sufficient evidence, and it did not exceed its statutory authority in using enhanced competition and consumer choice as key factors in a comparative analysis. Total Renal Care of N.C., LLC v. N.C. HHS, 171 N.C. App. 734, 615 S.E.2d 81, 2005 N.C. App. LEXIS 1354 (2005).

Effect of Successive Certificate of Need Applications. — Issue of the denial of a hospital's 2003 application for a certificate of need (CON) for a replacement hospital was made moot by its 2005 application for a CON since the 2005 application covered the same facility and, compliant with G.S. 131E-175, G.S. 131E-183(a)(1), the State Medical Facilities Plan set maximum beds and operating rooms for the county. Good Hope Health Sys., L.L.C. v. N.C. HHS, 175 N.C. App. 296, 623 S.E.2d 307, 2006 N.C. App. LEXIS 62 (2006), review granted, cert. denied, 360 N.C. 479, 632 S.E.2d 171 rev'd and remanded, review improvidently granted, 360 N.C. 635, 637 S.E.2d 517 (2006) (rev'd as to mootness issue). See also Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, (2006).

Allegation of Priority Status Without Merit. — The certificate of need section should not be foreclosed from carrying out the purposes and intent of the certificate of need law by an alleged priority status obtained by an applicant being the only one of several applicants to exercise its rights to judicial review. In re Denial of Request by Humana Hosp. Corp., 78 N.C. App. 637, 338 S.E.2d 139 (1986), decided under former G.S. 131-175 and 131-181.

Duplication of Services Not a Concern. — The Department of Health and Human Services' finding that the successful Certificate of Need (CON) application conformed with subsections (a)(3), (4) and (6) of this section was supported by substantial evidence where the applicant identified 34 of its own patients at another facility who expressed a willingness to transfer their treatment to the proposed facility; where such transfer would not result in a duplication of services but rather better access for current patients; and where an evaluation of the alternatives—(1) relocating stations to develop a new facility at a new site, (2) expansion of the existing facility, and (3) doing nothing—revealed that opening a new center was the most effective alternative although the competing CON applicant already serviced a dialysis center in the city of the proposed new site. Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000).

Number of Existing Federal-Approved Dialysis Stations Considered. — Where evidence presented at hearing showed that eighty to ninety percent of the dialysis patients in the area to be served relied on Medicare or Medicaid to pay for dialysis treatment, the agency was justified in concluding that only federally-approved stations should be considered when counting the number of existing stations. In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788, cert. denied, 320 N.C. 793, 361 S.E.2d 89 (1987).

Financial Status of Participating Out-of-State Physician Considered. — The agency did not act in an unfair or illegal manner is considering evidence of the financial status of a listed shareholder who was a licensed physician in several states and needed to meet only pro-forma requirements in order to become licensed in North Carolina, simply because such evidence had not been utilized in the initial decision and because he was not yet a licensed physician in North Carolina, where all the evidence indicated that he would be a licensed physician and thus eligible to participate in the project by the time the Certificate of Need would be issued. In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788, cert. denied, 320 N.C. 793, 361 S.E.2d 89 (1987).

Project analyst's request for documentation of petitioner's alleged support by professional groups and individuals was entirely reasonable and within Department of Human Resources' authority, in order to obtain the necessary information to properly review application. Charter Pines Hosp. v. North Carolina Dep't of Human Resources, 83 N.C. App. 161, 349 S.E.2d 639 (1986), cert. denied, 319 N.C. 105, 353 S.E.2d 106 (1987), decided under former G.S. 131-177 and 131-181.

Evidence supported department's conclusion that need existed for dialysis facility, and that there were no less costly or more effective alternatives for providing the desired services. In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788, cert. denied, 320 N.C. 793, 361 S.E.2d 89 (1987).

For case where determination that criteria for qualifying for certificate of need for construction of hospital were not met, see Hospital Group of Western North Carolina, Inc. v. North Carolina Dep't of Human Resources, 76 N.C. App. 265, 332 S.E.2d 748 (1985).

Substantial Evidence Supported Conditional Approval. — Substantial evidence existed from which the agency could reasonably find that a Certificate of Need (CON) application for a dialysis center, as conditioned, conformed with Criterion 5 where the financial backer agreed to carry out the project, and the bank's finance officer testified, after the conditional approval, that the backer had access to sufficient funds for their equity contribution. Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000).

Conditional Approval Not Arbitrary or Capricious. — The agency's decision to conditionally approve a Certificate of Need (CON) application did not constitute arbitrary and capricious decision-making where the services were determined to be needed; where the conditions imposed, as required by Criterion 5, insured that the proposal was consistent with applicable criteria; and where there was substantial evidence from which the agency could reasonably find the application conditionally conforming. Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000).

Subdivision (a)(5) of this section did not require the submission of financial statements by the applicants; it merely required the Department of Human Resources to determine the availability of funds for the project from the entity responsible for funding, which may or may not be an applicant. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Financial Resources of Other Entity. — There is nothing in subdivision (a)(5) of this section which precludes a certificate of need applicant from relying on the financial resources of another entity for its funding. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Where a project is to be funded other than by the applicants, the application must contain evidence of a commitment to provide the funds by the funding entity; without such a commitment, an applicant cannot adequately demonstrate availability of funds or the requisite financial feasibility. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Sufficient evidence supported a finding of financial feasibility where the availability of a bank loan was properly evidenced by a letter of interest, where a loan shortfall could be covered by other personal assets, and where "the certificate of need section did not rely on [the availability of a line of credit in the name of a deceased individual] in concluding that there were sufficient funds to finance [the] proposal." Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Financial Commitment Adequately Demonstrated. — Evidence of financial backers' net worth and demonstrated ability to provide $811,362.00 separate and apart from their wives, who had not signed commitment letters, coupled with a certification page by one of the backers describing his "intent to carry out the proposed project" and an affidavit further affirming this intent, when added to evidence demonstrating the ability of the funding sources to provide the funds, were sufficient to show commitment required by this section. Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res., 136 N.C. App. 307, 524 S.E.2d 352, 2000 N.C. App. LEXIS 20 (2000).

Early Expiration of Credit Line. — Where Certificate of Need applicant's supporting documentation indicated that the bank's line of credit would expire before the proposed project was scheduled to commence, substantial evidence supported the Department of Health and Human Services' finding that the applicant failed to establish the availability and commitment of funds required by this section. Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res., 136 N.C. App. 307, 524 S.E.2d 352, 2000 N.C. App. LEXIS 20 (2000).

Letter Not Commitment to Finance. — A letter from a bank indicating its interest in loaning money to a corporation for the addition/conversion of beds and confirming that it had money which could be used to fund the project did not constitute a commitment to provide financing, nor did it bind it to use money for the project. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

A letter which may arguably have shown commitment to provide working capital during the first 3 years of operation did not commit a corporation to expend any money for the capital expenses necessary to implement the project. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Determination of Assumptions and Methodology. — The Department of Human Resources employed the wrong standard in determining whether assumptions and methodology were contained in an application where, instead of finding that they were "clearly stated", the agency found that they were "sufficiently clear" and "discernible." Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Errors and Omissions Did Not Prejudice Competitor. — While the Department of Health and Human Services technically exceeded its authority and jurisdiction and committed errors of law by awarding a Certificate of Need to establish a new dialysis center on the basis of an application that was never shown to be conforming to all applicable criteria, its actions did not prejudice the applicant's competitor because the alleged mistakes and omissions, which were made under a settlement agreement, were corrected by final agency decision. Bio-Medical Applications of N.C., Inc. v. North Carolina Dep't of Human Resources, 136 N.C. App. 103, 523 S.E.2d 677, 1999 N.C. App. LEXIS 1372 (1999).

Application Unclear. — Applicant failed to define clearly the type of services it intended to provide where its application contained contradictory information regarding whether or not it proposed a dedicated Alzheimer's unit. Retirement Villages, Inc. v. North Carolina Dep't of Human Resources, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Department Decision Reversed. — Final agency decision of the North Carolina Department of Health and Human Services (DHHS), which upheld two settlement agreements between the DHHS' Certificate of Need (CON) section and a group of medical centers and issued a CON to the group for a hospital project was reversed on appeal, because the DHHS failed to follow statutory procedure when it rejected an administrative law judge's recommendation to deny the CON applications of the group by erroneously considering new evidence, which it had no statutory authority to do. Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

Cited in Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990).

§ 131E-184. Exemptions from review.

(a) Except as provided in subsection (b), the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required, for any of the following:

(1) To eliminate or prevent imminent safety hazards as defined in federal, State, or local fire, building, or life safety codes or regulations.

(1a) To comply with State licensure standards.

(1b) To comply with accreditation or certification standards which must be met to receive reimbursement under Title XVIII of the Social Security Act or payments under a State plan for medical assistance approved under Title XIX of that act.

(2) Repealed by Session Laws 1987, c. 511, s. 1.

(3) To provide data processing equipment.

(4) To provide parking, heating or cooling systems, elevators, or other basic plant or mechanical improvements, unless these activities are integral portions of a project that involves the construction of a new health service facility or portion thereof and that is subject to certificate of need review.

(5) To replace or repair facilities destroyed or damaged by accident or natural disaster.
(6) To provide any nonhealth service facility or service.
(7) To provide replacement equipment.
(8) To acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.
(9) To develop or acquire a physician office building regardless of cost, unless a new institutional health service other than defined in G.S. 131E-176(16)b. is offered or developed in the building.

(b) Those portions of a proposed project which are not proposed for one or more of the purposes under subsection (a) of this section are subject to certificate of need review, if these non-exempt portions of the project are new institutional health services under G.S. 131E-176(16).

(c) The Department shall exempt from certificate of need review any conversion of existing acute care beds to psychiatric beds provided:
(1) The hospital proposing the conversion has executed a contract with the Department's Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and/or one or more of the Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities to provide psychiatric beds to patients referred by the contracting agency or agencies; and
(2) The total number of beds to be converted shall not be more than twice the number of beds for which the contract pursuant to subdivision (1) of this subsection shall provide.

(d) In accordance with, and subject to the limitations of G.S. 148-19.1, the Department shall exempt from certificate of need review the construction and operation of a new chemical dependency or substance abuse facility for the purpose of providing inpatient chemical dependency or substance abuse services solely to inmates of the Department of Correction. If an inpatient chemical dependency or substance abuse facility provides services both to inmates of the Department of Correction and to members of the general public, only the portion of the facility that serves inmates shall be exempt from certificate of need review. (1983, c. 775, s. 1; 1987, c. 511, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 37; 1993, c. 7, s. 7; 2001-424, s. 25.19(c); 2002-159, s. 41.)

CASE NOTES

The legislature did not intend to impose unreasonable limitations on maintaining or expanding presently offered health services. Cape Fear Mem. Hosp. v. North Carolina Dep't of Human Resources, 121 N.C. App. 492, 466 S.E.2d 299 (1996).

No Exemption For Complete Replacement Hospital. — Hospital was not exempt under G.S. 131E-184 from the process of applying for a Certificate Of Need to build a complete replacement hospital in the place of an existing hospital which it proposed to acquire. G.S. 131E-184(a)(5) allowed the replacement of an entire facility, but then only to replace or repair facilities destroyed or damaged by accident or natural disaster. Good Hope Hosp., Inc. v. N.C. HHS, 175 N.C. App. 309, 623 S.E.2d 315, 2006 N.C. App. LEXIS 63 (2006), review denied, cert. denied, 360 N.C. 480, 632 S.E.2d 172 aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006).

No Exemption for New Institutional Health Service. — Branch office proposed by a hospice was not located within the service area of the hospice; therefore, the proposed branch office was a new institutional health service for which the hospice had to obtain a certificate of need. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Exhaustion of Administrative Remedies. — Trial court did not err in dismissing appeal filed by hospital joint venture and a town in an action to permit the construction of a new hospital under the exemption provisions of G.S. 131E-184(a) where the hospital joint venture and the town failed to exhaust their administrative remedies by pursuing an administrative review hearing as provided by G.S. 131E-78(b)(1), the available administrative remedies were not inadequate to resolve the dispute, the plaintiffs failed to state an equal protection claim upon which relief could be granted in that they failed to allege the lack of a rational basis; and the complaint failed to meet the heightened standard required to overcome a regional hospital's Noerr immunity after it commented against the issuance of a certificate of need to the building of a new hospital. Good Hope Hosp., Inc. v. N.C. HHS, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 131E-185. Review process.

(a) Repealed by Session Laws 1987, c. 511, s. 1.

(a1) Except as provided in subsection (c) of this section, there shall be a time limit of 90 days for review of the applications, beginning on the day established by rule as the day on which applications for the particular service in the service area shall begin review.

(1) Any person may file written comments and exhibits concerning a proposal under review with the Department, not later than 30 days after the date on which the application begins review. These written comments may include:
   a. Facts relating to the service area proposed in the application;
   b. Facts relating to the representations made by the applicant in its application, and its ability to perform or fulfill the representations made;
   c. Discussion and argument regarding whether, in light of the material contained in the application and other relevant factual material, the application complies with relevant review criteria, plans, and standards.

(2) No more than 20 days from the conclusion of the written comment period, the Department shall ensure that a public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply; the review to be conducted is competitive; the proponent proposes to spend five million dollars ($5,000,000) or more; a written request for a public hearing is received before the end of the written comment period from an affected party as defined in G.S. 131E-188(c); or the agency determines that a hearing is in the public interest. At such public hearing oral arguments may be made regarding the application or applications under review; and this public hearing shall include the following:
   a. An opportunity for the proponent of each application under review to respond to the written comments submitted to the Department about its application;
   b. An opportunity for any person, except one of the proponents, to comment on the applications under review;
   c. An opportunity for a representative of the Department, or such other person or persons who are designated by the Department to conduct the hearing, to question each proponent of applications under review with regard to the contents of the application;

   The Department shall maintain a recording of any required public hearing on an application until such time as the Department's final decision is issued, or until a final agency decision is issued pursuant to a contested case hearing, whichever is later; and any person may submit a written synopsis or verbatim statement that contains the oral presentation made at the hearing.

(3) The Department may contract or make arrangements with a person or persons located within each service area for the conduct of such public hearings as may be necessary. The Department shall publish, in each service area, notice of the contracts that it executes for the conduct of those hearings.

(4) Within 15 days from the beginning of the review of an application or applications proposing the same service within the same service area,

the Department shall publish notice of the deadline for receipt of written comments, of the time and place scheduled for the public hearing regarding the application or applications under review, and of the name and address of the person or agency that will preside.

(5) The Department shall maintain all written comments submitted to it during the written comment stage and any written submissions received at the public hearing as part of the Department's file respecting each application or group of applications under review by it. The application, written comments, and public hearing comments, together with all documents that the Department used in arriving at its decision, from whatever source, and any documents that reflect or set out the Department's final analysis of the application or applications under review, shall constitute the Department's record for the application or applications under review.

(a2) When an expedited review has been approved by the Department, no public hearing shall be held. The Department may contact the applicant and request additional or clarifying information, amendments to, or substitutions for portions of the application. The Department may negotiate conditions to be imposed on the certificate of need with the applicant.

(b) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 137(a).

(c) The Department may extend the review period for a period not to exceed 60 days and provide notice of such extension to all applicants. For expedited reviews, the Department may extend the review period only if it has requested additional substantive information from the applicant. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 9, 10; 1983, c. 775, s. 1; 1987, c. 511, s. 1; 1991, c. 692, s. 7; 1991 (Reg. Sess., 1992), c. 900, s. 137(a), (b); 1993, c. 7, s. 8; 2005-325, s. 4.)

Editor's Note. — Session Laws 2007-473, ss. 1, 2, effective August 29, 2007, and applicable to certificate of need applications for the relocation of adult care homes and adult care home beds or nursing homes and nursing home beds within the same county filed on or after the date of implementation of the expedited review process by the Department of Health and Human Services, Division of Health Service Regulation, provide:

"The Department of Health and Human Services, Division of Facility Services, shall develop an expedited certificate of need review process for a current holder of a certificate of need for an adult care home or a nursing home to relocate from one licensed facility or campus to another. This expedited certificate of need review process shall be available only to a facility that meets the following criteria:

"(1) The facility currently holds a certificate of need for an adult care home or nursing home.

"(2) The facility proposes to move from one licensed facility or campus to another licensed facility or campus.

"(3) Both the current and the proposed facilities or campuses are located within the same county.

"(4) The relocation of the adult care home or nursing home would not result in an increase in the total number of adult care home beds or nursing home beds for that facility or campus.

"The Department of Health and Human Services, Division of Health Service Regulation, shall implement the expedited certificate of need review process no later than October 1, 2007. The Department shall determine the minimum review criteria needed to determine the need for a relocation of a facility under the circumstances required under Section 1 of this act and report to the General Assembly on or before May 1, 2008."

CASE NOTES

Editor's Note. — *Most of the cases annotated below were decided prior to the 1992 amendment to this section, which repealed subsection (b) and amended subsection (c).*

Former subsection (b) of this section was construed in pari materia with G.S. 131E-186(a). HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Construed in pari materia, as they must be, this section and G.S. 131-186 must be read as providing that the Department shall exercise one of two options, within the review period, when dealing with an application for a certificate of need: (1) make a decision to deny or approve the application, or (2) reject the application. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

The limiting phrase "within the review period" in former subsection (b) of this section modified only the phrase "reject the application," and, therefore, the Department lost subject matter jurisdiction to reject an application when the review period ended. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

A time limit of 90 days was prescribed by statute for the Department's review of applications for certificates of need, running from the date upon which the assigned review period begins. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

An exception to the former 90-day time limit mandated by the foregoing provision was contained in subsection (c) of this section. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Failure of Department to Act on Application Within Review Period to Be Deemed Approval. — The provisions of Article 9 must be construed as expressing the legislature's intent that the Department be deemed as a matter of law to have rendered a decision to approve a certificate of need if the Department fails to act upon an application within the applicable review period. Thereafter, the Department retains subject matter jurisdiction only for the purpose of issuing the certificate of need, which it is deemed to have decided to approve. A contrary interpretation of the certificate of need law would leave the applicant with no effective remedy for the Department's failure to comply with the statute. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Time Limitation for Acting on Certificate of Need Is Jurisdictional. — Former statutory provisions clearly prescribed a mandatory maximum time limit of 150 days within which the Department must act on applications for certificates of need. To the extent it was applicable, this time limit was jurisdictional in nature. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Once the review period expired without action by the Department, it retained jurisdiction only for the purpose of issuing certificates of need. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Department of Human Resources is authorized to approve projects for fewer beds than are proposed by an applicant. The power to make such conditional approvals is discretionary, however, and not mandatory. Charter Pines Hosp. v. North Carolina Dep't of Human Resources, 83 N.C. App. 161, 349 S.E.2d 639 (1986), cert. denied, 319 N.C. 105, 353 S.E.2d 106 (1987), decided under former G.S. 131-182(b).

Comments Did Not Constitute Unauthorized Amendment. — Where information provided by a successful applicant for a certificate of need (CON) neither changed its application nor had any impact on the agency's determination that the application met the statutory criteria, its comments were not an unauthorized amendment to the application. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Conditioned Approval. — It was not erroneous for hearing officer to condition her approval of application for certificate of need upon information to be furnished later, rather than returning the case to analyst for further review, as this section authorizes the Department to issue the certificate of need with or without conditions. In re Conditional Approval of Certificate of Need Application of Health Care & Retirement Corp. of Am., 88 N.C. App. 563, 364 S.E.2d 150, cert. denied, 322 N.C. 480, 370 S.E.2d 220 (1988).

The North Carolina Department of Health and Human Services may find that an application for a Certificate of Need is consistent with the statutory criteria while imposing conditions upon it, especially where those conditions (the provision of documentation showing which financial backer would be responsible for the owner's equity portion of the capital expenses) were not essential to the application's approval. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Participation in Certificate of Need Application Process. — Branch office proposed by a hospice was not located within the service area of the hospice; therefore, a competing hospice provider that was already providing hospice services in the service area could participate in the certificate of need application process by filing written comments and exhibits concerning the proposal. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Department's disapproval of pending applications after the maximum 150-day review period expired was a nullity and of no legal consequence. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of

Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Cited in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995); Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996); Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000); Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-186. Decision.

(a) Within the prescribed time limits in G.S. 131E-185, the Department shall issue a decision to "approve," "approve with conditions," or "deny," an application for a new institutional health service. Approvals involving new or expanded nursing care or intermediate care for the mentally retarded bed capacity shall include a condition that specifies the earliest possible date the new institutional health service may be certified for participation in the Medicaid program. The date shall be set far enough in advance to allow the Department to identify funds to pay for care in the new or expanded facility in its existing Medicaid budget or to include these funds in its State Medicaid budget request for the year in which Medicaid certification is expected.

(b) Within five business days after it makes a decision on an application, the Department shall provide written notice of all the findings and conclusions upon which it based its decision, including the criteria used by the Department in making its decision, to the applicant. (1977, 2nd Sess., c. 1182, s. 2; 1983, c. 775, s. 1; 1987, c. 511, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 137(c).)

CASE NOTES

Former G.S. 131E-185(b) was construed in pari materia with subsection (a) of this section. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Construed in pari materia, as they must be, G.S. 131E-185 and this section must be read as providing that the Department shall exercise one of two options, within the review period, when dealing with an application for a certificate of need: (1) make a decision to deny or approve the application, or (2) reject the application. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Notice of Findings and Conclusions. — Although the agency must review applications in accordance with statutory criteria and administrative rules adopted by the Department of Human Resources, subsection (b) requires the agency to provide notice of its findings and conclusions upon which it based its decision, but does not limit those findings to statutory criteria of rules. Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

Claim Under G.S. 75-1.1 Not Supported. — Under North Carolina's certificate of need law, an applicant seeking to develop a health service facility must meet certain criteria. Defendant, a member of the health care community, was requesting that plaintiff's application for a certificate of need be subjected to scrutiny before the organization which would run the chemical dependency treatment facility was admitted to the community. These actions do not give rise to a claim under G.S. 75-1.1. Moreover, G.S. 75-1.1(b) exempts professional services rendered by a member of a learned profession, and an existing institutional health service would be exempted as a professional health care provider. Abram v. Charter Medical Corp. of Raleigh, 100 N.C. App. 718, 398 S.E.2d 331 (1990), discretionary review denied, 328 N.C. 328, 402 S.E.2d 828 (1991).

Review of Criteria by Agency. — The certificate of need law does not contemplate that the agency will review any criteria competitively, and subsequently find one applicant nonconforming to a criterion simply because another applicant is found conforming, as the intent of the legislature is to have the agency first ensure that each application comports with the statutory and regulatory criteria. Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

Conditioned Approval. — The North Carolina Department of Health and Human Services may find that an application for a Certificate of Need is consistent with the statutory criteria while imposing conditions upon it, especially where those conditions (the provision of documentation showing which financial backer would be responsible for the owner's equity portion of the capital expenses) were not essential to the application's approval. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

The N.C. Department of Health and Human Services adhered to required procedures where it first analyzed each individual certificate of need application to determine the extent to which each application conformed to the statutory criteria, and then entered exhaustive findings with respect to the relative merits of the applications, comparing Medicaid access, costs for services, operating costs, types of services, staffing, and location before concluding that the successful application was comparatively superior. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Department Decision Reversed. — Final agency decision of the North Carolina Department of Health and Human Services (DHHS), which upheld two settlement agreements between the DHHS' Certificate of Need (CON) section and a group of medical centers and issued a CON to the group for a hospital project was reversed on appeal, because the DHHS failed to follow statutory procedure when it rejected an administrative law judge's recommendation to deny the CON applications of the group by erroneously considering new evidence, which it had no statutory authority to do. Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

Applied in Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000).

Cited in In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788 (1987); Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000).

§ 131E-187. Issuance of a certificate of need.

(a) The Department shall issue a certificate of need within 35 days of the date of the decision referenced in G.S. 131E-186, when no request for a contested case hearing has been filed in accordance with G.S. 131E-188, and all applicable conditions of approval that can be satisfied before issuance of the certificate of need have been met.

(b) The Department shall issue a certificate of need within five days after a request for a contested case hearing has been withdrawn or the final agency decision has been made following a contested case hearing, and all applicable conditions of approval that can be satisfied before issuance of the certificate of need have been met. (1977, 2nd Sess., c. 1182, s. 2; 1983, c. 775, s. 1; 1987, c. 511, s. 1.)

CASE NOTES

Conditioned Approval. — The North Carolina Department of Health and Human Services may find that an application for a Certificate of Need is consistent with the statutory criteria while imposing conditions upon it, especially where those conditions (the provision of documentation showing which financial backer would be responsible for the owner's equity portion of the capital expenses) were not essential to the application's approval. Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999).

Cited in HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990); Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000); Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257, 2000 N.C. App. LEXIS 491 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-188. Administrative and judicial review.

(a) After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law, any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department makes its decision. When a petition is filed, the Department shall send notification of the petition to the proponent of each application that was reviewed with the application for a certificate of need that is the subject of the petition. Any affected person shall be entitled to intervene in a contested case.

A contested case shall be conducted in accordance with the following timetable:

(1) An administrative law judge or a hearing officer, as appropriate, shall be assigned within 15 days after a petition is filed.
(2) The parties shall complete discovery within 90 days after the assignment of the administrative law judge or hearing officer.
(3) The hearing at which sworn testimony is taken and evidence is presented shall be held within 45 days after the end of the discovery period.
(4) The administrative law judge or hearing officer shall make his recommended decision within 75 days after the hearing.
(5) The Department shall make its final decision within 30 days of receiving the official record of the case from the Office of Administrative Hearings.

The administrative law judge or hearing officer assigned to a case may extend the deadlines in subdivisions (2) through (4) so long as the administrative law judge or hearing officer makes his recommended decision in the case within 270 days after the petition is filed. The Department may extend the deadline in subdivision (5) for up to 30 days by giving all parties written notice of the extension.

(a1) On or before the date of filing a petition for a contested case hearing on the approval of an applicant for a certificate of need, the petitioner shall deposit a bond with the clerk of superior court where the new institutional health service that is the subject of the petition is proposed to be located. The bond shall be secured by cash or its equivalent in an amount equal to five percent (5%) of the cost of the proposed new institutional health service that is the subject of the petition, but may not be less than five thousand dollars ($5,000) and may not exceed fifty thousand dollars ($50,000). A petitioner who received approval for a certificate of need and is contesting only a condition in the certificate is not required to file a bond under this subsection.

The applicant who received approval for the new institutional health service that is the subject of the petition may bring an action against a bond filed under this subsection in the superior court of the county where the bond was filed. Upon finding that the petition for a contested case was frivolous or filed to delay the applicant, the court may award the applicant part or all of the bond filed under this subsection. At the conclusion of the contested case, if the court does not find that the petition for a contested case was frivolous or filed to delay the applicant, the petitioner shall be entitled to the return of the bond deposited with the superior court upon demonstrating to the clerk of superior court where the bond was filed that the contested case hearing is concluded.

(b) Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision of the Department shall be taken within 30 days of the receipt of the written notice of final decision, and notice of appeal shall be filed with the Division of Health Service Regulation, Department of Health and Human Services and served on all other affected persons who were parties to the contested hearing.

(b1) Before filing an appeal of a final decision by the Department granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. The bond shall be secured by cash or its equivalent in an amount equal to five percent (5%) of the cost of the proposed new institutional health service that is the subject of the appeal, but may not be less than five thousand dollars ($5,000) and may not exceed fifty thousand dollars ($50,000). A holder of a certificate of need who is appealing only a condition in the certificate is not required to file a bond under this subsection.

If the Court of Appeals finds that the appeal was frivolous or filed to delay the applicant, the court shall remand the case to the superior court of the county where a bond was filed for the contested case hearing on the certificate of need. The superior court may award the holder of the certificate of need part or all of the bond. The court shall award the holder of the certificate of need reasonable attorney fees and costs incurred in the appeal to the Court of Appeals. If the Court of Appeals does not find that the appeal was frivolous or filed to delay the applicant and does not remand the case to superior court for a possible award of all or part of the bond to the holder of the certificate of need, the person originally filing the bond shall be entitled to a return of the bond.

(c) The term "affected persons" includes: the applicant; any individual residing within the service area or the geographic area served or to be served by the applicant; any individual who regularly uses health service facilities within that geographic area or the service area; any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant; any person who, prior to receipt by the agency of the proposal being reviewed, has provided written notice to the agency of an intention to provide similar services in the future to individuals residing within the service area or the geographic area to be served by the applicant; third party payers who reimburse health service facilities for services in the service area in which the project is proposed to be located; and any agency which establishes rates for health service facilities or HMOs located in the service area in which the project is proposed to be located. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 11; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1000, s. 1; 1987, c. 511, s. 1; 1991, c. 692, s. 8; c. 701, s. 3; 1993, c. 7, s. 9; 1997-443, s. 11A.118(a); 2005-325, s. 5; 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subsection (b).

CASE NOTES

Editor's Note. — *Some of the cases annotated below were decided under the law in effect prior to Session Laws 1987, c. 511, which amended this section and repealed former G.S. 131E-191.*

Applicability of Section. — This section only applies to challenges relating to the issuance, denial or withdrawal of certificates of need. Gummels v. North Carolina Dep't of Human Resources, 97 N.C. App. 245, 388 S.E.2d 223, cert. denied, 97 N.C. App. 245, 393 S.E.2d 877 (1990).

G.S. 131E-188(a) provided that "any affected person" could contest a decision by the certificate of need section of the North Carolina DHHS, Division of Facility Services, to issue, deny, or withdraw a certificate of need or exemption, and any person who provided services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant, was an "affected party" under G.S. 131E-188(c). Hospice & Palliative Care Charlotte Region v. N.C. HHS, — N.C. App. —, 648 S.E.2d 284, 2007 N.C. App. LEXIS 1675 (2007).

When a contested case under G.S. 131E-188 was filed seeking review of a decision that a health service did not require a certificate of need, there was no rule that the contested case was always moot when the challenged health service became "fully operational," because this would accelerate the unlawful development of new institutional health services, encouraging health service providers to make questionable projects "fully operational" before an "affected party" had time to contest the action. Hospice & Palliative Care Charlotte Region v. N.C. HHS, — N.C. App. —, 648 S.E.2d 284, 2007 N.C. App. LEXIS 1675 (2007).

Mootness. — When a competitor filed a contested case under G.S. 131E-188 seeking review of a decision that a hospice did not require a certificate of need to open a branch office outside of the hospice's geographic area, the fact that the hospice obtained a license four days before the competitor filed the contested case did not render the contested case moot because, if a certificate of need was required for the hospice's branch office as alleged by the competitor in the constested case, the hospice's license could be revoked under G.S. 131E-190(e), so a resolution of the issue raised by the competitor would have a significant practical effect on the controversy, and the contested case was not moot. Hospice & Palliative Care Charlotte Region v. N.C. HHS, — N.C. App. —, 648 S.E.2d 284, 2007 N.C. App. LEXIS 1675 (2007).

The right to administrative and judicial review of decisions regarding certificates of need is governed by this section. Iredell Mem. Hosp. v. North Carolina Dep't of Human Resources, 103 N.C. App. 637, 406 S.E.2d 304 (1991).

The language of subsection (a) leaves no room for judicial construction. The statute clearly contemplates that a petition for a contested case hearing must be filed — not mailed or served — with the Office of Administrative Hearings within the 30-day deadline. Gummels v. North Carolina Dep't of Human Resources, 98 N.C. App. 675, 392 S.E.2d 113 (1990).

Without the jurisdictional prerequisite of a contested case hearing, a petitioner cannot utilize subsection (b) to appeal to the Court of Appeals. Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

Full Contested Case Hearing Not Precluded by the Statute. — In a Certificate of Need (CON) case, the CON Statute does not preclude a full contested case hearing where an ALJ recommended a summary judgment in a decision based only on each applicant's conformity with the criteria in G.S. 131E-183. A full hearing protects the applicant's due process rights, allows the record to be fully developed, and encourages judicial economy. Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs., 138 N.C. App. 572, 532 S.E.2d 192, 2000 N.C. App. LEXIS 782 (2000).

The result of a petitioner's ineffective attempts to file a petition for a contested case hearing was only a contested case. Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

Refusal to Amend Semiannual Dialysis Report. — Summary judgment for the N.C. Department of Health and Human Services, Division of Facility Services [now the Division of Health Service Regulation], and its Medical Facilities Planning Section was affirmed as a dialysis firm could not challenge the refusal by the Planning Section to amend a Semiannual Dialysis Report under the certificate of need (CON) statute since a CON had not been issued, denied, or withdrawn; the refusal to amend the SDR was beyond the terms and conditions for the waiver of sovereign immunity prescribed by the CON statute. Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006).

For the purposes of meeting the appeal requirements of subsection (b) of this section, appellant, proposed intervenor below, was not and could not be a party to the contested hearing at issue below until its motion to intervene was approved. Since the motion was not approved, appellant was not a party to the contested case and, therefore, did not meet the jurisdictional requirements of subsection (b) of this section. HCA Crossroads Residential Centers, Inc. v. North Carolina Dep't of Human Resources, 99 N.C. App. 193, 392 S.E.2d 398 (1990).

Under 1986 version of subsection (a), in effect at time of petitioner's request for a contested case hearing, the request was timely "filed" with the Division of Facility Services [now the Division of Health Service Regulation] where it was received within 30 days of the contested decision; the version of the subdivision in effect at that time read in pertinent part: ".... any affected person shall be entitled to a contested case hearing under Article 3 of Chapter 150A [now Chapter 150B] of the General Statutes, if the department receives a request therefor within 30 days after its decision." Under the current statutes, a request must be filed within 30 days, not just received. Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990).

The exercise of the right to an eviden-

tiary hearing under the contested case provision of subsection (a) does not commence a de novo proceeding by the administrative law judge (ALJ) intended to lead to a formulation of the final decision pursuant to G.S. 150B-23(a), the ALJ, in a contested case hearing under the certificate of need law and the Administrative Procedure Act, G.S. 150B-1 et seq., determines whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule, based on a hearing limited to the evidence that is presented or available to the agency during the review period. Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

To What Court Appeals May Be Taken. — Direct appeal to the Court of Appeals for review of certificate of need decisions is provided for in subsection (b) of this section. Iredell Mem. Hosp. v. North Carolina Dep't of Human Resources, 103 N.C. App. 637, 406 S.E.2d 304 (1991).

This section provides for an appeal directly to the Court of Appeals from an adverse decision after a contested case hearing, while all parties aggrieved by any other final agency decision are still required to appeal to the Wake County Superior Court pursuant to former G.S. 131E-191(b). Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Dep't of Human Resources, 83 N.C. App. 122, 349 S.E.2d 291 (1986).

Under subsection (b) of this section, an actual "contested case hearing" is a jurisdictional prerequisite for a direct appeal to the Court of Appeals from a final agency decision, and parties aggrieved by any other final agency decision are required to appeal to the Wake County Superior Court pursuant to former G.S. 131E-191(b). Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988).

Following Department's initial assertion that applicant was not entitled to a hearing, applicant's sole avenue of relief lay in an appeal to Wake County Superior Court for a determination of its right to a contested case hearing, and the Department thus correctly dismissed its initial attempt to appeal directly to the Court of Appeals. The fact that the appeal came to the Court of Appeals as an appeal from the dismissal of a previous appeal did not alter the application of the rule that a contested case hearing must precede appeal to the Court of Appeals. Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988).

Where hospital did not perfect an appeal of the final agency decision of the Department of Human Resources (Agency) denying its request to build a new surgical facility, but rather, the hospital's appeal to the superior court only sought review of the Agency's refusal to issue a declaratory ruling in response to the hospital's request, and since this section provides that such appeals are to be filed in the Court of Appeals, not the superior court, the superior court had no jurisdiction to consider the final agency decision and that decision, not having been appealed, remained binding on the parties. Catawba Mem. Hosp. v. North Carolina Dep't of Human Resources, 112 N.C. App. 557, 436 S.E.2d 390 (1993), cert. granted, 336 N.C. 72, 445 S.E.2d 31 (1994).

North Carolina DHHS, Division of Facility Services, Certificate of Need Section's issuance of a No Review letter to a hospice that sought to open a branch office in another service area was the issuance of an exemption for purposes of G.S. 131E-188(a); accordingly, G.S. 131E-188(b) conferred jurisdiction on the court of Appeals of North Carolina to hear an appeal from a challenge to the letter. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Award of Certificate of Need Affirmed. — Decision of the North Carolina Department of Health and Human Services to award a certificate of need for new kidney dialysis machines to an applicant was affirmed as the agency's findings were supported by sufficient evidence, and it did not exceed its statutory authority in using enhanced competition and consumer choice as key factors in a comparative analysis. Total Renal Care of N.C., LLC v. N.C. HHS, 171 N.C. App. 734, 615 S.E.2d 81, 2005 N.C. App. LEXIS 1354 (2005).

In a hospital's contested case petition under G.S. 131E-188(a) to challenge the conditional approval of a certificate of need (CON) permitting a medical center to expand its emergency room facilities, the medical center was entitled to summary judgment because the hospital did not prove substantial prejudice from the CON under G.S. 150B-23(a); the hospital's claim of prejudice from challenges by the medical center to a facility it was building had been declared moot in another action, and judicial estoppel did not bar the medical center from claiming that the hospital was not substantially prejudiced because the other action was not related and did not stem from a common set of circumstances. Presbyterian Hosp. v. N.C. HHS, 177 N.C. App. 780, 630 S.E.2d 213, 2006 N.C. App. LEXIS 1184 (2006), appeal dismissed, cert. denied, 361 N.C. 221, 642 S.E.2d 446 (2007).

Res Judicata Effect. — In action to appeal Department of Human Resources's denial of hospital's building request, the final agency decision was a judicial decision which barred, as res judicata, plaintiff's complaint for declaratory judgment. Catawba Mem. Hosp. v. North Carolina Dep't of Human Resources, 112 N.C. App. 557, 436 S.E.2d 390 (1993), cert. granted, 336 N.C. 72, 445 S.E.2d 31 (1994).

Cited in Hospital Group v. North Carolina Dep't of Human Resources, 67 N.C. App. 265, 332 S.E.2d 748 (1985); Humana Hosp. Corp. v. North Carolina Dep't of Human Resources, 81 N.C. App. 628, 345 S.E.2d 235 (1986); In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788 (1987); Lenoir Mem. Hosp. v. North Carolina Dep't of Human Resources, 98 N.C. App. 178, 390 S.E.2d 448 (1990); Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995); Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources, 135 N.C. App. 568, 522 S.E.2d 96, 1999 N.C. App. LEXIS 1180 (1999); Mooresville Hosp. Mgmt. Assocs. v. N.C. HHS, Div. of Facility Servs., 169 N.C. App. 641, 611 S.E.2d 431, 2005 N.C. App. LEXIS 796 (2005).

§ 131E-189. Withdrawal of a certificate of need.

(a) The Department shall specify in each certificate of need the time the holder has to make the service or equipment available or to complete the project and the timetable to be followed. The timetable shall be the one proposed by the holder of the certificate of need unless the Department specifies a different timetable in its decision letter. The holder of the certificate shall submit such periodic reports on his progress in meeting the timetable as may be required by the Department. If no progress report is provided or, after reviewing the progress, the Department determines that the holder of the certificate is not meeting the timetable and the holder cannot demonstrate that it is making good faith efforts to meet the timetable, the Department may withdraw the certificate. If the Department determines that the holder of the certificate is making a good faith effort to meet the timetable, the Department may, at the request of the holder, extend the timetable for a specified period.

(b) The Department may withdraw any certificate of need, if the holder of the certificate fails to develop the service in a manner consistent with the representations made in the application or with any condition or conditions the Department placed on the certificate of need.

(c) The Department may immediately withdraw any certificate of need if the holder of the certificate, before completion of the project or operation of the facility, transfers ownership or control of the facility, the project, or the certificate of need. Any transfer after that time will be subject to the requirement that the service be provided consistent with the representations made in the application and any applicable conditions the Department placed on the certificate of need. Transfers resulting from death or personal illness or other good cause, as determined by the Department, shall not result in withdrawal if the Department receives prior written notice of the transfer and finds good cause. Transfers resulting from death shall not result in withdrawal. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 12; 1983, c. 775, s. 1; 1987, c. 511, s. 1; 1993, c. 7, s. 10.)

§ 131E-190. Enforcement and sanctions.

(a) Only those new institutional health services which are found by the Department to be needed as provided in this Article and granted certificates of need shall be offered or developed within the State.

(b) No formal commitments made for financing, construction, or acquisition regarding the offering or development of a new institutional health service shall be made by any person unless a certificate of need for such service or activities has been granted.

(c) Repealed by Session Laws 1993, c. 7, s. 11.

(d) If any person proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services, the penalty for such violation of this Article and rules hereunder may include the withholding of federal and State funds under Titles V, XVIII, and XIX of the Social Security Act for reimbursement of capital and operating expenses related to the provision of the new institutional health service.

(e) The Department may revoke or suspend the license of any person who proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services.

(f) The Department may assess a civil penalty of not more than twenty thousand dollars ($20,000) against any person who knowingly offers or develops any new institutional health service within the meaning of this Article without a certificate of need issued under this Article and the rules pertaining thereto, or in violation of the terms or conditions of such a certificate, whenever it determines a violation has occurred and each time the service is provided in violation of this provision. In determining the amount of the penalty the Department shall consider the degree and extent of harm caused by the violation and the cost of rectifying the damage. A person who is assessed a penalty shall be notified of the penalty by registered or certified mail. The notice shall state the reasons for the penalty. If a person fails to pay a penalty, the Department shall refer the matter to the Attorney General for collection. For the purpose of this subsection, the word "person" shall not include an individual in his capacity as an officer, director, or employee of a person as otherwise defined in this Article.

The clear proceeds of penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(g) No agency of the State or any of its political subdivisions may appropriate or grant funds or financially assist in any way a person, applicant, or facility which is or whose project is in violation of this Article.

(h) If any person proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services, the Secretary of Health and Human Services or any person aggrieved, as defined by G.S. 150B-2(6), may bring a civil action for injunctive relief, temporary or permanent, against the person offering, developing or operating any new institutional health service. The action may be brought in the superior court of any county in which the health service facility is located or in the superior court of Wake County.

(i) If the Department determines that the recipient of a certificate of need, or its successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the Department may bring an action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized for injunctive relief, temporary or permanent, requiring the recipient, or its successor, to materially comply with the representations in its application. The Department may also bring an action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized to enforce the provisions of this subsection and G.S. 131E-181(b) and the rules adopted in accordance with this subsection and G.S. 131E-181(b). (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 13; 1983, c. 775, s. 1; 1985 (Reg. Sess., 1986), c. 968, s. 2; 1987, c. 511, s. 1; 1991, c. 692, s. 9; 1993, c. 7, s. 11; 1997-443, s. 11A.118(a); 1998-215, s. 80.)

CASE NOTES

Mootness. — When a competitor filed a contested case under G.S. 131E-188 seeking review of a decision that a hospice did not require a certificate of need to open a branch office outside of the hospice's geographic area, the fact that the hospice obtained a license four days before the competitor filed the contested case did not render the contested case moot because, if a certificate of need was required for the hospice's branch office as alleged by the competitor in the constested case, the hospice's license could be revoked under G.S. 131E-190(e), so a resolution of the issue raised by the competitor would have a significant practical effect on the controversy, and the contested case was not moot. Hospice & Palliative Care Charlotte Region v. N.C. HHS, — N.C. App. —, 648 S.E.2d 284, 2007 N.C. App. LEXIS 1675 (2007).

§ 131E-191: Repealed by Session Laws 1987, c. 511, s. 1.

§ 131E-192: Reserved for future codification purposes.

Article 9A.

Certificate of Public Advantage.

§ 131E-192.1. Findings.

The General Assembly of North Carolina makes the following findings:

(1) That technological and scientific developments in hospital care have enhanced the prospects for further improvement in the quality of care provided by North Carolina hospitals to North Carolina citizens.

(2) That the cost of improved technology and improved scientific methods for the provision of hospital care contributes substantially to the increasing cost of hospital care. Cost increases make it increasingly difficult for hospitals in rural areas of North Carolina to offer care.

(3) That changes in federal and State regulations governing hospital operation and reimbursement have constrained the ability of hospitals to acquire and develop new and improved machinery and methods for the provision of hospital-related care.

(4) That cooperative agreements among hospitals and between hospitals and others for the provision of health care services may foster improvements in the quality of health care for North Carolina citizens, moderate increases in cost, improve access to needed services in rural areas of North Carolina, and enhance the likelihood that smaller hospitals in North Carolina will remain open in beneficial service to their communities.

(5) That hospitals are often in the best position to identify and structure cooperative arrangements that enhance quality of care, improve access, and achieve cost-efficiency in the provision of care.

(6) That federal and State antitrust laws may prohibit or discourage cooperative arrangements that are beneficial to North Carolina citizens despite their potential for or actual reduction in competition and that such agreements should be permitted and encouraged.

(7) That competition as currently mandated by federal and State antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, or between hospitals and others, that are beneficial to North Carolina citizens when the benefits of cooperative agreements outweigh their disadvantages caused by their potential or actual adverse effects on competition.

(8) That regulatory as well as judicial oversight of cooperative agreements should be provided to ensure that the benefits of cooperative agreements permitted and encouraged in North Carolina outweigh any disadvantages attributable to any reduction in competition likely to result from the agreements. (1993, c. 529, s. 5.2.)

§ 131E-192.2. Definitions.

The following definitions apply in this Article:

(1) "Attorney General" means the Attorney General of the State of North

Carolina or any attorney on his or her staff to whom the Attorney General delegates authority and responsibility to act pursuant to this Article.

(2) "Cooperative agreement" means an agreement among two or more hospitals, between a hospital and any other person, or between a person who controls a hospital and another hospital or person who controls a hospital for any of the following:
  a. The sharing, allocation, or referral of patients, personnel, instructional programs, support services and facilities, or medical, diagnostic, or laboratory facilities or equipment, or procedures or other services traditionally offered by hospitals.
  b. A purchase of assets pursuant to a merger or sale, a partnership, a joint venture, or any other affiliation by which ownership or control over all or substantially all of the stock, assets, or activities of one or more hospitals or persons who control hospitals are transferred to another hospital or person who controls a hospital.

"Cooperative agreement" shall not include any agreement that would permit self-referrals of patients by a health care provider that is otherwise prohibited by law.

(3) "Department" means the Department of Health and Human Services.

(4) "Federal or State antitrust laws" means any and all federal or State laws prohibiting monopolies or agreements in restraint of trade, including the federal Sherman Act, Clayton Act, Federal Trade Commission Act, and North Carolina laws codified in Chapter 75 of the General Statutes that prohibit restraints on competition.

(5) "Hospital" means any hospital required to be licensed under Chapters 131E or 122C of the General Statutes.

(6) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency. (1993, c. 529, s. 5.2; 1995, c. 205, s. 1; 1997-443, s. 11A.118(a).)

Editor's Note. — The definitions in this section were placed in alphabetical order at the direction of the Revisor of Statutes.

§ 131E-192.3. Certificate of public advantage; application.

(a) A hospital and any person who is a party to a cooperative agreement with a hospital may negotiate, enter into, and conduct business pursuant to a cooperative agreement without being subject to damages, liability, or scrutiny under any State antitrust law if a certificate of public advantage is issued for the cooperative agreement, or in the case of activities to negotiate or enter into a cooperative agreement, if an application for a certificate of public advantage is filed in good faith. It is the intention of the General Assembly that immunity from federal antitrust laws shall also be conferred by this statute and the State regulatory program that it establishes.

(b) Parties to a cooperative agreement may apply to the Department for a certificate of public advantage governing that cooperative agreement. The application must include an executed written copy of the cooperative agreement or letter of intent with respect to the agreement, a description of the nature and scope of the activities and cooperation in the agreement, any consideration passing to any party under the agreement, and any additional materials necessary to fully explain the agreement and its likely effects. A copy of the application and all additional related materials shall be submitted to the

Attorney General at the same time the application is submitted to the Department. (1993, c. 529, s. 5.2.)

§ 131E-192.4. Procedure for review; standards for review.

(a) The Department shall review an application in accordance with the standards set forth in subsection (b) of this section and shall hold a public hearing with the opportunity for the submission of oral and written public comments in accordance with rules adopted by the Department. The Department shall determine whether the application should be granted or denied within 90 days of the date the application is filed. The Department may extend the review period for a specified period of time upon notice to the parties.

(b) The Department shall determine that a certificate of public advantage should be issued for a cooperative agreement if it determines that an applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the disadvantages likely to result from a reduction in competition from the agreement.

(1) In evaluating the potential benefits of a cooperative agreement, the Department shall consider whether one or more of the following benefits may result from the cooperative agreement:
  a. Enhancement of the quality of hospital and hospital-related care provided to North Carolina citizens.
  b. Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities.
  c. Lower costs of, or gains in, the efficiency of delivering hospital services.
  d. Improvements in the utilization of hospital resources and equipment.
  e. Avoidance of duplication of hospital resources.
  f. The extent to which medically underserved populations are expected to utilize the proposed services.

(2) In evaluating the potential disadvantages of a cooperative agreement, the Department shall consider whether one or more of the following disadvantages may result from the cooperative agreements:
  a. The extent to which the agreement may increase the costs or prices of health care at a hospital which is party to the cooperative agreement.
  b. The extent to which the agreement may have an adverse impact on patients in the quality, availability, and price of health care services.
  c. The extent to which the agreement may reduce competition among the parties to the agreement and the likely effects thereof.
  d. The extent to which the agreement may have an adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents, or other health care payors to negotiate optimal payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers.
  e. The extent to which the agreement may result in a reduction in competition among physicians, allied health professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals.
  f. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition.

(3) In making its determination, the Department may consider other benefits or disadvantages that may be identified. (1993, c. 529, s. 5.2; 1997-456, s. 27.)

Editor's Note. — The subsections and subdivisions in this section were redesignated pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 131E-192.5. Issuance of a certificate.

If the Department determines that the likely benefits of a cooperative agreement outweigh the likely disadvantages attributable to reduction of competition as a result of the agreement by clear and convincing evidence, and the Attorney General has not stated any objection to issuance of a certificate during the review period, the Department shall issue a certificate of public advantage for the cooperative agreement at the conclusion of the review period. The certificate shall include any conditions of operation under the agreement that the Department, in consultation with the Attorney General, determines to be appropriate in order to ensure that the cooperative agreement and the activities engaged under it are consistent with this Article and its purpose to limit health care costs. The Department shall include conditions to control prices of health care services provided under the cooperative agreement. Consideration shall be given to assure that access to health care is provided to all areas of the State. The Department shall publish its decisions on applications for certificates of public advantage in the North Carolina Register. (1993, c. 529, s. 5.2.)

§ 131E-192.6. Objection by Attorney General.

If the Attorney General is not persuaded that an applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the likely disadvantages of any reduction of competition to result from the agreement as set forth in G.S. 131E-192.4, the Attorney General may, within the review period, state an objection to the issuance of a certificate of public advantage and may extend the review period for a specified period of time. Notice of the objection and any extension of the review period shall be provided in writing to the applicant, together with a general explanation of the concerns of the Attorney General. The parties may attempt to reach an agreement with the Attorney General on modifications to the agreement or to conditions in the certificate so that the Attorney General no longer objects to issuance of a certificate. If the Attorney General withdraws the objection and the Department maintains its determination that a certificate should be issued, the Department shall issue a certificate of public advantage with any appropriate conditions as soon as practicable following the withdrawal of the objection. If the Attorney General does not withdraw the objection, a certificate shall not be issued. (1993, c. 529, s. 5.2.)

§ 131E-192.7. Record keeping.

The Department shall maintain on file all cooperative agreements for which certificates of public advantage are in effect and a copy of the certificate, including any conditions imposed in it. Any party to a cooperative agreement who terminates an agreement shall file a notice of termination with the Department within 30 days after termination. These files shall be public records as set forth in Chapter 132 of the General Statutes. (1993, c. 529, s. 5.2.)

§ 131E-192.8. Review after issuance of certificate.

If at any time following the issuance of a certificate of public advantage, the Department or the Attorney General has questions concerning whether the parties to the cooperative agreement have complied with any condition of the certificate or whether the benefits or likely benefits resulting from a cooperative agreement may no longer outweigh the disadvantages or likely disadvantages attributable to a reduction in competition resulting from the agreement, the Department or the Attorney General shall advise the parties to the agreement, and either the Department or the Attorney General shall request any information necessary to complete a review of the matter. (1993, c. 529, s. 5.2.)

§ 131E-192.9. Periodic reports.

(a) During the time that a certificate is in effect, a report of activities pursuant to the cooperative agreement must be filed every two years with the Department on or before the anniversary date on which the certificate was issued. A copy of the periodic report shall be submitted to the Attorney General at the same time that it is filed with the Department. A report shall include all of the following:

(1) A description of the activities conducted pursuant to the agreement.
(2) Price and cost information.
(3) The nature and scope of the activities pursuant to the agreement anticipated for the next two years, the likely effect of those activities.
(4) A signed certificate by each party to the agreement that the benefits or likely benefits of the cooperative agreement as conditioned continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement as conditioned.
(5) Any additional information requested by the Department or the Attorney General.

The Department shall give public notice in the North Carolina Register that a report has been received. After notice is given, the public shall have 30 days to file written comments on the report and on the benefits and disadvantages of continuing the certificate of public advantage. Periodic reports, public comments, and information submitted in response to a request shall be public records as set forth in Chapter 132 of the General Statutes.

(b) Failure to file a periodic report required by this section after notice of default or failure to provide information requested pursuant to a review under G.S. 131E-192.8 is grounds for the revocation of the certificate by the Attorney General or the Department.

(c) The Department shall review each periodic report, public comments, and information submitted in response to a request under G.S. 131E-192.8 to determine whether the advantages or likely advantages of the cooperative agreement continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, and to determine what, if any, changes in the conditions of the certificate should be made. In the review the Department shall consider the benefits and disadvantages set forth in G.S. 131E-192.4. Within 60 days of the filing of a periodic report, the Department shall determine whether the certificate should remain in effect and whether any changes to the conditions in the certificate should be made. The Department may extend the review period an additional 30 days. If either the Department or the Attorney General determines that the parties to a cooperative agreement have not complied with any condition of the certificate, the Department or the Attorney General shall revoke the certificate and the parties shall be notified. If the certificate is revoked, the parties shall be entitled to no benefits under this Article, beginning on the date of revocation. If the Department determines that the certificate should remain in effect and the Attorney General has not stated any objection to the certificate remaining in effect during the review period, the certificate shall remain in effect subject to any changes in the conditions of the certificate imposed by the Department. The parties shall be notified in writing of the Department's decision and of any changes in the conditions of the certificate. The Department shall publish its decision and any changes in the conditions in the North Carolina Register.

If the Department determines that the benefits or likely benefits of the agreement and the unavoidable costs of terminating the agreement do not continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, or if the Attorney General objects to the certificate remaining in effect based upon a review of the benefits and disadvantages set forth in G.S. 131E-192.4, the Department shall notify the parties to the agreement in writing of its determination or the objections of the Attorney General and shall provide a summary of any concerns of the Department or Attorney General to the parties. (1993, c. 529, s. 5.2.)

§ 131E-192.10. Right to judicial action.

(a) Any applicant or other person aggrieved by a decision to issue or not issue a certificate of public advantage is entitled to judicial review of the action or inaction in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to issue or deny issuance of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(b) Any party or other person aggrieved by a decision to allow a certificate to remain in effect or to make changes in the conditions of a certificate is entitled to judicial review of the decision in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to allow the certificate to remain in effect or to make changes in the conditions of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(c) If the Department or the Attorney General determines that the certificate should not remain in effect, the Attorney General may bring suit in the Superior Court of Wake County on behalf of the Department, or on its own behalf, to seek an order to authorize the cancellation of the certificate. To prevail in the action, the Attorney General must establish that the benefits resulting from the agreement are outweighed by the disadvantages attributable to a reduction in competition resulting from the agreement.

(d) In any action instituted under this section, the work product of the Department, the Attorney General or his staff, is not a public record under Chapter 132, and shall not be discoverable or admissable, nor shall the Attorney General or any member of his staff be compelled to be a witness, whether in discovery or at any hearing or trial. (1993, c. 529, s. 5.2.)

§ 131E-192.11. Fees for applications and periodic reports.

(a) The Department and the Attorney General shall establish a schedule of fees for filing an application for a certificate of public advantage and for filing a periodic report based on the total cost of the project for which the application or periodic report is made. The fee for filing an application may not exceed fifteen thousand dollars ($15,000). The fee for filing a periodic report may not exceed two thousand five hundred dollars ($2,500). The fee schedule established should generate sufficient revenue to offset the costs of the program. An application filing fee must be paid to the Department at the time an application for a certificate of public advantage is submitted to it pursuant to G.S. 131E-192.3. A periodic report filing fee must be paid to the Department at the time a periodic report is submitted to it pursuant to G.S. 131E-192.9.

(b) If the Department or the Attorney General determines that consultants are needed to complete a review of an application, an additional application fee may be established by prior agreement with the applicants before the application is considered. The amount of the additional fee may not exceed the costs of contracting with the necessary consultants. The additional fee shall not be considered in determining whether an application fee exceeds the maximum application fee amount set in subsection (a) of this section. (1993, c. 529, s. 5.2; 1995, c. 205, s. 2.)

§ 131E-192.12. Department and Attorney General authority.

The Department and Attorney General shall have the necessary powers to adopt rules to conduct a review of applications for certificates of public advantage and of periodic reports filed in connection therewith and to bring actions in the Superior Court of Wake County as required under G.S. 131E-192.10. This Article shall not limit the authority of the Attorney General under federal or State antitrust laws. (1993, c. 529, s. 5.2.)

§ 131E-192.13. Effects of certificate of public advantage; other laws.

(a) Activities conducted pursuant to a cooperative agreement for which a certificate of public advantage has been issued are immunized from challenge or scrutiny under State antitrust laws. In addition, conduct in negotiating and entering into a cooperative agreement for which an application for a certificate of public advantage is filed in good faith shall be immune from challenge or scrutiny under State antitrust laws, regardless of whether a certificate is issued. It is the intention of the General Assembly that this Article shall also immunize covered activities from challenge or scrutiny under federal antitrust law.

(b) Nothing in this Article shall exempt hospitals or other health care providers from compliance with State or federal laws governing certificate of need, licensure, or other regulatory requirements.

(c) Any dispute among the parties to a cooperative agreement concerning its meaning or terms is governed by normal principles of contract law. (1993, c. 529, s. 5.2.)

§§ 131E-193 through 131E-199: Reserved for future codification purposes.

ARTICLE 10.

Hospice Licensure Act.

§ 131E-200. Title; purpose.

This Article shall be known as the "Hospice Licensure Act." The purpose of this Article is to establish licensing requirements for hospices. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1987, c. 34.)

§ 131E-201. Definitions.

As used in this Article, unless a different meaning or construction is clearly required by the context:

(1) "Commission" means the North Carolina Medical Care Commission.

(2) "Department" means the Department of Health and Human Services.

(3) "Hospice" means any coordinated program of home care with provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

(3a) "Hospice inpatient facility" means a freestanding licensed hospice facility or a designated inpatient unit in an existing health service facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in an inpatient setting.

(4) "Hospice patient" means a patient diagnosed as terminally ill by a physician licensed to practice medicine in North Carolina, who the physician anticipates to have a life expectancy of weeks or months, generally not to exceed six months, and who alone, or in conjunction with designated family members, has voluntarily requested and been accepted into a licensed hospice program.

(5) "Hospice patient's family" means the hospice patient's immediate kin, including a spouse, brother, sister, child, or parent. Other relations and individuals with significant personal ties to the hospice patient may be designated as members of the hospice patient's family by mutual agreement among the hospice patient, the relation or individual and the hospice team.

(5a) "Hospice residential care facility" means a freestanding licensed hospice facility which provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of terminally ill patients and their families in a group residential setting.

(5b) "Hospice services" means the provision of palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual, and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.

(6) "Hospice team" or "Interdisciplinary team" means the following hospice personnel: physician licensed to practice medicine in North Carolina; nurse holding a valid, current license as required by North Carolina law; social worker; clergy member; and trained hospice volunteer. Other health care practitioners may be included on the team as the needs of the patient dictate or at the request of the physician. Other providers of special services may also be included as the needs of the patient dictate.

(7) "Identifiable hospice administration" means an administrative group, individual, or legal entity that has an identifiable organizational structure, accountable to a governing board directly or through a chief executive officer. This administration shall be responsible for the management of all aspects of the program.

(8) "Palliative care" means treatment directed at controlling pain, relieving other symptoms, and focusing on the special needs of the patient and family as they experience the stress of the dying process, rather than the treatment aimed at investigation and intervention for the purpose of cure or prolongation of life. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1993, c. 376, s. 5; 1997-443, s. 11A.118(a).)

§ 131E-202. Licensing.

(a) The Commission shall adopt rules for the licensing and regulation of hospices, hospice inpatient facilities, and hospice residential care facilities pursuant to this Article for the purpose of providing care, treatment, health, safety, welfare, and comfort of hospice patients. These rules shall include, but not be limited to:

(1) The qualifications and supervision of licensed and nonlicensed personnel;
(2) The provision and coordination of home and inpatient care, including the development of a written care plan;
(3) The management, operation, staffing, and equipping of the hospice program;
(4) Clinical and business records kept by the hospice, hospice inpatient care facility, and hospice residential care facility; and
(5) Procedures for the review of utilization and quality of care.

(b) The Department shall provide applications for hospice licensure. Each application filed with the Department shall contain all information requested therein. A license shall be granted to the applicant upon determination by the Department that the applicant has complied with the provisions of this Article and with the rules adopted by the Commission thereunder. Each license shall be issued only for the premises and persons named therein, shall not be transferable or assignable except with the written approval of the Department, and shall be posted in a conspicuous place on the licensed premises.

(c) The Department shall renew the license in accordance with this Article and with rules adopted thereunder. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1993, c. 376, s. 6.)

§ 131E-203. Coverage.

(a) Except as provided in subsection (b) of this section, no person or other entity shall operate or represent himself or itself to the public as operating a hospice, a hospice inpatient facility, or a hospice residential care facility, or offer or represent himself or itself to the public as offering hospice services without obtaining a license from the Department pursuant to this Article.

(b) Hospices administered by local health departments established under Article 2 of Chapter 130A of the General Statutes shall not be required to be licensed under this Article. Additionally, health care facilities and agencies licensed under Article 5 or 6 of Chapter 131E of the General Statutes shall not be required to be separately licensed under this Article. However, any facility or agency exempted from licensure under this subsection which operates a hospice, a hospice inpatient facility, or a hospice residential care facility, or offers hospice services shall be subject to rules adopted pursuant to this Article.

(c) Hospice care shall be available 24 hours a day, seven days a week. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1993, c. 376, s. 7.)

§ 131E-204. Inspections.

The Department shall inspect all hospices that are subject to rules adopted pursuant to this Article in order to determine compliance with the provisions of this Article and with rules adopted thereunder. Inspections shall be conducted in accordance with rules adopted by the Commission. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-205. Adverse action on a license; appeal procedures.

(a) The Department may suspend, revoke, cancel, or amend a license when there has been a substantial failure to comply with this Article or with rules and regulations adopted thereunder.

(b) Chapter 150B of the General Statutes, the Administrative Procedure Act, shall govern all administrative action pursuant to subsection (a) and all judicial review arising therefrom. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1987, c. 827, s. 1.)

§ 131E-206. Injunction.

(a) Notwithstanding the existence or pursuit of any other remedy, the Department may maintain an action in the name of the State for injunctive relief or other process against any person to restrain or prevent the establishment, conduct, management, or operation of a hospice without a license.

(b) Notwithstanding the provisions of G.S. 131E-203(b) or the existence of any other remedy, the Department may maintain an action in the name of the State for injunctive relief or other process against any person to restrain or prevent substantial noncompliance with this Article or the rules adopted thereunder.

(c) If any person shall hinder the proper performance of duty of the Department in carrying out the provisions of this Article, the Department may institute an action in the superior court of the county in which the hindrance occurred for injunctive relief against the continued hindrance. (1983 (Reg. Sess., 1984), c. 1022, s. 1.)

§ 131E-207. Confidentiality.

(a) Notwithstanding G.S. 8-53 or any other law relating to confidentiality of communications between physician and patient, in the course of an inspection conducted under G.S. 131E-204:

(1) Department representatives may review any writing or other record concerning the admission, discharge, medication, treatment, medical condition, or history of any person who is or has been a hospice patient; and

(2) Any person involved in treating a patient at or through a hospice may disclose information to a Department representative unless the patient objects in writing to review of his records or disclosure of the information. A hospice shall not release any information or allow any inspections under this section without first informing each affected patient in writing of his right to object to and thereby prohibit release of information or review of records pertaining to him.

A hospice, its employees and any other person interviewed in the course of an inspection shall be immune from liability for damages resulting from disclosure of any information to the Department.

(b) The Department shall not disclose:

(1) Any confidential or privileged information obtained under this section unless the patient or his legal representative authorizes disclosure in writing or unless a court of competent jurisdiction orders disclosure; or

(2) The name of anyone who has furnished information concerning a hospice without that person's consent.

The Department shall institute appropriate policies and procedures to ensure that unauthorized disclosure does not occur. Any Department employee who willfully discloses this information without appropriate authorization or court order shall be guilty of a Class 3 misdemeanor and upon conviction only fined at the discretion of the court but not to exceed five hundred dollars ($500.00).

(c) All confidential or privileged information obtained under this section and the names of persons providing this information shall be exempt from Chapter 132 of the General Statutes. (1983 (Reg. Sess., 1984), c. 1022, s. 1; 1993, c. 539, s. 965; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 131E-208, 131E-209: Reserved for future codification purposes.

ARTICLE 11.

North Carolina Medical Database Commission.

§§ 131E-210 through 131E-213: Repealed by Session Laws 1995, c. 517, s. 39, effective October 1, 1995.

ARTICLE 11A.

Medical Care Data.

§ 131E-214. Title and purpose.

(a) This Article is the Medical Care Data Act.

(b) The General Assembly finds that, as a result of rising medical care costs and the concern expressed by medical care providers, medical care consumers, third-party payors, and health care planners involved with planning for the provision of medical care, there is an urgent and continuing need to understand patterns and trends in the use and cost of medical care services in this State. The purposes of this Article are as follows:

(1) To ensure that there is an information base containing medical care data from throughout the State that can be used to improve the appropriate and efficient use of medical care services and maintain an acceptable quality of health care services in this State.

(2) To ensure that the necessary medical care data is available to university researchers, State public policymakers, and all other interested persons to improve the decision-making process regarding access, identified needs, patterns of medical care, charges, and use of appropriate medical care services.

(3) To ensure that a data processor receiving data under this Article protects patient confidentiality.

These purposes are to be accomplished by requiring that all hospitals and freestanding ambulatory surgical facilities submit information necessary for a review and comparison of charges, utilization patterns, and quality of medical services to a data processor that maintains a statewide database of medical care data and that makes medical care data available to interested persons, including medical care providers, third-party payors, medical care consumers, and health care planners. (1995, c. 517, s. 39(b).)

Advisory Commission on Hospital Infection Control and Disclosure. — Session Laws 2007-480, provides in its preamble: "Whereas, the Centers for Disease Control and Prevention (CDC) reports that approximately 2,000,000 people annually become ill from hospital-acquired infections, called nosocomial infections, and about 90,000 people die each year from hospital-acquired infections; and

"Whereas, the CDC reports that hospital-acquired infections add at least $5,000,000,000 annually to the nation's health care bill; and

"Whereas, a Pennsylvania report on hospital-acquired infections found that 76% of the cost for treating infections in that state was billed to public health insurance; and

"Whereas, the CDC reports that despite the risks associated with nosocomial infections, information on nosocomial infection rates is hard to obtain, even though basic data is compiled as hospitals monitor infections, particularly in intensive care units and following surgery; and

"Whereas, the CDC estimates, based on voluntary reporting, that hospital-acquired infections have become America's leading cause of death from infectious disease; and

"Whereas, it is the intent of the General Assembly to enact a law requiring public disclosure of hospital-acquired infection incidence rates to become effective in 2010; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2007-480, s. 1, provides: "(a) There is established the Advisory Commission on Hospital Infection Control and Disclosure (Advisory Commission). The purpose of the Advisory Commission is to prepare State agencies, hospitals, and the public for the reporting and public disclosure of hospital-acquired infection incidence rates as may be required by law for specific clinical procedures under the following categories:

"(1) Class I surgical site infections.

"(2) Ventilator-associated pneumonia.

"(3) Central line-related bloodstream infections.

"(b) The Advisory Commission shall consist of 13 members appointed as follows:

"(1) Four shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as follows:

"a. One member who is a hospital infection control professional, as recommended by the North Carolina Hospital Association;

"b. One physician who is a member of the Society for Health Care Epidemiology, as recommended by the Society for Health Care Epidemiology;

"c. The Director of the Statewide Program for Infection Control and Epidemiology at the School of Medicine of the University of North Carolina at Chapel Hill; and

"d. One who is a member of the general public but who is neither a health care professional nor affiliated with a health care facility.

"(2) Four shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as follows:

"a. One physician who is a member of the Society for Health Care Epidemiology, as recommended by the Society for Health Care Epidemiology;

"b. One member who is a hospital infection control professional, as recommended by the North Carolina Hospital Association;

"c. The Director of the Duke Inspection Control Network, or the Director's designee; and

"d. One who is a member of the general public but who is neither a health care professional nor affiliated with a health care facility.

"(3) Five shall be appointed by the Governor, as follows:

"a. A representative of the North Carolina Institute of Medicine, as recommended by the North Carolina Institute of Medicine;

"b. The Director of the NC Center for Hospital Quality and Patient Safety;

"c. The Director of the Consumer Protection Division of the Office of the NC Attorney General;

"d. The State Health Director; and

"e. The State Epidemiologist.

"The Governor shall appoint the Chair of the Advisory Committee.

"(c) Subject to the approval of the Legislative Services Commission, the Advisory Commission may meet in the State Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist in the work of the Advisory Commission. The Directors of Legislative Assistants for the House of Representatives and the Senate shall assign clerical staff to the Advisory Commission, and the expenses relating to the clerical employees shall be borne by the Advisory Commission. The Advisory Commission, while in the discharge of its official duties, may exercise all the powers provided under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may meet during a regular or extra session of the General Assembly, subject to the approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 138-5 or G.S. 138-6, as applicable.

Session Laws 2007-480, s. 2, provides: "(a) The Advisory Commission shall be meaningfully involved in the development of all aspects of the methodology used for collecting, analyzing, and disclosing publicly the information on hospital-acquired infection incidence rates, including collection methods, formatting, and methods and means for release and dissemination.

"(b) The Advisory Commission shall develop a process to ensure that information and data on hospital-acquired infection incidence rates available for dissemination to the general public shall not be made available in any form unless the information and data have been reviewed, adjusted, and validated according to the following process:

"(1) The entire methodology for collecting and analyzing the data shall be disclosed to all relevant organizations and to all hospitals and ambulatory surgical facilities that are the subject of any information to be made available to the public before any public disclosure of the information or data.

"(2) Data collection and analytical methodologies shall be used that meet accepted standards of validity and reliability before any information is made available to the public.

"(3) Comparisons among hospitals and freestanding ambulatory surgical facilities shall adjust for patient case mix and other relevant risk factors and control for provider peer groups, when appropriate.

"(4) The limitations of the data sources and analytical methodologies used to develop comparative hospital and freestanding ambulatory surgical facility information shall be clearly identified and acknowledged, including the appropriate and inappropriate uses of the data.

"(5) To the greatest extent possible, comparative hospital and freestanding ambulatory surgical facility information initiatives shall use standard-based norms derived from widely accepted provider-developed practice guidelines.

"(6) Comparative hospital and freestanding ambulatory surgical facility information and other information that the statewide data processor or Department has compiled regarding the hospital or freestanding ambulatory surgical facility shall be shared with the hospital or freestanding ambulatory surgical facility under review prior to public dissemination of the information, and the hospital or freestanding ambulatory surgical facility shall have 30 days to make corrections and to add helpful explanatory comments about the information before the publication.

"(7) Safeguards shall be implemented to:

"a. Protect against the unauthorized use or disclosure of hospital and freestanding ambulatory surgical facility information; and

"b. Protect against the dissemination of inconsistent, incomplete, invalid, inaccurate, or subjective hospital or freestanding ambulatory surgical facility data.

"(8) A process to ensure the quality and accuracy of information reported by a hospital or freestanding ambulatory surgical facility under this section and its data collection, analysis, and dissemination methodologies are evaluated regularly.

"(9) A process to ensure that only the most basic identifying information from submitted reports are used, and except as otherwise authorized by Article 11A of Chapter 131E of the General Statutes, information identifying a patient, employee, or licensed professional shall not be released.

"(c) The Advisory Commission shall establish standardized criteria and methods for data submitted to the statewide data processor under G.S. 131E-214.2.

Session Laws 2007-480, s. 3, provides: "(a) The Advisory Commission shall submit an interim report on its activities to the General Assembly on or before May 1, 2008. The Advisory Commission shall submit its final report to the 2009 General Assembly upon its convening with recommendations and proposed legislation for requiring hospital-acquired infection incidence rates public disclosure. Upon submission of its final report, the Commission shall terminate.

"(b) It is the intent of the General Assembly to enact legislation before adjournment sine die of the 2009 General Assembly requiring hospitals to report and publicly disclose hospital-acquired infection incidence rates.

Session Laws 2007-480, s. 4, provides: "The Legislative Services Officer shall allocate funds appropriated to the General Assembly for this purpose to implement this act.

Session Laws 2007-480, s. 5, provides: "This act is effective when it becomes law."

Editor's Note. — Session Laws 1995, c. 517, which enacted this article, in s. 39(e) provided that this article does not require a person, corporation, or other entity not previously required to report data to the Medical Database Commission to report data under this article, nor does it require a person, corporation, or other entity to be a statewide data processor.

§ 131E-214.1. Definitions.

As used in this Article:

(1) "Division" means the Division of Health Service Regulation of the Department of Health and Human Services.

(2) "Freestanding ambulatory surgical facility" means a facility licensed under Part D of Article 6 of this Chapter.

(3) "Hospital" means a facility licensed under Article 5 of this Chapter or Article 2 of Chapter 122C of the General Statutes, but does not include the following:
   a. A facility with all of its beds designated for medical type "LTC" (long-term care).
   b. A facility with the majority of its beds designated for medical type "PSY-3" (mental retardation).
   c. A facility operated by the North Carolina Department of Correction.

(4) "Patient data" means data that includes a patient's age, sex, zip code, third-party coverage, principal and other diagnosis, date of admission, procedure and discharge date, principal and other procedures, total charges and components of the total charges, attending physician identification number, and hospital or freestanding ambulatory surgical facility identification number.

(5) "Patient identifying information" means the name, address, social security number, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a health care provider if that number does not consist of or contain numbers, including social security or drivers license numbers, that could be used to identify a patient with reasonable accuracy and speed from sources external to the health care provider.

(6) "Statewide data processor" means a data processor certified by the Division as capable of complying with the requirements of G.S. 131E-214.4. The Division may deny, suspend, or revoke a certificate, in accordance with Chapter 150B of the General Statutes, if the statewide data processor does not comply with or is not capable of complying with the requirements of G.S. 131E-214.4. The Division is authorized to promulgate rules concerning the receipt, consideration, and limitation of a certificate applied for or issued under this Article. (1995, c. 517, s. 39(b); 1997-443, s. 11A.118(a); 2007-182, s. 1.)

Effect of Amendments. — Session Laws 2007-182, s. 1, effective July 5, 2007, substituted "Division of Health Service Regulation" for "Division of Facility Services" in subdivision (1).

§ 131E-214.2. Data submission required.

Except as prohibited by federal law or regulation, each hospital and freestanding ambulatory surgical facility shall submit patient data to a statewide data processor within 60 calendar days after the close of each calendar quarter for patients that were discharged or died during that quarter. (1995, c. 517, s. 39(b).)

§ 131E-214.3. Patient data not public records.

(a) The following are not public records under Chapter 132 of the General Statutes:

(1) Patient data furnished to and maintained by a statewide data processor pursuant to this Article.

(2) Compilations of patient data prepared for release or dissemination by a statewide data processor pursuant to this Article.

(3) Patient data furnished by a statewide data processor to the State.

(b) Compilations of data under subdivision (a)(3) of this section, prepared for release or dissemination by the State, are public records.

(c) The State shall not allow proprietary information, including patient data, that it receives from a statewide data processor to be used by a person for commercial purposes. The State shall require the person requesting this information to certify that it will not use the information for commercial purposes.

(d) A person is immune from liability for actions arising from the required submission of data under this Article. (1995, c. 517, s. 39(b).)

§ 131E-214.4. Statewide data processor.

(a) A statewide data processor shall perform the following duties:

(1) Make available annually to the Division, at no charge, a report that includes a comparison of the 35 most frequently reported charges of hospitals and freestanding ambulatory surgical facilities. The report is a public record and shall be made available to the public in accordance with Chapter 132 of the General Statutes. Publication or broadcast by the news media shall not constitute a resale or use of the data for commercial purposes.

(2) Receive patient data from hospitals and freestanding ambulatory surgical facilities throughout this State.

(3) Compile and maintain a uniform set of data from the patient data submitted.

(4) Analyze the patient data.

(5) Compile reports from the patient data and make the reports available upon request to interested persons at a reasonable charge determined by the data processor.

(6) Ensure that adequate measures are taken to provide system security for all data and information received from hospitals and freestanding ambulatory surgical facilities pursuant to this Article.

(7) Protect the confidentiality of patient records and comply with applicable laws and regulations concerning patient confidentiality, including the confidentiality of patient-identifying information. The data processor shall not disclose patient-identifying information unless (i) the information was originally submitted by the party requesting disclosure or (ii) the State Health Director requests specific individual records for the purpose of protecting and promoting the public health under Chapter 130A of the General Statutes, and the disclosure is not otherwise prohibited by federal law or regulation. Such records shall be made available to the State Health Director at a reasonable charge. Such records made available to the State Health Director are not public records; the State Health Director shall maintain their confidentiality and shall not make the records available notwithstanding G.S. 130A-374(a)(2).

(b) The Department of Health and Human Services may take adverse action against a hospital under G.S. 131E-78 or G.S. 122C-24 or against a freestanding ambulatory surgical center under G.S. 131E-148 for a violation of this Article. (1995, c. 517, s. 39(b); 1997-443, s. 11A.118(a).)

§§ 131E-214.5 through 131E-214.10: Reserved for future codification purposes.

ARTICLE 12.

Disclosure and Contract Requirements for Continuing Care Facilities.

§§ 131E-215 through 131E-224: Repealed by Session Laws 1989, c. 758, s. 2.

Cross References. — For present provisions pertaining to disclosure and contract requirements for continuing care facilities, see G.S. 58-64-1 et seq.

Editor's Note. — Section 3 of Session Laws 1989, c. 758 provided that the act would not be construed to obligate the General Assembly to make any appropriation to implement the provisions of the act, and that the act would not become effective unless monies necessary to implement the act were appropriated. Such an appropriation was made. However, Session Laws 1991, c. 720, s. 2 provides that section 3 is repealed effective July 16, 1991.

§§ 131E-225 through 131E-229: Reserved for future codification purposes.

ARTICLE 13.

Temporary Management of Long-Term Care Facilities.

§ 131E-230. Legislative findings.

The General Assembly finds that:

(1) A substantial number of citizens of this State now reside, or in the future may reside, in long-term care facilities within this State;

(2) Improper operation of long-term care facilities may tend to create a substantial risk of serious physical injury to residents;

(3) The closure of a long-term care facility can have adverse effects on the residents thereof, especially if the closure and transfer of residents is done hastily;

(4) The general health and welfare of the people of this State, particularly those persons residing in long-term care facilities within this State, would be enhanced by development of a procedure for the court appointment of a temporary manager to assure the proper operation of a long-term care facility in certain instances until a manager chosen by the facility is prepared to properly operate the facility, or until the residents can be safely transferred to a proper alternative setting; and

(5) The use of a temporary manager is intended as a temporary measure and the ongoing or long-term operation of a nursing facility by a temporary manager is neither beneficial nor appropriate. (1993, c. 390, s. 1.)

§ 131E-231. Definitions.

As used in this Article, unless otherwise specified:

(1) "Long-term care facility" means a nursing home as defined in G.S. 131E-101(6) and an adult care home as defined in G.S. 131D-2(a)(3) or G.S. 131E-101(4).

(2) "Resident" means a person who has been admitted to a long-term care facility.

(3) "Respondent" means the person or entity holding a license pursuant to G.S. 131E-102 or G.S. 131D-2 or a person or entity operating a long-term care facility subject to licensure without a license. (1993, c. 390, s. 1; 1995, c. 535, s. 26.)

Editor's Note. — G.S. 131D-2(a)(3), referred to in subsection (1) above, has been repealed.

§ 131E-232. Who may petition; contents of petition.

The Department may petition a court of competent jurisdiction to appoint a temporary manager to operate a long-term care facility. The petition shall set forth material facts showing that one or more of the grounds for appointment of a temporary manager set forth in G.S. 131E-234 exist, that the facts set forth in the petition have been brought to the attention of the respondent, and that the conditions described in the petition have not been remedied within a reasonable period of time. The petition shall also set forth a brief description of the action or actions necessary to remedy the alleged conditions. (1993, c. 390, s. 1.)

§ 131E-233. Procedures for appointment; evidence in defense.

(a) The procedure for petitioning the superior court for the appointment of a temporary manager, including service of process shall be in accordance with the North Carolina Rules of Civil Procedure. If personal service of a copy of the petition cannot be made with due diligence upon the respondent, service may be made upon the respondent by sending a copy of the summons and petition to the respondent by registered mail at the respondent's last known address and by hand-delivering or mailing a copy to the administrative or staff person in charge of the facility.

(b) A hearing shall be held on the petition within 20 days of service of the petition upon the respondent. Both the Department and the respondent may present evidence and written and oral argument at the hearing regarding the allegations of the petition. It shall be relevant evidence in defense to a petition that the conditions alleged in the petition do not in fact exist, that such conditions do not exist to the extent alleged, or that such conditions have been remedied or removed.

(c)(1) Upon petition by the Department for emergency intervention, a court may order the appointment of an emergency temporary manager after finding that there is reasonable cause to believe that:
  a. Conditions or a pattern of conditions exist in the long-term care facility that create an immediate substantial risk of death or serious physical harm to residents; or
  b. The long-term care facility is closing or intends to close before the time in which a hearing would ordinarily be scheduled, and:
    1. Adequate arrangements for relocating residents have not been made, or
    2. Quick relocation would not be in the best interest of residents.

(2) The court shall appoint an emergency temporary manager to serve until a hearing is conducted in accordance with ordinary procedures and shall direct the temporary manager to make only such changes in administration as necessary to protect the health or safety of residents until the emergency condition is resolved.

(3) The court shall schedule a hearing on the appointment of an emergency temporary manager within three days after service of notice of the filing of the petition. Notice of the filing of the petition and other relevant information, including the factual basis of the belief that an emergency temporary manager is needed shall be served upon the facility as provided in this Article. The notice shall be given at least 24 hours prior to the hearing of the petition for emergency intervention, except that the court may issue an immediate emergency order ex parte upon a finding as fact that:
  a. The conditions specified above exist, and

b. There is likelihood that a resident may suffer irreparable injury or death if the order is delayed.

The order shall contain a show-cause notice to each person upon whom the notice is served directing the person to appear immediately or at any time up to and including the time for the hearing of the petition for emergency services and show cause, if any exists, for the dissolution or modification of the order. Unless dissolved by the court for good cause shown, the emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services. At the hearing, if the court determines that the emergency continues to exist, the court may order the provision of emergency services in accordance with subsections (a) and (b) of this section. (1993, c. 390, s. 1; 1999-334, s. 1.11.)

§ 131E-234. Grounds for appointment of temporary manager.

Upon a showing by the Department that one or more of the following grounds exist, the court may appoint a temporary manager for an initial period of 30 days or the first review by a superior court judge pursuant to G.S. 131E-243, whichever is longer:

(1) Conditions or a pattern of conditions exist in the long-term care facility that create a substantial risk of death or serious physical harm to residents or that death or serious physical harm has occurred, and it is probable that the facility will not or cannot immediately remedy those conditions or pattern of conditions, or the facility has shown a pattern of failure to comply with applicable laws and rules and continues to fail to comply;

(2) The long-term care facility is operating without a license;

(3) The license of the long-term care facility has been revoked or the long-term care facility is closing or intends to close and: (i) adequate arrangements for relocating residents have not been made, or (ii) quick relocation would not be in the best interest of the residents; or

(4) A previous court order has been issued requiring the respondent to act or refrain from acting in a manner directly affecting the care of the residents and the respondent has failed to comply with the court order. (1993, c. 390, s. 1; 1999-334, s. 1.12.)

§ 131E-235. Alternative to appointment of temporary manager.

(a) After the hearing described in G.S. 131E-233(b), if the court finds that the evidence warrants the granting of the relief sought and the respondent applies to the court for permission to promptly remove or remedy the conditions or pattern specified in the petition and demonstrates the ability to promptly undertake and complete the removal or remedying of such conditions or pattern, the court, in lieu of appointing a temporary manager, may issue an order permitting the respondent to remove or remedy the conditions in accordance with a time schedule and subject to conditions determined by the court, including the posting of security for the performance of the work as may be fixed by the court.

(b) If, after entry of an order pursuant to subsection (a) of this section, it appears that the respondent is not proceeding in accordance with the court's order in removing or remedying the conditions found by the court to exist, the Department, upon notice to the respondent, may move the court for an order appointing a temporary manager pursuant to the court's findings at the original hearing. If upon hearing the matter, the court finds that the respondent is not proceeding in accordance with the court's order, the court may appoint a temporary manager as authorized by G.S. 131E-234. If the respondent has posted security to ensure removal or remedying of the conditions found by the court, the security or any part of the security as is necessary may be used by the temporary manager to remedy the conditions. (1993, c. 390, s. 1.)

§ 131E-236. Compensation of temporary manager.

The court shall set the compensation of the temporary manager. (1993, c. 390, s. 1.)

§ 131E-237. Candidates for temporary managers.

In the petition the Department shall nominate at least one candidate for temporary manager and shall include the name, address, and qualifications of each nominee. The Department shall maintain a list of persons qualified to act as temporary managers. The person or persons nominated by the Department to serve as temporary manager shall either be employed by the Department or be one of the persons on the list of qualified persons maintained by the Department. This nominee shall be approved by the court reviewing the Department's petition for appointment of a temporary manager. (1993, c. 390, s. 1.)

§ 131E-238. Temporary manager; powers and duties.

A temporary manager appointed under this section:

(1) May exercise those powers and shall perform those duties ordered by the court;

(2) Shall operate the long-term care facility in compliance with State and federal laws and assure the safety of the residents and the delivery of services to them;

(3) May operate the facility under a temporary license issued by the Department in the event that the license of the original operator has been revoked or suspended or was never issued;

(4) Shall have the same rights as the respondent to possession of the building in which the long-term care facility is located and of all goods and fixtures located in the building at the time the temporary manager is appointed. If the court finds that between the time the petition is filed and the temporary manager is appointed, the respondent has transferred assets for the purpose of frustrating the intent of this section, the court may require the respondent to repay to the temporary manager the value of such transferred assets. The temporary manager shall take all actions necessary to protect and conserve the assets and property of which the temporary manager takes possession, and the proceeds of any transfer, and may use them only in the performance of the powers and duties set forth in this section and as may be ordered by the court;

(5) May use the building, fixtures, furnishings, and any accompanying consumable goods in providing care and services to residents and to any other persons receiving services from the long-term care facility at the time the petition for temporary management was filed. The temporary manager shall collect payment for all goods and services provided to residents or others at the same rate and method of payment as was charged by the respondent at the time the petition for

temporary management was filed, unless a different rate is set by the State or other third-party payors. The temporary manager shall owe a duty to the owner of the long-term care facility to protect and preserve, and to avoid the waste or diminution of, the building, fixtures, furnishings, consumable goods, receipts, and other assets of the facility and to prevent the use of those assets for any purpose other than the reasonable operation of the facility;

(6) May correct or eliminate any deficiency in the structure or furnishings of the long-term care facility that endangers the safety or health of residents, provided the total cost of correction of all such deficiencies does not exceed one thousand dollars ($1,000);

(7) Shall submit to the court a plan in accordance with G.S. 131E-239 for correction or elimination of any deficiency or deficiencies in the structure or furnishings of the long-term care facility that endanger the safety or health of residents and that are estimated to exceed one thousand dollars ($1,000), and shall carry out the plan with any modification approved by the court;

(8) May enter into contracts and hire agents and employees to carry out the powers and duties created under this section, provided that the temporary manager must notify the court and the respondent prior to entering into any substantially new contract obligating the respondent to pay more than one thousand dollars ($1,000);

(9) Except as specified in G.S. 131E-241, shall honor all leases, mortgages, and secured transactions governing the building in which the long-term care facility is located and all goods and fixtures in the building of which the temporary manager has taken possession, but, in the case of a rental agreement, only to the extent of payments that are for the use of the property during the period of the temporary management, or, in the case of a purchase agreement, come due during the period of the temporary management;

(10) Shall have full power to direct, manage, and discharge employees of the long-term care facility, consistent with applicable State and federal laws governing the employment of these employees;

(11) If transfer of the residents is necessary, shall cooperate with the Department or local departments of social services or both in carrying out the transfer of residents to an alternative placement;

(12) Shall be entitled to and shall take possession of all property or assets of residents in the possession of the respondents. The temporary manager shall preserve all property, assets, and records of residents of which the temporary manager takes possession and shall provide for the prompt transfer of the property, assets, and records to the alternative placement of any transferred resident. No owner, licensee, or administrator of a facility under temporary management shall be liable for the waste, mismanagement, or other negligent or intentional wrongful act of a temporary manager with respect to the property or assets of residents; and

(13) May be held liable in his personal capacity only for his own gross negligence or intentional acts. (1993, c. 390, s. 1.)

§ 131E-239. Plan for correction of deficiencies in excess of one thousand dollars ($1,000).

(a) If the temporary manager determines that it is necessary to correct a deficiency or deficiencies in the structure or furnishings reasonably estimated by the temporary manager to cost in excess of one thousand dollars ($1,000), the temporary manager shall submit to the court a written plan that contains the following:

(1) A description of the deficiency or deficiencies that require correction;

(2) A description of the method proposed by the temporary manager for correction of the deficiency or deficiencies; and

(3) An estimate of the cost of the correction or corrections.

(b) A copy of the plan shall be served upon the Department and the respondent on the same day that it is submitted to the court.

(c) If the Department or respondent makes a written request for a hearing within seven days after the submission of the plan to the court, a hearing on the proposed plan of correction shall be held. If a hearing is requested by a party, the hearing shall be held within 14 days of the written request. The Department, respondent, and temporary manager shall have the opportunity to present evidence at the hearing regarding the proposed plan. Upon hearing the evidence, the court may approve the plan, modify the plan, or, if the court determines as a result of the evidence that the alleged deficiency does not require correction, it may reject the plan. If no party requests a hearing on the plan in accordance with this subsection, the court may order the temporary manager to proceed to implement the plan.

(d) In the event of an emergency situation involving the structure or furnishings of the facility the correction of which will cost in excess of one thousand dollars ($1,000) and where failure to correct the situation immediately will likely result in serious physical harm or death to residents, the temporary manager may proceed to correct the situation in the most economical and efficient manner under the circumstances without prior court approval of a plan. If the court later determines pursuant to G.S. 131E-244(b) that the expenditure was not necessary or reasonable under the circumstances, payment for the expenditure or any part determined to be unreasonable or unnecessary by the court, must be paid from the contingency fund described in G.S. 131E-242. If the payment was initially made by the temporary manager from the contingency fund, the respondent shall have no obligation to repay those funds to the contingency fund upon a finding that the expenditure was unreasonable or unnecessary. If the payment was initially made by the temporary manager from operating revenues of the facility, the respondent shall be entitled to repayment of those amounts from the contingency fund. (1993, c. 390, s. 1.)

§ 131E-240. Payment to temporary manager.

(a) A person served with notice of an order of the court appointing a temporary manager and of the temporary manager's name and address shall be liable to pay the temporary manager for any goods or services provided by the temporary manager after the date of the order if the person would have been liable for the goods or services supplied by the respondent or an agent of the respondent. The temporary manager shall give a receipt for each payment and shall keep a copy of each receipt on file. The temporary manager shall deposit amounts received in a special account and shall use this account for all disbursements.

(b) The temporary manager may bring an action to enforce the liability created by subsection (a) of this section. Proof of payment to the temporary manager is as effective in favor of the person making the payment as payment of the amount to the person who, but for this subsection, would have been entitled to receive the sum paid.

(c) A resident may not be discharged, nor may any contract or rights be forfeited or impaired, nor may forfeiture or liability be increased, by reason of an omission to pay a respondent, licensee, or other person a sum paid to the temporary manager. (1993, c. 390, s. 1.)

§ 131E-241. Avoidance of preexisting leases, mortgages, and contracts.

(a) A temporary manager shall not be required to honor any lease, mortgage, secured transaction, or other wholly or partially executory contract entered into by the respondent, licensee, or administrator of the long-term care facility if the temporary manager demonstrates to the court that the rental price, rate of interest, or other compensation to be paid under the contract or agreement is unreasonable in light of conditions existing at the time the agreement was entered into by the parties or in light of the relationship of the parties.

(b) If the temporary manager is in possession of real estate or goods subject to a lease, mortgage, security interest, or other contract that the temporary manager is permitted to avoid under subsection (a) of this section, and if the real estate or goods are necessary for the continued operation of the long-term care facility, the temporary manager may apply to the court to set a reasonable rental price, rate of interest, or other compensation to be paid by the temporary manager during the duration of the temporary management. The court shall hold a hearing on the application within 15 days after receipt of the application. At least 10 days prior to the hearing, the temporary manager shall send notice of the application to any known person with any beneficial interest in the property involved.

(c) Payment by the temporary manager of the amount determined by the court to be reasonable is a defense to any action against the temporary manager for payment or for possession of the goods or real estate subject to the lease, mortgage, security interest, or other contract involved by any person who received such notice, but the payment does not relieve the obligee of liability for the difference between the amount paid by the temporary manager and the amount due under the original lease, mortgage, or security interest involved. (1993, c. 390, s. 1.)

§ 131E-242. Contingency fund.

(a) The Department may maintain a temporary management contingency fund.

(b) Upon a showing that proper expenses of the temporary management under this Article exceed the operating funds of the long-term care facility, the court, in its discretion, may order that the Department provide funds from the contingency fund to the temporary manager to operate the facility and compensate the temporary manager.

(c) When the total funds available in the contingency fund exceed five hundred thousand dollars ($500,000), the Department may reallocate any or all of the amount in excess of five hundred thousand dollars ($500,000) for other activities intended to protect the health and property of residents. (1993, c. 390, s. 1; 1995, c. 535, s. 27; 1998-215, s. 78(d); 1999-334, s. 1.13.)

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ 131E-243. Review and termination of temporary management.

(a) The operations and continuing need for a temporary manager shall be reviewed by the court every 30 days following the appointment of the temporary manager.

(b) The court may order the replacement of a temporary manager upon a showing that the temporary manager has mismanaged the long-term care facility.

(c) The court shall order the termination of the temporary management upon the recommendation of the Department or upon a showing that the conditions leading to imposition of the temporary management have been resolved.

(d) When a long-term care facility is returned to its owner, the court may impose conditions to assure compliance with applicable laws and regulations. (1993, c. 390, s. 1.)

§ 131E-244. Accounting lien for expenses.

(a) Within 30 days after termination of the temporary management, the temporary manager shall give the court a complete accounting of:

(1) All property of which the temporary manager took possession;
(2) All funds collected under this Article;
(3) Expenses of the temporary management; and
(4) All disbursements or transfers of facility funds or other assets made during the period of temporary management. On the same day the accounting is filed with the court, the temporary manager shall serve on the respondent by registered mail a copy of this accounting.

(b) If the operating funds collected during the temporary management exceed the reasonable expenses of the temporary management, the court shall order payment of the excess to the respondent, after reimbursement to the contingency fund. If the operating funds are insufficient to cover the reasonable expenses of the temporary management, the respondent shall be liable for the deficiency, except as described in this section. If the respondent demonstrates to the court that repayment of amounts spent from the contingency fund would significantly impair the provision of appropriate care or services to residents, the court may order repayment over a period of time with or without interest or may order that the respondent be required to repay only part or none of the amount spent from the contingency fund. In reaching this decision, the court may consider all assets, revenues, debts and other obligations of the long-term care facility, the likelihood of the sale of the long-term care facility where repayment forgiveness would result in unjust enrichment of the respondent, and shall consider the impact of its determination on the provision of care to residents. The respondent may petition the court to determine the reasonableness of any expenses of the temporary management. The respondent shall not be responsible for expenses in excess of amounts the court finds to be reasonable. Payment recovered from the respondent shall be used to reimburse the contingency fund for amounts used by the temporary manager.

(c) The court may order that the Department have a lien for any reasonable costs of the temporary management that are not covered by the operating funds collected by the temporary manager and for any funds paid out of the contingency fund during the temporary management upon any beneficial interest, direct or indirect, of any respondent in the following property:

(1) The building in which the long-term care facility is located;
(2) The land on which the long-term care facility is located;
(3) Any fixtures, equipment, or goods used in the operation of the long-term care facility; or
(4) The proceeds from any conveyance of property described in subdivisions (1), (2), and (3) of this subsection made by the respondent within one year prior to the filing of the petition for temporary management unless such transfers were made in good faith, in the ordinary course of business, and without intent to frustrate the intent of subsection (b)

of this section. Transfers made coincidental with serious deficiencies in resident care may be considered evidence of intent to frustrate the intent of subsection (b) of this section.

(d) To the extent permitted by other provisions of applicable State or federal law, the lien provided for in this section is superior to any lien or other interest that arises subsequent to the filing of the petition for temporary management under this section, except for a construction or mechanic's lien arising out of work performed with the express consent of the temporary manager.

(e) The clerk of court in the county in which the long-term care facility is located shall record the filing of the petition for temporary management in the lien docket opposite the names of the respondents and licensees named in the petition.

(f) Within 60 days after termination of the temporary management, the temporary manager shall file a notice of any lien created under this section. If the lien is on real property, the notice shall be filed with the clerk of court in the county where the long-term care facility is located and entered on the lien docket. If the lien is on personal property, the lien shall be filed with the person against whom the lien is claimed, and shall state the name of the temporary manager, the date of the petition for temporary management, the date of the termination of temporary management, a description of the property involved, and the amount claimed. No lien shall exist under this section against any person, on any property, or for any amount not specified in the notice filed under this section. (1993, c. 390, s. 1.)

§ 131E-245. Obligations of licensee.

Nothing in this Article shall relieve any respondent, licensee, or administrator of a long-term care facility placed in temporary management of any civil or criminal liability, or any duty imposed by law, by reason of acts or omissions of the respondent, licensee, or administrator prior to the appointment of the temporary manager. Nothing in this Article shall suspend during the temporary management any obligation of the respondent, licensee, or administrator for payment of taxes, other operating and maintenance expenses of the long-term care facility, nor the respondent, licensee, or administrator or any other person for the payment of mortgages or liens. No owner, licensee, or administrator shall be held personally liable for acts or omissions of the temporary manager or the temporary manager's employees during the term of the temporary management. No licensee or administrator may be held responsible or liable for licensure fines, sanctions or penalties, or other administrative sanctions, arising or imposed as a result of acts or omissions occurring during the period of temporary management unless those sanctions result from acts or omissions by the licensee or administrator. (1993, c. 390, s. 1.)

§ 131E-246. Conflict of laws.

In the event of a conflict between federal laws or regulations and State law or rules, the federal laws or regulations shall control. (1993, c. 390, s. 1.)

§§ 131E-247 through 131E-249: Reserved for future codification purposes.

ARTICLE 14.

Disposal of Surplus Property to Aid Other Countries.

§ 131E-250. Disposition of surplus property by public and State hospitals.

(a) As used in this section, "public hospital" has the same meaning as in G.S. 159-39. A State hospital is any hospital operated by the State.

(b) A public hospital or a State hospital may donate medical equipment it determines is no longer needed by the hospital to any of the following if the property so donated is to be used by a hospital or medical facility in another country:

(1) A corporation that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.
(2) The United States or any agency of it.
(3) The government of a foreign country or any political subdivision of that country.
(4) The United Nations or an agency of it.
(5) Other eleemosynary institutions and groups. (1993, c. 529, s. 7.6; 1995, c. 509, s. 73.)

Editor's Note. — This section was enacted as G.S. 131E-248, and was recodified as G.S. 131E-250 by the Revisor of Statutes.

§§ 131E-251 through 131E-254: Reserved for future codification purposes.

ARTICLE 15.

Health Care Personnel Registry.

§ 131E-255. Nurse Aide Registry.

(a) Pursuant to 42 U.S.C. § 1395i-3(e) and 42 U.S.C. § 1396r(e), the Department shall establish and maintain a registry containing the names of all nurse aides working in nursing facilities in North Carolina. The Department shall include in the nurse aide registry any findings by the Department of neglect of a resident in a nursing facility or abuse of a resident in a nursing facility or misappropriation of the property of a resident in a nursing facility by a nurse aide.

(b) A nurse aide who wishes to contest a finding of resident neglect, resident abuse, or misappropriation of resident property made against the aide, is entitled to an administrative hearing as provided by the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days of the mailing of the written notice by certified mail of the Department's intent to place findings against the aide in the nurse aide registry.

(c) "Nursing facility", as used in this section, means a "combination home" as defined in G.S. 131E-101(1) and a "nursing home" as defined in G.S. 131E-101(6) and also means "facility" as that term is defined in G.S. 131E-116(2).

(d) The Commission shall adopt, amend, and repeal all rules necessary for the implementation of this section.

(e) No person shall be liable for providing any information for the nurse aide registry if the information is provided in good faith. Neither an employer, potential employer, nor the Department shall be liable for using any information from the nurse aide registry if the information is used in good faith for the purpose of screening prospective applicants for employment or reviewing the employment status of an employee. (1991, c. 185, s. 1; c. 761, s. 26; 1995 (Reg. Sess., 1996), c. 713, ss. 3(a), (b).)

Editor's Note. — This section was formerly numbered G.S. 131E-111. It was recodified as G.S. 131E-255 by Session Laws 1995 (Reg. Sess., 1996), c. 713, s. 3.

CASE NOTES

Applied in Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

§ 131E-256. Health Care Personnel Registry.

(a) The Department shall establish and maintain a health care personnel registry containing the names of all health care personnel working in health care facilities in North Carolina who have:

(1) Been subject to findings by the Department of:
  a. Neglect or abuse of a resident in a health care facility or a person to whom home care services as defined by G.S. 131E-136 or hospice services as defined by G.S. 131E-201 are being provided.
  b. Misappropriation of the property of a resident in a health care facility, as defined in subsection (b) of this section including places where home care services as defined by G.S. 131E-136 or hospice services as defined by G.S. 131E-201 are being provided.
  c. Misappropriation of the property of a health care facility.
  d. Diversion of drugs belonging to a health care facility.
  d1. Diversion of drugs belonging to a patient or client of the health care facility.
  e. Fraud against a health care facility.
  e1. Fraud against a patient or client for whom the employee is providing services.

(2) Been accused of any of the acts listed in subdivision (1) of this subsection, but only after the Department has screened the allegation and determined that an investigation is required.

The Health Care Personnel Registry shall also contain all findings by the Department of neglect of a resident in a nursing facility or abuse of a resident in a nursing facility or misappropriation of the property of a resident in a nursing facility by a nurse aide that are contained in the nurse aide registry under G.S. 131E-255.

(a1) The Department shall include in the registry a brief statement of any individual disputing the finding entered against the individual in the health care personnel registry pursuant to subdivision (1) of subsection (a) of this section.

(b) For the purpose of this section, the following are considered to be "health care facilities":

(1) Adult Care Homes as defined in G.S. 131D-2.
(2) Hospitals as defined in G.S. 131E-76.
(3) Home Care Agencies as defined in G.S. 131E-136.
(4) Nursing Pools as defined by G.S. 131E-154.2.
(5) Hospices as defined by G.S. 131E-201.
(6) Nursing Facilities as defined by G.S. 131E-255.

(7) State-Operated Facilities as defined in G.S. 122C-3(14)f.
(8) Residential Facilities as defined in G.S. 122C-3(14)e.
(9) 24-Hour Facilities as defined in G.S. 122C-3(14)g.
(10) Licensable Facilities as defined in G.S. 122C-3(14)b.
(11) Multiunit Assisted Housing with Services as defined in G.S. 131D-2.
(12) Community-Based Providers of Services for the Mentally Ill, the Developmentally Disabled, and Substance Abusers that are not required to be licensed under Article 2 of Chapter 122C of the General Statutes.
(13) Agencies providing in-home aide services funded through the Home and Community Care Block Grant Program in accordance with G.S. 143B-181.1(a)11.

(c) For the purpose of this section, the term "health care personnel" means any unlicensed staff of a health care facility that has direct access to residents, clients, or their property. Direct access includes any health care facility unlicensed staff that during the course of employment has the opportunity for direct contact with an individual or an individual's property, when that individual is a resident or person to whom services are provided.

(d) Health care personnel who wish to contest findings under subdivision (a)(1) of this section are entitled to an administrative hearing as provided by the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days of the mailing of the written notice of the Department's intent to place its findings about the person in the Health Care Personnel Registry.

(d1) Health care personnel who wish to contest the placement of information under subdivision (a)(2) of this section are entitled to an administrative hearing as provided by the Administrative Procedure Act, Chapter 150B of the General Statutes. A petition for a contested case hearing shall be filed within 30 days of the mailing of the written notice of the Department's intent to place information about the person in the Health Care Personnel Registry under subdivision (a)(2) of this section. Health care personnel who have filed a petition contesting the placement of information in the health care personnel registry under subdivision (a)(2) of this section are deemed to have challenged any findings made by the Department at the conclusion of its investigation.

(d2) Before hiring health care personnel into a health care facility or service, every employer at a health care facility shall access the Health Care Personnel Registry and shall note each incident of access in the appropriate business files.

(e) The Department shall provide an employer at a health care facility or potential employer at a health care facility of any person listed on the Health Care Personnel Registry information concerning the nature of the finding or allegation and the status of the investigation.

(f) No person shall be liable for providing any information for the health care personnel registry if the information is provided in good faith. Neither an employer, potential employer, nor the Department shall be liable for using any information from the health care personnel registry if the information is used in good faith for the purpose of screening prospective applicants for employment or reviewing the employment status of an employee.

(g) Health care facilities shall ensure that the Department is notified of all allegations against health care personnel, including injuries of unknown source, which appear to be related to any act listed in subdivision (a)(1) of this section. Facilities must have evidence that all alleged acts are investigated and must make every effort to protect residents from harm while the investigation is in progress. The results of all investigations must be reported to the Department within five working days of the initial notification to the Department.

(h) The North Carolina Medical Care Commission shall adopt, amend, and repeal all rules necessary for the implementation of this section.

(i) In the case of a finding of neglect under subdivision (1) of subsection (a) of this section, the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

(1) The employment and personal history of the nurse aid does not reflect a pattern of abusive behavior or neglect;

(2) The neglect involved in the original finding was a singular occurrence; and

(3) The petition for removal is submitted after the expiration of the one-year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section. (1995 (Reg. Sess., 1996), c. 713, s. 3(b); 1998-212, s. 12.16E; 1999-159, s. 1; 2000-55, s. 1; 2004-203, ss. 52(a), (b), (c); 2007-544, s. 2.)

Effect of Amendments. — Session Laws 2007-544, s. 2, effective January 1, 2008, in subdivision (a)(1)d, deleted "or to a patient or client" following "facility"; in subdivision (a)(1)e, deleted "or against a patient or client for whom the employee is providing services" following "facility"; added subdivisions (a)(1)d1, (a)(1)e1, and (b)(10) through (b)(13); rewrote subsection (c); and in subsection (e), inserted "at a health care facility" both places it appears.

CASE NOTES

Applied in Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

§ 131E-256.1. Adverse action on a license; appeal procedures.

(a) The Department may suspend, cancel, or amend a license when a facility subject to this Article has substantially failed to comply with this Article or rules adopted under this Article.

(b) Administrative action taken by the Department under this section shall be in accordance with Chapter 150B of the General Statutes. (2000-55, s. 2.)

Article 15A.

Public Hospital Personnel Act.

§ 131E-257. Title; purpose; applicability of other laws; "public hospital" defined.

(a) This Article shall be known and may be cited as the "Public Hospital Personnel Act".

(b) The purpose of this Article is to protect the privacy of the personnel records of public hospital employees and to authorize public hospitals to determine employee compensation and personnel policies and to establish employee benefit plans.

(c) Unless otherwise provided, none of the provisions of Part 4, Article 5, Chapter 153A and Part 4, Article 7, Chapter 160A shall apply to public hospitals.

(d) If any provision of this Article is inconsistent with any provision of any other law, the provision of this Article shall be controlling.

(e) As used in this Article, unless the context clearly indicates otherwise, the term "public hospital" has the same meaning as in G.S. 159-39. (1997-517, s. 2.)

CASE NOTES

Public Hospital Employee Records. — Trial court erred in granting summary judgment to a newspaper in its action under the Public Records Act, G.S. 132-1 et seq., and the Public Hospital Personnel Act, G.S. 131E-257 et seq., seeking disclosure of public hospital employee salary information, as such was protected from disclosure, except as to current salary, pursuant to G.S. 131E-257.2; information contained in an employee's personnel file was "gathered" by the hospital, pursuant to the use of that term under G.S. 131E-257.2(a), as it was not construed narrowly, but rather, read to mean amassed or collected in one place. Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

Cited in Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

§ 131E-257.1. Compensation; personnel policies; employee benefits plans.

(a) A public hospital shall determine the pay, expense allowances, and other compensation of its officers and employees, and may establish position classification and pay plans and incentive compensation plans.

(b) A public hospital may:

(1) Adopt personnel policies and procedures regarding, without limitation, vacations, personal leave, service award programs, other personnel policies and procedures, and any other measures that enhance the ability of a public hospital to hire and retain employees.

(2) Determine the work hours, workdays, and holidays applicable to its employees.

(3) Establish and pay all or part of the cost of benefit plans for its employees and former employees, including without limitation, life, health and disability plans, pension, profit sharing, deferred compensation and other retirement plans, and other fringe benefit plans.

(4) Pay severance payments and provide other employee severance benefits to its employees and former employees pursuant to a severance plan established in connection with a reduction in the size of the workforce of a public hospital or, with respect to an individual employee, pursuant to an employment agreement entered into prior to the date the employee receives notice of termination of employment.

(c) The provisions of G.S. 159-30 and G.S. 159-31 are not applicable to public hospitals with respect to the investment of escrowed or trusteed retirement and deferred compensation funds. Public hospitals may invest such escrowed and trusteed funds in property or securities in which trustees, guardians, personal representatives, and others acting in a fiduciary capacity may legally invest funds under their control. (1997-517, s. 2.)

§ 131E-257.2. Privacy of employee personnel records.

(a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees and applicants for employment maintained by a public hospital are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the public hospital with respect to an employee and, by way of illustration but not limitation, relating to the employee's application, selection or nonselection, performance, promotions, demotions, transfers, suspensions and other disciplinary actions, evaluation forms, employment contracts, leave, salary, and termination of employment. As used in this section, "employee" includes both current and former employees of a public hospital.

(b) The following information with respect to each public hospital employee is a matter of public record:

(1) Name.
(2) Age.
(3) Date of original employment.
(4) Current position title.
(5) Date of the most recent promotion, demotion, transfer, suspension, separation or other change in position classification.
(6) The office to which the employee is currently assigned.

In addition, the following information with respect to each licensed medical provider employed by or having privileges to practice in a public hospital shall be a matter of public record: educational history and qualifications, date and jurisdiction or original and current licensure; and information relating to medical board certifications or other qualifications of medical specialists.

(b1) In addition, the following information for the last completed fiscal year, beginning with the fiscal year ending in 2008, of a public hospital with respect to each Covered Officer and the five key employees (who are not Covered Officers) with the highest annual compensation of a public hospital is a matter of public record:

(1) Base salary.
(2) Bonus compensation.
(3) Plan-based incentive compensation.
(4) Dollar value of all other compensation, which includes any perquisites and other personal benefits.

(b2) As used in this section:

(1) "Covered Officer" means each of the following:
  a. All individuals serving as the public hospital's chief executive officer or acting in a similar capacity at any time during the last completed fiscal year, regardless of compensation level.
  b. The public hospital's four most highly compensated executive officers, determined by the aggregate amount reportable under subdivisions (1) through (4) of subsection (b1) of this section, other than the chief executive officer, who were serving as executive officers at the end of the last completed fiscal year.
  c. Any individual for whom disclosure would have been provided pursuant to sub-subdivision b. of this subsection but for the fact that the individual's service as an executive officer of the public hospital terminated during the last completed fiscal year.
(2) "Executive officer" means each employee of the public hospital specifically appointed by the governing board of the public hospital to serve as an officer.
(3) "Key employee" means any person having responsibilities, powers, or influence similar to those of an officer. The term includes the chief management and administrative officials of a public hospital.

(b3) The governing board of a public hospital shall determine in what form and by whom this information will be maintained. Any person may have access to this information for the purpose of inspection, examination, and copying, during regular business hours, subject only to such rules and regulations for the safekeeping of public records as the governing board of the public hospital may have adopted. Any person denied access to this information may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.

(c) All information contained in a public hospital employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:

(1) The employee or the employee's duly authorized agent may examine all portions of the employee's personnel file, except letters of reference solicited prior to employment.

(2) A licensed physician designated in writing by the employee may examine the employee's medical record.

(3) A public hospital employee having supervisory authority over the employee may examine all material in the employee's personnel file.

(4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.

(5) An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when the inspection is deemed by the person having custody of the file to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency, but no information shall be divulged for the purpose of assisting in criminal prosecution of the employee, or for the purpose of assisting in an investigation of the employee's tax liability. However, the official having custody of the records may release the name, address, and telephone number from a personnel file for the purpose of assisting in a criminal investigation.

(6) An employee may sign a written release, to be placed with the employee's personnel file, that permits the person with custody of the file to provide, either in person, by telephone, or by mail, information specified in the release to prospective employers, educational institutions, or other persons specified in the release.

(d) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

(1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the public hospital's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.

(2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.

(3) Information that might identify an undercover law enforcement officer or a law enforcement informer.

(4) Notes, preliminary drafts, and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

(e) The governing board of a public hospital may permit access, subject to limitations they may impose, to selected personnel files by a professional representative of a training, research, or academic institution if that representative certifies that he or she will not release information identifying the employees whose files are opened and that the information will be used solely for statistical, research, or teaching purposes. This certification shall be retained by the public hospital as long as each personnel file so examined is retained.

(f) The governing board of a public hospital that maintains personnel files containing information other than the information mentioned in subsection (b) of this section shall establish procedures whereby an employee who objects to material in his or her file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material.

(g) A public hospital director, trustee, officer, or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor; however, conviction under this subsection shall be punishable only by a fine not to exceed five hundred dollars ($500.00).

(h) Any person not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its official filing place, or remove, or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor; however, conviction under this subsection shall be punishable, in the discretion of the court, by a fine not to exceed five hundred dollars ($500.00). (1997-517, s. 2; 2007-508, s. 5.5.)

Effect of Amendments. — Session Laws 2007-508, s. 5.5, effective August 30, 2007, inserted "employment contracts" near the end of subsection (a); deleted "current salary, and the date and amount of the most recent increase or decrease in salary" at the end of subdivision (b)(4); added subsections (b1) and (b2); and redesignated the former last paragraph of subsection (b) as subsection (b3).

CASE NOTES

Construction. — Although documents under the definition of "public records" of G.S. 132-1(a) of the Public Records Act, G.S. 132-1 et seq., were usually subject to disclosure, an exemption existed for public hospital personnel files under the clear and unambiguous language of G.S. 131E-257.2 of the Public Hospital Personnel Act, and "personnel files" was defined broadly in G.S. 131E-257.2(a); the interpretation of what information was to be disclosed from those files was based on statutory history, including changes made from predecessor language, as well as the legislature's intent to carve out a privacy niche for public hospital employees for all information regarding compensation except "current salary." Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

"Gathered." — Trial court erred in granting summary judgment to a newspaper in its action under the Public Records Act, G.S. 132-1 et seq., and the Public Hospital Personnel Act, G.S. 131E-257 et seq., seeking disclosure of public hospital employee salary information, as such was protected from disclosure, except as to current salary, pursuant to G.S. 131E-257.2; information contained in an employee's personnel file was "gathered" by the hospital, pursuant to the use of that term under G.S. 131E-257.2(a), as it was not construed narrowly, but rather, read to mean amassed or collected in one place. Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

OPINIONS OF ATTORNEY GENERAL

Settlement Agreement Not Confidential. — Only medical malpractice settlements in which the State is a party are exempt from disclosure; a settlement agreement, not involving medical malpractice, between a doctor and a State hospital, even one purporting to keep the settlement or related matters confidential, must be released to the requestor in its unredacted form, with the exception of information from the doctor's personnel file which was first gathered by the hospital. See opinion of Attorney General to Mr. Fred M. Carmichael Summrell, Sugg, Carmichael & Ashton, P.A., 1997 N.C.A.G. 68 (11/26/97).

§§ **131E-258 through 131E-264:** Reserved for future codification purposes.

Article 16.

Miscellaneous Provisions.

§ 131E-265. Criminal history record checks required for certain applicants for employment.

(a) Requirement; Nursing Home or Home Care Agency. — An offer of employment by a nursing home licensed under this Chapter to an applicant to fill a position that does not require the applicant to have an occupational license is conditioned on consent to a criminal history record check of the applicant. If the applicant has been a resident of this State for less than five years, then the offer of employment is conditioned on consent to a State and national criminal history record check of the applicant. The national criminal history record check shall include a check of the applicant's fingerprints. If the applicant has been a resident of this State for five years or more, then the offer is conditioned on consent to a State criminal history record check of the applicant. An offer of employment by a home care agency licensed under this Chapter to an applicant to fill a position that requires entering the patient's home is conditioned on consent to a criminal history record check of the applicant. In addition, employment status change of a current employee of a home care agency licensed under this Chapter from a position that does not require entering the patient's home to a position that requires entering the patient's home shall be conditioned on consent to a criminal history record check of that current employee. If the applicant for employment or if the current employee who is changing employment status has been a resident of this State for less than five years, then the offer of employment or change in employment status is conditioned on consent to a State and national criminal history record check. The national criminal history record check shall include a check of the applicant's or current employee's fingerprints. If the applicant or current employee has been a resident of this State for five years or more, then the offer is conditioned on consent to a State criminal history record check of the applicant or current employee applying for a change in employment status. A nursing home or a home care agency shall not employ an applicant who refuses to consent to a criminal history record check required by this section. In addition, a home care agency shall not change a current employee's employment status from a position that does not require entering the patient's home to a position that requires entering the patient's home who refuses to consent to a criminal history record check required by this section. Within five business days of making the conditional offer of employment, a nursing home or home care agency shall submit a request to the Department of Justice under G.S. 114.19.10 to conduct a State or national criminal history record check required by this section, or shall submit a request to a private entity to conduct a State criminal history record check required by this section. Notwithstanding G.S. 114-19.10, the Department of Justice shall return the results of national criminal history record checks for employment positions not covered by Public Law 105-277 to the Department of Health and Human Services, Criminal Records Check Unit. Within five business days of receipt of the national criminal history of the person, the Department of Health and Human Services, Criminal Records Check Unit, shall notify the nursing home or home care agency as to whether the information received may affect the employability of the applicant. In no case shall the results of the national criminal history record check be shared with the nursing home or home care agency. Nursing homes and home care agencies shall make available upon request verification that a criminal history check has been completed on any staff covered by this section. All criminal history information received by the home or agency is confidential and may not be disclosed, except to the applicant as provided in subsection (b) of this section.

(a1) Requirement; Contract Agency of Nursing Home or Home Care Agency. — An offer of employment by a contract agency of a nursing home or home care agency licensed under this Chapter to an applicant to fill a position that does not require the applicant to have an occupational license is conditioned upon consent to a criminal history record check of the applicant. If the applicant has been a resident of this State for less than five years, then the offer of employment is conditioned on consent to a State and national criminal history record check of the applicant. The national criminal history record check shall include a check of the applicant's fingerprints. If the applicant has been a resident of this State for five years or more, then the offer is conditioned on consent to a State criminal history record check of the applicant. A contract agency of a nursing home or home care agency shall not employ an applicant who refuses to consent to a criminal history record check required by this section. Within five business days of making the conditional offer of employment, a contract agency of a nursing home or home care agency shall submit a request to the Department of Justice under G.S. 114-19.10 to conduct a State or national criminal history record check required by this section, or shall submit a request to a private entity to conduct a State criminal history record check required by this section. Notwithstanding G.S. 114-19.10, the Department of Justice shall return the results of national criminal history record checks for employment positions not covered by Public Law 105-277 to the Department of Health and Human Services, Criminal Records Check Unit. Within five business days of receipt of the national criminal history of the person, the Department of Health and Human Services, Criminal Records Check Unit, shall notify the contract agency of the nursing home or home care agency as to whether the information received may affect the employability of the applicant. In no case shall the results of the national criminal history record check be shared with the contract agency of the nursing home or home care agency. Contract agencies of nursing homes and home care agencies shall make available upon request verification that a criminal history check has been completed on any staff covered by this section. All criminal history information received by the contract agency is confidential and may not be disclosed, except to the applicant as provided by subsection (b) of this section.

(b) Action. — If an applicant's criminal history record check reveals one or more convictions of a relevant offense, the nursing home or home care agency, or the contract agency of a nursing home or home care agency, shall consider all of the following factors in determining whether to hire the applicant:

(1) The level and seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed.
(7) The subsequent commission by the person of a relevant offense.

The fact of conviction of a relevant offense alone shall not be a bar to employment; however, the listed factors shall be considered by the nursing home or home care agency, or the contract agency of the nursing home or home care agency. If a nursing home, home care agency, or contract agency of a nursing home or home care agency disqualifies an applicant after consideration of the relevant factors, then the nursing home, home care agency, or contract agency may disclose information contained in the criminal history record check that is relevant to the disqualification, but may not provide a copy of the criminal history record check to the applicant.

(c) Limited Immunity. — An entity and an officer or employee of an entity that, in good faith, complies with this section is not liable for the failure of the entity to employ an individual on the basis of information provided in the criminal history record check of the individual.

(d) Relevant Offense. — As used in this section, the term “relevant offense” has the same meaning as in G.S. 131D-40.

(e) Penalty for Furnishing False Information. — Any applicant for employment who willfully furnishes, supplies, or otherwise gives false information on an employment application that is the basis for a criminal history record check under this section shall be guilty of a Class A1 misdemeanor.

(f) Conditional Employment. — A nursing home or home care agency may employ an applicant conditionally prior to obtaining the results of a criminal history record check regarding the applicant if both of the following requirements are met:

(1) The nursing home or home care agency shall not employ an applicant prior to obtaining the applicant’s consent for a criminal history record check as required in subsection (a) of this section or the completed fingerprint cards as required in G.S. 114-19.10.

(2) The nursing home or home care agency shall submit the request for a criminal history record check not later than five business days after the individual begins conditional employment.

(g) Immunity From Liability. — An entity and officers and employees of an entity shall be immune from civil liability for failure to check an employee’s history of criminal offenses if the employee’s criminal history record check is requested and received in compliance with this section.

(h) For purposes of this section, the term ‘private entity’ means a business regularly engaged in conducting criminal history record checks utilizing public records obtained from a State agency. (1995 (Reg. Sess., 1996), c. 606, s. 3; 1997-125, s. 2; 1997-140, s. 4; 2000-154, ss. 3(a),(b); 2004-124, s. 10.19D(a); 2005-4, ss. 8, 9; 2007-444, s. 3.2.)

Editor’s Note. — The number of this Article and the number of this section were assigned by the Revisor of Statutes, the numbers as enacted by Session Laws 1995 (Reg. Sess., 1996), c. 606, s. 3, having been Article 15 and G.S. 131E-255.

Session Laws 2001-465, ss. 1(a) and (b), effective November 16, 2001, provide: “(a) Notwithstanding G.S. 131E-265, the requirements of that statute for nursing homes and home care agencies to conduct national criminal history record checks shall apply only to nursing home and home care agency employment positions involving direct patient care, and the national checks shall be conducted in accordance with Public Law 105-277.

“(b) This section [s. 1 of Session Laws 2001-465] expires January 1, 2003.”

Session Laws 2001-465, s. 2(a), effective November 16, 2001, provides: “The requirements of G.S. 131E-265(a1) for contract agencies of nursing homes and home care agencies, G.S. 131D-40 for adult care homes and contract agencies of adult care homes, and of G.S. 122C-80 for area mental health, developmental disabilities, and substance abuse services authorities, to conduct national criminal history record checks are suspended until January 1, 2003.”

Session Laws 2002-126, s. 1.2, provides: “This act shall be known as ‘The Current Operations, Capitol Improvements, and Finance Act of 2002’.”

Session Laws 2002-126, s. 31.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year.”

Session Laws 2002-126, s. 31.6, is a severability clause.

Session Laws 2003-284, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2003’.”

Session Laws 2003-284, s. 10.8E, effective July 1, 2003, provides: “Notwithstanding any other provision of law to the contrary, the requirements of G.S. 131E-265 for nursing homes to conduct national criminal history record checks for employment positions other than those involving direct patient care shall become effective no earlier than January 1,

2005. Notwithstanding any other provision of law to the contrary, the requirements of G.S. 131D-2 for adult care homes to conduct national criminal records checks for all staff positions shall become effective no earlier than January 1, 2005. For similar provision setting effective date of no earlier than January 1, 2003, see Session Laws 2001-465, s. 2(b). For similar provision setting effective date of no earlier than January 1, 2004, see Session Laws 2002-126, s. 10.10C."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Effect of Amendments. — Session Laws 2007-444, s. 3.2, effective August 23, 2007, added subsection (h).

§ 131E-266. Compliance history provider file.

The Department of Health and Human Services shall establish and maintain a provider file to record and monitor compliance histories of facilities, owners, operators, and affiliates of nursing homes and adult care homes. (1999-334, s. 3.8.)

Editor's Note. — Session Laws 1999-334, s. 3.8, was codified as this section and G.S. 131D-41 at the direction of the Revisor of Statutes.

§ 131E-267. Fees for departmental review of licensed health care facility or Medical Care Commission bond-financed construction projects.

(a) The Department of Health and Human Services shall charge a fee for the review of each health care facility construction project to ensure that project plans and construction are in compliance with State law. The fee shall be charged on a one-time, per-project basis as provided in this section. In no event may a fee imposed under this section exceed two hundred thousand dollars ($200,000) for any single project. The first seven hundred twelve thousand six hundred twenty-six dollars ($712,626) in fees collected under this section shall remain in the Division of Health Service Regulation. Additional fees collected shall be credited to the General Fund as nontax revenue and are intended to offset rather than replace appropriations made for this purpose.

(b) The fee imposed for the review of a hospital construction project varies depending upon the square footage of the project:

Over	Up To	Project Fee
-0-	5,000	$750.00 plus $0.25 per square foot
5,000	10,000	$1,500 plus $0.40 per square foot
10,000	20,000	$2,000 plus $0.50 per square foot
20,000	NA	$3,000 plus $0.75 per square foot

(c) The fee imposed for the review of a nursing home construction project varies depending upon the square footage of the project:

Over	Up To	Project Fee
-0-	2,000	$250.00 plus $0.15 per square foot
2,000	NA	$250.00 plus $0.16 per square foot

(d) The fee imposed for the review of an ambulatory surgical facility construction project varies depending upon the square footage of the project:

Over	Up To	Project Fee
-0-	2,000	$200.00 plus $0.15 per square foot

Over	**Up To**	**Project Fee**
2,000	NA	$250.00 plus $0.20 per square foot

(e) The fee imposed for the review of a psychiatric hospital construction project varies depending upon the square footage of the project:

Over	**Up To**	**Project Fee**
-0-	5,000	$200.00 plus $0.16 per square foot
5,000	10,000	$200.00 plus $0.25 per square foot
10,000	20,000	$300.00 plus $0.45 per square foot
20,000	NA	$400.00 plus $0.45 per square foot

(f) The fee imposed for the review of an adult care home construction project varies depending upon the square footage of the project:

Over	**Up To**	**Project Fee**
-0-	2,000	$175.00 plus $0.10 per square foot
2,000	NA	$175.00 plus $0.20 per square foot

(g) The fee imposed for the review of the following residential construction projects is:

Residential Project	**Project Fee**
Family Care Homes	$200.00 flat fee
ICF/MR Group Homes	$300.00 flat fee
Group Homes: 1-3 beds	$100.00 flat fee
Group Homes: 4-6 beds	$200.00 flat fee
Group Homes: 7-9 beds	$250.00 flat fee
Other residential:	
More than 9 beds	$250.00 plus $0.75 per square foot of project space.

(2003-284, s. 34.11(a); 2005-276, s. 41.2(j); 2006-66, s. 10.22; 2007-323, s. 30.5(a).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 10.22, effective July 1, 2006, substituted "twenty-five thousand dollars ($25,000)" for "twelve thousand five hundred dollars ($12,500)" in the last sentence of the first paragraph.

Session Laws 2007-323, s. 30.5.(a), effective October 1, 2007, and applicable to applications for review submitted on or after October 1, 2007, rewrote the section heading; redesignated and rewrote the existing provisions as subsections (a) and (g); and added subsections (b) through (f).

§ **131E-268:** Reserved for future codification purposes.

§ 131E-269. Authorization to charge fee for certification of facilities suitable to perform abortions.

The Department of Health and Human Services shall charge each hospital or clinic certified by the Department as a facility suitable for the performance of abortions, as authorized under G.S. 14-45.1, a nonrefundable annual certification fee in the amount of seven hundred dollars ($700.00). (2003-284, s. 34.7(a); 2005-276, s. 41.2(g).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.5, is a severability clause.

§ 131E-270. Medication Aide Registry.

(a) The Department shall establish and maintain a Medication Aide Registry containing the names of all health care personnel in North Carolina who have successfully completed a medication aide training program that has been approved by the North Carolina Board of Nursing, passed a State-administered medication aide competency exam, and met any other requirements set by the Medical Care Commission.

(b) Before allowing an individual to serve as a medication aide, an employer shall access the Medication Aide Registry to verify that the individual is listed on the Registry and shall note each incidence of access in the appropriate business file. Employers may not use an individual as a medication aide unless the individual is listed on the Medication Aide Registry.

(c) Employers shall access the Health Care Personnel Registry prior to employing a medication aide. Any substantiated action as defined in G.S. 131E-256(a)(1) listed against the medication aide shall disqualify the medication aide from employment in any facility or agency covered by Part 1 of Article 6 of this Chapter. (2005-276, s. 10.40C(c); 2007-444, s. 4(b).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 10.40C(d), provides: "This section becomes effective July 1, 2006. The North Carolina Board of Nursing and the Department of Health and Human Services shall report on the implementation of this act to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than March 1, 2006, and annually thereafter."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-444, s. 4(b), effective August 23, 2007, in subsection (a), made a stylistic change, and added "and met any other requirements set by the Medical Care Commission."

§§ 131E-271 through 131E-274: Reserved for future codification purposes.

Article 17.

Provider Sponsored Organization Licensing.

§ 131E-275. General provisions.

(a) The General Assembly acknowledges that section 1855, et seq., of the federal Social Security Act permits provider sponsored organizations that are organized and licensed under State law as risk-bearing entities, or that are otherwise certified as such by the federal government, to be eligible to offer Medicare health insurance or health benefits coverage in each state in which the provider sponsored organization offers a Medicare+Choice plan. The General Assembly declares that provider sponsored organizations are beneficial to North Carolina citizens who are Medicare beneficiaries and should be encouraged, subject to appropriate regulation by the Division of Medical Assistance of the Department of Health and Human Services. The General Assembly further declares that, because provider sponsored organizations provide health care directly and assume responsibility for the provision of health care services to Medicare beneficiaries under the requirements of the federal Medicare program, they require different regulatory oversight to protect the public than health maintenance organizations and insurance companies. The General Assembly further declares that the organizers and operators of provider sponsored organizations which are licensed under the terms of this Article as risk-bearing entities authorized to contract directly with the federal Medicare+Choice program shall not be subject to Chapter 58 of the General Statutes or the insurance laws of this State, unless otherwise specified in this Article.

It is the intent of the General Assembly to encourage innovative methods by which sponsoring providers can directly or indirectly share substantial financial risk in the PSO in any lawful manner.

(b) As set forth in this Article, the Division of Medical Assistance of the Department of Health and Human Services shall be the agency of the State authorized to license provider sponsored organizations to contract with Medicare to provide health care services to Medicare beneficiaries and to engage in the other related activities described in this Article.

(c) Each provider sponsored organization shall obtain a license from the Division or shall otherwise be certified by the federal government prior to establishing, maintaining, and operating a health care plan in this State for Medicare+Choice beneficiaries. Nothing in this Article shall be construed to authorize a provider sponsored organization to establish, maintain, or operate a health care plan other than exclusively for Medicare+Choice beneficiaries. (1998-227, s. 1.)

Editor's Note. — Session Laws 1998-227, s. 6, appropriates initial funds and further provides for the allocation of $50,000 from funds appropriated to the Department of Health and Human Services for the 1998-99 fiscal year to be used by the Division of Medical Assistance to implement the Act and further provides that nothing in the Act shall obligate the General Assembly to appropriate or allocate additional funds to implement the Act.

§ 131E-276. Definitions.

As used in this Article, unless the context clearly implies otherwise, the following definitions apply:

(1) "Affiliated provider" means a health care provider that is affiliated with another provider if, through contract, ownership, or otherwise: (i) one provider directly controls, is controlled by, or is under common

control with the other provider; (ii) each provider participates in a lawful combination under which they share substantial financial risk for the organization's operation; (iii) both providers are part of a controlled group of corporations as defined under section 1563 of the Internal Revenue Code of 1986; or (iv) both providers are part of an affiliated service group under section 414 of this Code. Control is presumed if one party directly or indirectly owns, controls, or holds the power to vote, or proxies for, at least fifty-one percent (51%) of the voting or governance rights of another.

(2) "Beneficiary" or "beneficiaries" means a beneficiary or beneficiaries of the Medicare+Choice program who are enrolled with the provider sponsored organization (PSO) under the terms of a contract between the PSO and the Medicare program.

(3) "Current assets" means cash, marketable securities, accounts receivable, and other current items that will be converted into cash within 12 months.

(4) "Current liabilities" means accounts payable and other accrued liabilities, including payroll, claims, and taxes that will need to be paid within 12 months.

(5) "Current ratio" means the ratio of current assets divided by current liabilities calculated at the end of any accounting period.

(6) "Division" means the Division of Medical Assistance of the Department of Health and Human Services.

(7) "Emergency services" has the same meaning as defined in G.S. 58-50-61(a)(5).

(8) "Health care delivery assets" means any tangible asset that is part of a PSO operation, including hospitals, medical facilities, and their ancillary equipment, and any property that may reasonably be required for the PSO's principal office or for any purposes that may be necessary in the transaction of the business of the PSO.

(9) "Health plan contract" or "Medicare contract" means a PSO's direct contract with the United States Department of Health and Human Services under section 1857 of the federal Social Security Act.

(10) "Out-of-network services" means health care items or services that are covered services under a PSO's Medicare contract and that are provided to beneficiaries by health care providers that are not participating providers in the PSO's network of health care providers.

(11) "Parent of a sponsoring provider" means the public or private entity that owns or controls a controlling interest in the sponsoring provider or that has the power to appoint a controlling number of the governing board of a sponsoring provider or that has the power to direct the management policy and decisions of the sponsoring provider.

(12) "Provider" or "health care provider" means: (i) any individual that is engaged in the delivery of health care services and that is required by North Carolina law or regulation to be licensed to engage in the delivery of these health care services and is so licensed; (ii) any entity that is engaged in the delivery of health care services and that is required by North Carolina law or regulation to be licensed to engage in the delivery of these health care services and is so licensed; or (iii) any entity that is owned or controlled entirely by individuals or entities described in subparts (i) or (ii) of this definition.

(13) "Provider sponsored organization" or "PSO" means a public or private entity domiciled in this State, including a business corporation, a nonprofit corporation, a partnership, a limited liability company, a professional limited liability company, a professional corporation, a sole proprietorship, a public hospital, a hospital authority, a hospital

district, or a body politic: (i) that is established, organized, and operated by sponsoring providers; (ii) in which physicians licensed pursuant to Article 1 of Chapter 90 of the General Statutes or to the laws of any state of the United States comprise no less than fifty percent (50%) of the governing board or body, unless otherwise prohibited by law; and (iii) that provides a substantial proportion of the services under each Medicare contract directly through the sponsoring provider. The requirement in subpart (ii) of this definition shall not preclude a PSO that includes a tax-exempt hospital from adopting a bylaw provision that provides a veto for the tax-exempt hospital over actions of the PSO necessary to maintain the hospital's tax-exempt status. A PSO shall not be out of compliance with the requirement in subpart (ii) due to temporary vacancies on its governing board or body. Subpart (ii) of this subdivision applies only if a hospital licensed under this Chapter or Chapter 122C of the General Statutes is the sponsoring provider or a member of the group of affiliated health care providers that comprises the sponsoring provider.

(14) "Sponsoring providers" of a PSO means the health care provider domiciled in this State that assumes, or group of affiliated health care providers that directly or indirectly shares, substantial financial risk in the PSO and that has at least a majority financial interest in the PSO.

(15) "Substantial proportion of the services" means at least seventy percent (70%), or sixty percent (60%) for PSOs whose beneficiaries reside primarily in rural areas, of the annual health care expenditures. (1998-227, s. 1.)

§ 131E-277. Direct or indirect sharing of substantial financial risk.

In order for sponsoring providers to directly or indirectly share substantial financial risk in the PSO, the PSO shall do one or more of the following:

(1) Provide services under its Medicare contract at a capitated rate;

(2) Provide designated services or classes of services under its Medicare contract for a predetermined percentage of premium or revenue from the Medicare program;

(3) Use significant financial incentives for its sponsoring providers, as a group to achieve specified cost-containment and utilization management goals either by:

a. Withholding from all sponsoring providers a substantial amount of the compensation due to them, with distribution of that amount to the sponsoring providers based on performance of all sponsoring providers in meeting the cost-containment goals of the network as a whole; or

b. Establishing overall cost or utilization targets for the PSO, with the sponsoring providers subject to subsequent substantial financial rewards or penalties based on group performance in meeting the targets; or

(4) Agree to provide a complex or extended course of treatment that requires the substantial coordination of care by sponsoring providers in different specialties offering a complementary mix of services, for a fixed, predetermined payment, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's treatment or other factors; or

(5) Agree to any other arrangement that the Division determines to provide for the sharing of substantial financial risk by the sponsoring providers. (1998-227, s. 1.)

§ 131E-278. Applicability of other laws.

Unless otherwise required by federal law, provider sponsored organizations licensed pursuant to the terms of this Article are exempt from all regulation under Chapter 58 of the General Statutes. Plan contracts, provider contracts, and other arrangements related to the provision of covered services by these licensed networks or by health care providers of these PSOs when operating through these PSOs shall likewise be exempt from regulation under Chapter 58 of the General Statutes. (1998-227, s. 1.)

§ 131E-279. Approval.

(a) Unless otherwise required by federal law, the Division shall be the agency of the State that shall license provider sponsored organizations that seek to contract with the federal government to provide health care services directly to Medicare beneficiaries under the Medicare+Choice program.

(b) Provider sponsored organizations which have been granted a waiver pursuant to 42 U.S.C. § 1395w-25(a)(2) and which otherwise meet the requirements of the PSO's Medicare contract shall be deemed by the State to be licensed under this Article for so long as the waiver or Medicare contract remains in effect. The foregoing shall not limit the Division's authority to regulate such PSOs and their respective sponsoring providers and affiliated providers as may be permitted in 42 U.S.C. § 1395w-25(a)(2)(G) or the PSO's Medicare contract.

(c) The Division shall license a PSO as a risk-bearing entity eligible to offer health benefits coverage in this State to Medicare beneficiaries if the PSO complies with the requirements of this Article. This license shall be granted or denied by the Division not longer than 90 days after the receipt of a substantially complete application for licensing. Within 45 days after the Division receives an application for licensing, the Division shall either notify the applicant that the application is substantially complete, or clearly and accurately specify in writing to the applicant all additional specific information required by the applicant to make the application a substantially completed application. This agency response shall set forth a date and time for a meeting within 30 days after it is sent to the applicant, at which a representative of the Division will explain with particularity the additional information required by the Division in the response to make the application substantially complete. The Division shall be bound by the response unless the Division determines that it must be modified in order to meet the purposes of this Article. The Division shall not delegate the authority to modify the response. If an applicant provides the additional information set forth in the response, the application shall be considered substantially complete. If the Division has not acted on an application within 90 days after it is deemed substantially complete, the Division shall immediately issue a license to the applicant, and the applicant shall be considered to have been licensed by the Division. Any reapplication which corrects the deficiencies which were specified by the Division in the response shall be approved by the Division.

(d) For purposes of determining, under 42 U.S.C. § 1395w-25(a)(2)(B), or any successor thereof, the date of receipt by the State of a substantially complete application, the date the Division receives the applicant's written response to the agency response or an earlier date considered by the Division shall be considered to be that date. The foregoing shall not limit the Division's authority to consider an application not substantially complete under subsection (c) of this section if the applicant's response to the response does not provide substantially the information specified in the response.

(e) A license shall be denied only after the Division complies with the requirements of G.S. 131E-305. (1998-227, s. 1.)

§ 131E-280. Applicants for license.

Each application for licensing as a provider sponsored organization authorized to do business in North Carolina shall be certified by an officer or authorized representative of the applicant, shall be in a form prescribed by the Division, and shall be set forth or be accompanied by the following:

(1) A copy of the basic organizational document, if any, of the applicant and each sponsoring organization that holds greater than a five percent (5%) interest in the PSO, such as the articles of incorporation, articles of organization, partnership agreement, trust agreement, or other applicable documents, and all amendments thereto;

(2) A copy of the respective bylaws, rules and regulations, or similar documents, if any, regulating the conduct of the internal affairs of the applicant and each sponsoring provider which holds greater than a five percent (5%) interest in the PSO;

(3) Copies of the document evidencing the arrangements between the applicant and each sponsoring provider that create the relationships and obligations described in G.S. 131E-276(1);

(4) A list of the names, addresses, and official positions of persons who are to be responsible for the conduct of the affairs of the applicant and of each sponsoring provider that holds greater than a five percent (5%) interest in the PSO, respectively, including all members of the respective boards of directors, boards of trustees, executive committees, or other governing boards or committees, the principal officers in the case of a corporation, and the partners or members in the case of a partnership or association;

(5) A copy of any contract form made or to be made between any class of providers and the PSO and a copy of any contract form made or to be made between third-party administrators, marketing consultants, or persons listed in subdivision (3) of this subsection and the PSO;

(6) A statement generally describing the provider sponsored organization, its sponsoring providers, its health care plan or plans, facilities, and personnel and certifying that its medical director or other person charged with determining and overseeing the PSO's medical policies is a medical doctor holding an unrestricted license to practice medicine under Article 1 of Chapter 90 of the General Statutes;

(7) A copy of the hospital license of each sponsoring provider that is a hospital, a copy of the license to practice medicine of each sponsoring provider or owner of a sponsoring provider that is a licensed physician, and a copy of the health care service or facility license held by any other licensed sponsoring provider;

(8) Financial statements showing the applicant's assets, liabilities, sources of financial support, and the financial statements of each sponsoring provider that holds greater than a five percent (5%) interest in the PSO showing the sponsoring provider's assets, liabilities, and sources of support. If the applicant's or any such sponsoring provider's financial affairs are audited by independent certified public accountants, a copy of the applicant's or sponsoring provider's most recent regular certified financial statement shall be considered to satisfy this requirement unless the Division directs that additional or more recent financial information is required for the proper administration of this Article;

(9) If the applicant's obligations under G.S. 131E-282, 131E-283, 131E-297, 131E-298, and 131E-299 are guaranteed by one or more guarantors:

a. Documentation that each guarantor meets the following requirements:

1. The guarantor is a legal entity authorized to conduct business in North Carolina.
2. The guarantor is not under federal bankruptcy or State receivership or rehabilitation proceedings.
3. The guarantor has a net worth, not including other guarantees, intangibles, and restricted reserves, equal to three times the amount of the PSO's guarantee.

b. Financial statements showing each guarantor's assets, liabilities, and source of financial support.

c. If a guarantor's financial affairs are audited by independent certified public accountants, a copy of the guarantor's most recent regular audited financial statement shall be considered to satisfy this requirement unless the Division directs that additional or more recent financial information is required for the proper administration of this Article.

d. The guarantee document, including a statement of the financial obligation covered by the guarantee, an agreement to unconditionally fulfill the financial obligations covered by the guarantee, an agreement not to subordinate the guarantee to any other claim on the resources of the guarantor and a declaration that the guarantor must act on a timely basis to satisfy the financial obligations covered by the guarantee.

(10) A financial plan, satisfactory to the Division, covering the first 12 months of operation under the PSO's Medicare contract and which meets the requirements of G.S. 131E-283. If the financial plan projects losses, the financial plan must cover the period through 12 months beyond the projected breakeven;

(11) A statement reasonably describing the geographic area or areas to be served;

(12) A description of the procedures to be implemented to meet the protection against insolvency requirements of G.S. 131E-298; and

(13) Any other information the Division may require to make the determinations required in G.S. 131E-282. (1998-227, s. 1.)

§ 131E-281. Additional information.

(a) In addition to the information filed under G.S. 131E-280, each application shall include a description of the following:

(1) The program to be used to evaluate whether the applicant's network of sponsoring providers and contracted providers is sufficient, in numbers and types of providers, to assure that all health care services will be accessible without unreasonable delay;

(2) The program used to evaluate whether the sponsoring providers provide a substantial portion of services under each Medicare contract of the PSO;

(3) The program to be used for verifying provider credentials;

(4) The utilization review program for the review and control of health care services provided or paid for by the applicant;

(5) The quality management program to assure quality of care and health care services managed and provided through the health care plan; and

(6) The applicant's network of sponsoring providers and contracted providers and evidence of the ability of that network to provide all health care services other than out-of-network services and emergency services to the applicant's prospective beneficiaries.

(b) The Division may promulgate rules and regulations exempting from the filing requirements of subsection (a) of this section those items it deems unnecessary. (1998-227, s. 1.)

§ 131E-282. Issuance of license.

(a) Before issuing a PSO license, the Division may make an examination or investigation as it deems expedient. The Division shall issue a license after receipt of a substantially complete application and upon satisfaction of the following requirements:

(1) The applicant is duly organized as a provider sponsored organization as defined by this Article.

(2) The PSO has initially a minimum net worth of one million five hundred thousand dollars ($1,500,000). In the event the PSO submits a financial plan that demonstrates that the PSO does not have to create but has or has available to it an administrative infrastructure that shall reduce the PSO's start-up costs, the Division may lower the initial minimum net worth required to one million dollars ($1,000,000) or to any lower amount as determined by the Division if the PSO operates primarily in rural areas.

(3) The PSO shall have at least seven hundred fifty thousand dollars ($750,000) in cash or equivalents on its balance sheet, except that the Division may permit a PSO operating primarily in rural areas to have a lesser amount held in cash or equivalents on its balance sheets.

(4) The applicant submits a financial plan satisfactory to the Division which covers the first 12 months of operation of the PSO's Medicare contract and which meets the requirements of G.S. 131E-283. If the plan projects losses, the financial plan shall cover the period through 12 months beyond projected breakeven.

(5) The Division determines that the applicant has sufficient cash flow to meet its obligations as they become due. In making that determination, the Division shall consider the following:

a. The timeliness of payment;

b. The extent to which the current ratio is maintained at one-to-one, or whether there is a change in the current ratio over a period of time; and

c. The availability of outside financial resources.

(b) In calculating the net worth of a PSO, the Division shall admit the following:

(1) One hundred percent (100%) of the book value of health care delivery assets on the balance sheet of the applicant.

(2) One hundred percent (100%) of the value of cash and cash equivalents on the balance sheet of the applicant.

(3) If at least one million dollars ($1,000,000) of the initial minimum net worth requirement is met by cash or cash equivalents, then one hundred percent (100%) of the book value of the PSO's intangible assets up to twenty percent (20%) of the minimum net worth amount required. If less than one million dollars ($1,000,000) of the initial minimum net worth requirement is met by cash or cash equivalents or if the Division has used its discretion to reduce the initial net worth requirement below one million five hundred thousand dollars ($1,500,000), then the Division shall admit one hundred percent (100%) of the book value of intangible assets of the PSO up to ten percent (10%) of the minimum net worth amount required.

(4) Standard accounting principles treatment shall be given to other assets of the PSO not used in the delivery of health care for the purposes of meeting the minimum net worth requirement.

(5) Deferred acquisition costs shall not be admitted. (1998-227, s. 1.)

§ 131E-283. Financial plan.

(a) The financial plan shall include the following:
- (1) A detailed marketing plan;
- (2) Statements of revenue and expense on an accrual basis;
- (3) Cash flow statements;
- (4) Balance sheets; and
- (5) The assumptions and justifications in support of the financial plan.

(b) In the financial plan, the PSO shall demonstrate that it has the resources available to meet the projected losses for the entire period to break even. Except for the use of guaranties as provided in subsection (c) of this section, letters of credit as provided in subsection (e) of this section, and other means as provided in subsection (f) of this section, the resources must be assets on the balance sheet of the PSO in a form that is either cash or convertible to cash in a timely manner, pursuant to the financial plan.

(c) Guaranties shall be acceptable as a resource to meet projected losses, under the following conditions:
- (1) For the first year of the PSO's operation of the PSO's Medicare contract, the guarantor must provide the PSO with cash or cash equivalents to fund the projected losses, as follows:
  - a. Prior to the beginning of the first quarter, in the amount of the projected losses for the first two quarters;
  - b. Prior to the beginning of the second quarter, in the amount of the projected losses through the end of the third quarter; and
  - c. Prior to the beginning of the third quarter, in the amount of the projected losses through the end of the fourth quarter.
- (2) If the guarantor provides the cash or cash equivalents to the PSO in a timely manner on the above schedule, this funding shall be considered in compliance with the guarantor's commitment to the PSO. In the third quarter, the PSO shall notify the Division if the PSO intends to reduce the period of funding of projected losses. The Division shall notify the PSO within 60 days of receiving the PSO's notice if the reduction is not acceptable.
- (3) If the above guaranty requirements are not met, the Division may take appropriate action, such as requiring funding of projected losses through means other than a guaranty. The Division retains discretion which shall be reasonably exercised to require other methods or timing of funding, considering factors such as the financial condition of the guarantor and the accuracy of the financial plan.

(d) The Division may modify the conditions in subsection (c) of this section in order to clarify the acceptability of guaranty arrangements.

(e) An irrevocable, clean, unconditional letter of credit may be used as an acceptable resource to fund projected losses in place of cash or cash equivalents if satisfactory to the Division.

(f) If approved by the Division, based on appropriate standards promulgated by the Division, PSOs may use the following to fund projected losses for periods after the first year: lines of credit from regulated financial institutions, legally binding agreements for capital contributions, or other legally binding contracts of a similar level of reliability.

(g) The exceptions in subsections (c), (e), and (f) of this section may be used in an appropriate combination or sequence. (1998-227, s. 1.)

§ 131E-284. Modifications.

(a) A provider sponsored organization shall file a notice describing any significant change in the information required by the Division under G.S.

131E-280. Such notice shall be filed with the Division prior to the change. If the Division does not disapprove within 90 days after the filing, this modification shall be considered approved. Changes subject to the terms of this section include expansion of service area, addition or deletion of sponsoring providers, changes in provider contract forms, and group contract forms when the distribution of risk is significantly changed, and any other changes that the Division describes in properly adopted rules. Every PSO shall report to the Division for the Division's information material changes in the network of sponsoring providers and affiliated providers of services to beneficiaries enrolled with the PSO, the addition or deletion of any Medicare contracts of the PSO or any other information the Division may require. This information shall be filed with the Division within 15 days after implementation of the reported changes. Every PSO shall file with the Division all subsequent changes in the information or forms that are required by this Article to be filed with the Division.

(b) The Division may adopt rules exempting from the filing requirements of subsection (a) of this section those items it considers unnecessary. (1998-227, s. 1.)

§ 131E-285. Deposits.

(a) At the time of application, the Division shall require a deposit of one hundred thousand dollars ($100,000) in cash or securities or a combination thereof for all provider sponsored organizations. The deposits shall be included in the calculations of a PSO's or applicant's net worth.

(b) All deposits required by this section shall be restricted to use in the event of insolvency to help assume continuation of services or pay costs associated with receivership or liquidation. (1998-227, s. 1.)

§ 131E-286. Ongoing financial standards — Net worth.

(a) Beginning the first day of operation of the PSO and except as otherwise provided in subsection (d) of this section, every PSO shall maintain a minimum net worth equal to the greatest of the following amounts:

(1) One million dollars ($1,000,000);

(2) Two percent (2%) of annual premium revenues as reported on the most recent annual financial statement filed with the Division on the first one hundred fifty million dollars ($150,000,000) of premium and one percent (1%) of annual premium on the premium in excess of one hundred fifty million dollars ($150,000,000);

(3) An amount equal to the sum of three months uncovered health care expenditures as reported on the most recent financial statement filed with the Division;

(4) An amount equal to the sum of:

  a. Eight percent (8%) of annual health care expenditures paid on a noncapitated basis to nonaffiliated providers as reported on the most recent financial statement filed with the Division; and

  b. Four percent (4%) of annual health care expenditures paid on a capitated basis to nonaffiliated providers plus annual health care expenditures paid on a noncapitated basis to affiliated providers; and

  c. Zero percent (0%) of annual health care expenditures paid on a capitated basis to affiliated providers regardless of downstream arrangements from the affiliated provider.

(b) In calculating net worth, liabilities shall not include fully subordinated debt or subordinated liabilities. For purposes of this provision, subordinated liabilities are claims liabilities otherwise due to providers that are retained by the PSO to meet net worth requirements and are fully subordinated to all creditors.

(c) In calculating net worth for purposes of this section, the items described in G.S. 131E-282(b) shall be admitted, except as follows:

(1) For intangible assets, if at least the greater of one million dollars ($1,000,000) or sixty-seven percent (67%) of the ongoing minimum net worth requirement is met by cash or cash equivalents, then the Division shall admit the book value of intangible assets up to twenty percent (20%) of the minimum net worth amount required. If less than the greater of one million dollars ($1,000,000) or sixty-seven percent (67%) of the ongoing minimum net worth requirement is met by cash or cash equivalents, then the Division shall admit the book value of intangible assets up to ten percent (10%) of the minimum net worth amount required; and

(2) Deferred acquisition costs shall not be admitted.

(d) The Division may lower the minimum ongoing net worth threshold, and the amount held in cash or cash equivalents for PSOs that operate primarily in rural areas.

(e) During the start-up phase of the PSO, the pre-break-even financial plan requirements shall apply. After the point of breakeven, the financial plan requirement shall address cash needs and the financing required for the next three years.

(f) If a PSO, or the legal entity of which the PSO is a component, did not earn a net operating surplus during the most recent fiscal year, the PSO shall submit a financial plan, satisfactory to the Division, meeting all of the requirements established for the initial financial plan. (1998-227, s. 1.)

§ 131E-287. PSO Reporting.

(a) The PSO shall file with the Division financial information relating to PSO solvency standards described in this Article, according to the following schedule:

(1) On a quarterly basis until breakeven; and

(2) On an annual basis after breakeven, if the PSO has a net operating surplus; or

(3) On a quarterly or monthly basis, as specified by the Division, after breakeven, if the PSO does not have a net operating surplus.

(b) To the extent not preempted by federal law or otherwise mandated by the Medicare program, the PSO shall annually, on or before the first day of March of each year, file with the Division the following information for the previous calendar year:

(1) The number of and reasons for grievances and complaints received from Medicare beneficiaries enrolled with the PSO under the PSO's Medicare contract regarding medical treatment. The report shall include the number of covered lives, total number of grievances categorized by reason for the grievance, the number of grievances referred to the second level grievance review, the number of grievances resolved at each level and their resolution, and a description of the actions that are being taken to correct the problems that have been identified through grievances received. Every PSO shall file with the Division, as part of its annual grievance report, a certificate of compliance stating that the PSO has established and follows, for its Medicare contract, grievance procedures that comply with this Article.

(2) The number of Medicare beneficiaries enrolled with the PSO under the PSO's Medicare contract who terminated their enrollment with the PSO for any reason.

(3) The number of provider contracts between the PSO and network providers for the provision of covered services to Medicare beneficiaries that were terminated and reasons for termination. This information shall include the number of providers leaving the PSO network and the number of new providers in the network. The report shall show voluntary and involuntary terminations separately.

(4) Data relating to the utilization, quality, availability, and accessibility of service. The report shall include the following:

a. Information on the PSO's program to determine the level of network availability, as measured by the numbers and types of network providers, required to provide covered services to covered persons. This information shall include the PSO's methodology under its Medicare+Choice program for:

1. Establishing performance targets for the numbers and types of providers by specialty, area of practice, or facility type, for each of the following categories: primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities.
2. Determining when changes in PSO Medicare+Choice program enrollees will necessitate changes in the provider network.

The report shall also include: the availability performance targets for the previous and current years; the numbers and types of providers currently participating in the PSO's provider network; and an evaluation of actual plan performance against performance targets.

b. The PSO's method for arranging or providing health care services from nonnetwork providers, both within and outside of its service area, when network providers are not available to provide covered services.

c. Information on the PSO's program under its Medicare+Choice program to determine the level of provider network accessibility necessary to serve its Medicare enrollees. This information shall include the PSO's methodology for establishing performance targets for member access to covered services from primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities. The methodology shall establish targets for:

1. The proximity of network providers to members, as measured by member driving distance, to access primary care, specialty care, hospital-based services, and services of nonhospital facilities.
2. Expected waiting time for appointments for urgent care, acute care, specialty care, and routine services for prevention and wellness.

The report shall also include: the accessibility performance targets for the previous and current years; data on actual overall accessibility as measured by driving distance and average appointment waiting time; and an evaluation of actual Medicare+Choice plan performance against performance targets. Measures of actual accessibility may be developed using scientifically valid random sample techniques.

d. A statement of the PSO's methods and standards for determining whether in-network services are reasonably available and accessible to a Medicare enrollee for the purpose of determining whether such enrollee should receive the in-network level of coverage for services received from a nonnetwork provider.

e. A description of the PSO's program to monitor the adequacy of its network availability and accessibility methodologies and performance targets, Medicare+Choice plan performance, and network provider performance.

f. A summary of the PSO's utilization review program activities for the previous calendar year under its Medicare+Choice program. The report shall include the number of: each type of utilization review performed, noncertifications for each type of review, each type of review appealed, and appeals settled in favor of Medicare enrollees. The report shall be accompanied by a certification from the carrier that it has established and follows procedures that comply with this Article.

(5) Aggregate financial compensation data, including the percentage of providers paid under a capitation arrangement, discounted fee-for-service or salary, the services included in the capitation payment, and the range of compensation paid by withhold or incentive payments. This information shall be submitted on a form prescribed by the Division.

The name, or group or institutional name, of an individual provider may not be disclosed pursuant to this subsection. No civil liability shall arise from compliance with the provisions of this subsection, provided that the acts or omissions are made in good faith and do not constitute gross negligence, willful or wanton misconduct, or intentional wrongdoing.

(c) Disclosure Requirements. — To the extent not otherwise prohibited by federal law or under the terms of the PSO's Medicare contract, each PSO shall provide the following applicable information to Medicare beneficiaries enrolled with the PSO under the PSO's Medicare contract and bona fide prospective enrollees upon request:

(1) The evidence of coverage under the Medicare+Choice plan provided by the PSO to Medicare beneficiaries under the terms of the PSO's Medicare contract;

(2) An explanation of the utilization review criteria and treatment protocol under which treatments are provided for conditions specified by the prospective enrollee. This explanation shall be in writing if so requested;

(3) If denied a recommended treatment, written reasons for the denial and an explanation of the utilization review criteria or treatment protocol upon which the denial was based;

(4) The plan's restrictive formularies or prior approval requirements for obtaining prescription drugs, whether a particular drug or therapeutic class of drugs is excluded from its formulary, and the circumstances under which a nonformulary drug may be covered; and

(5) The procedures and medically based criteria under the PSO's Medicare contract for determining whether a specified procedure, test, or treatment is experimental.

(d) Effective January 1, 1999, PSOs shall make the reports that are required under subsection (b) of this section and that have been filed with the Division available on their business premises and shall provide any Medicare beneficiary enrolled with the PSO access to them upon request, unless otherwise prohibited by federal law or under the terms of the PSO's Medicare contract.

(e) Every PSO licensed under this Article shall annually on or before the first day of March of each year, file with the Division a sworn statement verified by at least two of the principal officers of the PSO showing its condition on the thirty-first day of December, then next preceding; which shall be in such form as the Division shall prescribe. In case the PSO fails to file the annual statement as herein required, the Division is authorized to suspend the license issued to the PSO until the statement shall be properly filed.

(f) A PSO shall report to the Division the efforts it has undertaken to foster measurable improvements in the health status of the community's Medicare population, increase access to health care for noncovered benefits, and address critical health care needs of the community's Medicare population. (1998-227, s. 1.)

§ 131E-288. Liquidity.

(a) Each PSO shall have sufficient cash flow to meet its obligations as they become due. In determining the ability of a PSO to meet this requirement, the Division shall consider the following:

(1) The timeliness of payment;
(2) The extent to which the current ratio is maintained at one-to-one or whether there is a change in the current ratio over a period of time; and
(3) The availability of outside financial resources.

(b) The following corresponding remedies apply:

(1) If the PSO fails to pay obligations as they become due, the Division shall require the PSO to initiate corrective action to pay all overdue obligations.
(2) The Division may require the PSO to initiate corrective action if either of the following is evident: (i) the current ratio declines significantly; or (ii) there is a continued downward trend in the current ratio. The corrective action may include a change in the distribution of assets, a reduction of liabilities, or alternative arrangements to secure additional funding requirements to restore the current ratio to one-to-one.
(3) If there is a change in the availability of the outside resources, the Division shall require the PSO to obtain funding from alternative financial resources.

(c) Nothing in the foregoing liquidity requirements shall be interpreted to require the PSO to maintain a current ratio of one-to-one if the PSO can demonstrate to the Division that it is able to pay its obligations as they become due and the current ratio maintained by the PSO has neither declined significantly nor is on a continued downward trend. (1998-227, s. 1.)

§ 131E-289. Minimum of net worth that must be in cash or cash equivalents.

(a) Except as otherwise provided in subsection (b) of this section, each PSO shall, on an ongoing basis, maintain a minimum net worth in cash or cash equivalents of the greater of:

(1) Seven hundred fifty thousand dollars ($750,000) cash or cash equivalents; or
(2) Forty percent (40%) of the minimum net worth required.

(b) The Division may lower the threshold for minimum net worth held in cash or cash equivalents by PSOs that operate primarily in rural areas.

(c) Cash or cash equivalents held to meet the net worth requirement shall be current assets of the PSO. (1998-227, s. 1.)

§ 131E-290. Prohibited practice.

(a) No provider sponsored organization or sponsoring provider, unless licensed as an insurer under Chapter 58 of the General Statutes may use in its name, contracts, or literature any of the words "insurance", "casualty", "surety", "mutual", or any other words descriptive of the insurance, casualty, or surety business or deceptively similar to the name or description of any insurance or surety corporation doing business in this State.

(b) No provider sponsored organization or sponsoring provider shall engage in any activity or conduct which is prohibited by the terms of the PSO's Medicare contract.

(c) Unless otherwise preempted by federal law or mandated by the Medicare program, a PSO shall not discriminate with respect to participation, reimbursement, or indemnification as to any provider who is acting within the scope of the provider's license or certification under applicable State law, solely on the basis of that license or certification. This subsection does not preclude a PSO from including providers only to the extent necessary to meet the needs of the organization's enrollees or from establishing any measure designed to maintain quality and control costs consistent with the responsibilities of the organization. (1998-227, s. 1.)

§ 131E-291. Collaboration with local health departments.

A provider sponsored organization and a local health department shall collaborate and cooperate within available resources regarding health promotion and disease prevention efforts that are necessary to protect the public health. (1998-227, s. 1.)

§ 131E-292. Coverage.

(a) Provider sponsored organizations subject to this Article shall provide coverage for the medically appropriate and necessary services specified under the PSO's Medicare contract.

(b) In the event a PSO's Medicare contract or federal law, regulations, or rules governing coverage by the PSO of items or services to Medicare beneficiaries permits a PSO, sponsoring provider, or participating provider to object on moral or religious grounds to providing an item or service to Medicare beneficiaries, it is the policy of this State to permit this objection and allow the participating provider to refuse to provide the item or service. (1998-227, s. 1.)

§ 131E-293. Rates.

Rates charged by provider sponsored organizations to the Medicare program and charges by PSOs and sponsoring providers for items or services to beneficiaries shall be governed by the terms of the PSO's Medicare contract. (1998-227, s. 1.)

§ 131E-294. Additional consumer protection and quality standards.

Unless otherwise preempted by federal law or mandated by the Medicare program, the Division shall apply to provider sponsored organizations the same standards and requirements that the Department of Insurance applies to health maintenance organizations under Chapter 58 of the General Statutes with respect to the following consumer protection and quality matters:

(1) Quality management programs (11 NCAC 20.0500, et seq.);
(2) Utilization review procedures (G.S. 58-67-61 and G.S. 58-67-62);
(3) Unfair or deceptive trade practices (Article 63 of Chapter 58 of the General Statutes);
(4) Antidiscrimination (G.S. 58-3-25(b) and (c), 58-3-120, 58-63-15(7), and 58-67-75);
(5) Provider accessibility and availability (11 NCAC 20.0300, et seq.);
(6) Network provider credentialing (11 NCAC 20.0400, et seq.); and
(7) Data reporting requirements under G.S. 58-67-50(e). (1998-227, s. 1.)

§ 131E-295. Powers of insurers and medical service corporations.

Notwithstanding any provision of the insurance and hospital or medical service corporation laws contained in Articles 1 through 67 of Chapter 58 of the General Statutes, an insurer or a hospital or medical service corporation may contract with a provider sponsored organization to provide insurance or similar protection against the cost of care provided through provider sponsored organizations and their sponsoring providers to beneficiaries and to provide coverage in the event of the failure of the provider sponsored organization or its sponsoring providers to meet its obligations under the PSO's Medicare contract. The beneficiaries of a provider sponsored organization constitute a permissible group under these laws. Among other things, under these contracts, the insurer or hospital or medical service corporation may make benefit payments to provider sponsored organizations for health care services rendered by providers pursuant to the health care plan. (1998-227, s. 1.)

§ 131E-296. Examinations.

The Division may make an examination of the affairs of any provider sponsored organization and the contracts, agreements, or other arrangements pursuant to its health care plan as often as the Division considers necessary for the protection of the interests of the people of this State but not less frequently than once every three years. (1998-227, s. 1.)

§ 131E-297. Hazardous financial condition.

(a) Whenever the financial condition of any provider sponsored organization indicates a condition such that the continued operation of the provider sponsored organization might be hazardous to its beneficiaries, creditors, or the general public, then the Division may order the provider sponsored organization to take any action that may be reasonably necessary to rectify the existing condition, including one or more of the following steps:

(1) To reduce the total amount of present and potential liability for benefits by reinsurance;
(2) To reduce the volume of new business being accepted;
(3) To reduce the expenses by specified methods;
(4) To suspend or limit the writing of new business for a period of time;
(5) To require an increase to the provider sponsored organization's net worth by contribution;
(6) To add or delete sponsoring providers;
(7) To increase the amount of payments from the PSO which sponsoring providers agree to forego; or
(8) To require additional guaranties from sponsoring providers or from parents of sponsoring providers.

(b) If the Division determines that the standards in G.S. 131E-286, 131E-288, and 131E-289 do not provide sufficient early warning that the continued operation of any provider sponsored organization might be hazardous to its beneficiaries, creditors, or the general public, the Division may adopt rules to set uniform standards and criteria for such an early warning and to set standards for evaluating the financial condition of any provider sponsored organization, which standards shall be consistent with the purposes expressed in subsection (a) of this section. (1998-227, s. 1.)

§ 131E-298. Protection against insolvency.

(a) The Division shall require deposits in accordance with the provisions of G.S. 131E-285.

(b) If a provider sponsored organization fails to comply with the net worth requirements of G.S. 131E-286, the Division may take appropriate action to assure that the continued operation of the provider sponsored organization will not be hazardous to the beneficiaries enrolled with the PSO.

(c) Every provider sponsored organization shall have and maintain at all times an adequate plan for protection against insolvency acceptable to the Division. In determining the adequacy of such a plan, the Division shall consider:

(1) A reinsurance agreement preapproved by the Division covering excess loss, stop-loss, or catastrophies. The agreement shall provide that the Division will be notified no less than 60 days prior to cancellation or reduction of coverage;

(2) A conversion policy or policies that will be offered by an insurer to the beneficiaries in the event of the provider sponsored organization's insolvency;

(3) Legally binding unconditional guaranties by adequately capitalized sponsoring provider or adequately capitalized sponsoring corporations of sponsoring providers;

(4) Legally binding obligations of sponsoring providers to forego payment for items or services provided by the sponsoring provider in order to avoid the financial insolvency of the PSO;

(5) Legally binding obligations of sponsoring providers or parents of sponsoring providers to make capital infusions to the PSO; and

(6) Any other arrangements offering protection against insolvency that the Division may require. (1998-227, s. 1.)

§ 131E-299. Hold harmless agreements or special deposit.

(a) Unless the PSO maintains a special deposit in accordance with subsection (b) of this section, each contract between every PSO and a participating provider of health care services shall be in writing and shall set forth that in the event the PSO fails to pay for health care services as set forth in the contract, the Medicare subscriber or beneficiary shall not be liable to the provider for any sums owed by the PSO. No other provisions of these contracts shall, under any circumstances, change the effect of this provision. No participating provider or agent, trustee, or assignee thereof may maintain any action at law against a subscriber or beneficiary to collect sums owed by the PSO.

(b) In the event that the participating provider contract has not been reduced to writing or that the contract fails to contain the required prohibition, the PSO shall maintain a special deposit in cash or cash equivalent as follows:

(1) If at any time uncovered expenditures exceed ten percent (10%) of total health care expenditures the PSO shall either:

a. Place an uncovered expenditures insolvency deposit with the Division, or with any organization or trustee acceptable to the Division through which a custodial or controlled account is maintained, cash or securities that are acceptable to the Division. This deposit shall at all times have a fair market value in an amount of one hundred twenty percent (120%) of the PSO's outstanding liability for uncovered expenditures for enrollees, including incurred but not reported claims, and shall be calculated as of the first day of the month and maintained for the remainder of the month. If a PSO is not otherwise required to file a quarterly report, it shall file a report within 45 days of the end of the calendar quarter with information sufficient to demonstrate compliance with this section; or

b. Maintain adequate insurance or a guaranty arrangement approved in writing by the Division, to pay for any loss to beneficiaries claiming reimbursement due to the insolvency of the PSO. The Division shall approve a guaranty arrangement if the guarantying organization is a sponsoring provider, has been operating for at least 10 years, and has a net worth, including organization-related land, buildings, and equipment of at least fifty million dollars ($50,000,000), unless the Division finds that the approval of this guaranty may be financially hazardous to beneficiaries.

(2) The deposit required under sub-subdivision a. of subdivision (1) of this subsection is an admitted asset of the PSO in the determination of net worth. All income from these deposits or trust accounts shall be assets of the PSO and may be withdrawn from the deposit or account quarterly with the approval of the Division;

(3) A PSO that has made a deposit may withdraw that deposit or any part of the deposit if (i) a substitute deposit of cash or securities of equal amount and value is made, (ii) the fair market value exceeds the amount of the required deposit, or (iii) the required deposit under this subsection is reduced or eliminated. Deposits, substitutions, or withdrawals may be made only with the prior written approval of the Division;

(4) The deposit required under sub-subdivision a. of subdivision (1) of this section is in trust and may be used only as provided under this section. The Division may use the deposit of an insolvent PSO for administrative costs associated with administering the deposit and payment of claims of enrollees of the PSO.

(c) Whenever the reimbursements described in this section exceed ten percent (10%) of the PSO's total costs for health care services over the immediately preceding six months, the PSO shall file a written report with the Division containing the information necessary to determine compliance with sub-subdivision a. of subdivision (1) of subsection (b) of this section no later than 30 business days from the first day of the month. Upon an adequate showing by the PSO that the requirements of this section should be waived or reduced, the Division may waive or reduce these requirements to an amount it deems sufficient to protect beneficiaries of the PSO consistent with the intent and purpose of this Article. (1998-227, s. 1.)

§ 131E-300. Continuation of benefits.

The Division shall require that each PSO have a plan for handling insolvency, which plan allows for continuation of benefits for the duration of the contract period for which premiums have been paid and continuation of benefits to beneficiaries who are confined in an inpatient facility until their discharge or expiration of benefits. In considering such a plan, the Division may require:

(1) Insurance to cover the expenses to be paid for benefits after an insolvency;

(2) Provisions in provider contracts that obligate the provider to provide services for the duration of the period after the PSO's insolvency for which premium payment has been made and until the beneficiaries' discharge from inpatient facilities;

(3) Insolvency reserves as the Division may require;

(4) Letters of credit acceptable to the Division;

(5) Additional guaranties from a sponsoring provider of the PSO or from the parent of a sponsoring provider;

(6) Legally binding obligations of sponsoring providers to forego payment from the PSO for services provided to beneficiaries in order to avoid the insolvency of the PSO; and

(7) Any other arrangements to assure that benefits are continued as specified. (1998-227, s. 1.)

§ 131E-301. Insolvency.

(a) In the event of an insolvency of a PSO upon order of the Division, all providers that were sponsoring providers of the PSO within the previous 12 months from the order of the Division shall, for 30 days after the order, offer all beneficiaries enrolled with the insolvent PSO, covered services without charge other than for any applicable co-payments, deductibles, or coinsurance permitted to be charged to beneficiaries under the PSO's Medicare contract.

(b) If the Division determines that the sponsoring providers lack sufficient health care delivery resources to assure that health care services will be available and accessible to all of the beneficiaries of the insolvent PSO, then, in the event the Health Care Financing Administration of the United States Department of Health and Human Services fails to make such allocations in a timely manner, the Division shall allocate the insolvent PSO's contracts for these groups among all other PSOs that operate within a portion of the insolvent PSO's service area, taking into consideration the health care delivery resources of each PSO. Each PSO to which beneficiaries are so allocated by the Division shall offer such group or groups that PSO's existing coverage that is most similar to each beneficiary's coverage with the insolvent PSO at rates determined in accordance with the successor PSO's existing rating methodology.

(c) Taking into consideration the health care delivery resources of each such PSO, then in the event the Health Care Financing Administration of the United States Department of Health and Human Services fails to make such allocations in a timely manner, the Division shall also allocate among all PSOs that operate within a portion of the insolvent PSO's service area the insolvent PSO's beneficiaries who are unable to obtain other coverage. Each PSO to which beneficiaries are so allocated by the Division shall offer such beneficiaries that PSO's existing coverage for individual or conversion coverage as determined by the beneficiary's type of coverage in the insolvent PSO at rates determined in accordance with the successor PSO's Medicare contract. (1998-227, s. 1.)

§ 131E-302. Replacement coverage.

(a) Any carrier providing replacement coverage with respect to hospital, medical, or surgical expense or service benefits, within a period of 60 days from the date of discontinuance of a prior PSO contract or policy providing these hospital, medical, or surgical expense or service benefits, shall immediately cover all beneficiaries who were validly covered under the previous PSO contract or policy at the date of discontinuance and who would otherwise be eligible for coverage under the succeeding carrier's contract, regardless of any provisions of the contract relating to hospital confinement or pregnancy.

(b) Except to the extent benefits for the condition would have been reduced or excluded under the prior carrier's contract or policy, no provision in a succeeding carrier's contract of replacement coverage that would operate to reduce or exclude benefits on the basis that the condition giving rise to benefits preceded the effective date of the succeeding carrier's contract shall be applied with respect to those beneficiaries validly covered under the prior carrier's contract on the date of discontinuance. (1998-227, s. 1.)

§ 131E-303. Incurred but not reported claims.

(a) Every PSO shall, when determining liability, include an amount estimated in the aggregate to provide for any unearned premium and for the payment of all claims for health care expenditures that have been incurred, whether reported or unreported, that are unpaid and for which such PSO is or may be liable, and to provide for the expense of adjustment or settlement of such claims.

(b) These liabilities shall be computed in accordance with rules adopted by the Division upon reasonable consideration of the ascertained experience and character of the PSO. (1998-227, s. 1.)

§ 131E-304. Suspension or revocation of license.

(a) The Division may suspend, revoke, or refuse to renew a PSO license if the Division finds that the PSO:

(1) Is operating significantly in contravention of its basic organizational document, or in a manner contrary to that described in and reasonably inferred from any other information submitted under G.S. 131E-280, unless amendments to these submissions have been filed with and approved by the Division;

(2) Issues evidences of coverage or uses a schedule of premiums for health care services that do not comply with Medicare or Medicaid program requirements as applicable;

(3) No longer maintains the financial reserve specified in G.S. 131E-286 or is no longer financially responsible and may reasonably be expected to be unable to meet its obligations to beneficiaries or prospective beneficiaries;

(4) Knowingly or repeatedly fails or refuses to comply with any law or rule applicable to the PSO or with any order issued by the Division after notice and opportunity for a hearing;

(5) Has knowingly made to the Division any false statement or report;

(6) Has sponsoring providers that fail to provide a substantial proportion of the services under any health plan during any 12-month period;

(7) Has itself or through any person on its behalf advertised or merchandised its items or services in an untrue, misrepresentative, misleading, or unfair manner;

(8) If continuing to operate would be hazardous to beneficiaries; or

(9) Has otherwise substantially failed to comply with this Article.

(b) A license shall be suspended or revoked only after compliance with G.S. 131E-305.

(c) When a PSO license is suspended, the PSO shall not, during the suspension, enroll any additional beneficiaries and shall not engage in any advertising or solicitation.

(d) When a PSO license is revoked, the PSO shall proceed, immediately following the effective date of the order of revocation, to wind up its affairs and shall conduct no further business except as may be essential to the orderly conclusion of the affairs of the PSO. The PSO shall engage in no advertising or solicitation. The Division may, by written order, permit any further operation of the PSO that the Division may find to be in the best interest of beneficiaries, to the end that beneficiaries will be afforded the greatest practical opportunity to obtain continuing health care coverage. (1998-227, s. 1.)

§ 131E-305. Administrative procedures.

(a) When the Division has cause to believe that grounds for the denial of an application for a license exist, or that grounds for the suspension or revocation of a license exist, it shall notify the provider sponsored organization in writing specifically stating the grounds for denial, suspension, or revocation and fixing a time of at least 30 days thereafter for a hearing on the matter.

(b) After this hearing, or upon the failure of the provider sponsored organization to appear at this hearing, the Division shall take the action it considers advisable or make written findings that shall be mailed to the provider sponsored organization. The action of the Division shall be subject to review by the Superior Court of Wake County. The court may, in disposing of the issue before it, modify, affirm, or reverse the order of the Division in whole or in part.

(c) The provisions of Chapter 150B of the General Statutes apply to proceedings under this section to the extent that they are not in conflict with subsections (a) and (b) of this section. (1998-227, s. 1.)

§ 131E-306. Expired.

Editor's Note. — Session Laws 1998-227, s. 1, which enacted this section, provided that the section would expire January 1, 2000.

§ 131E-307. Penalties and enforcement.

(a) The provisions of G.S. 58-2-70, modified to replace the word "Commissioner" by the word "Division", applies to this Article. The Division may, in addition to or in lieu of suspending or revoking a license under G.S. 131E-304, proceed under G.S. 58-2-70, as so modified, provided that the provider sponsored organization has a reasonable time within which to remedy the defect in its operations that gave rise to the procedure under G.S. 58-2-70.

(b) Any person who violates this Article shall be guilty of a Class 1 misdemeanor.

(c) If the Division shall for any reason have cause to believe that any violation of this Article has occurred or is threatened, the Division may give notice to the provider sponsored organization and to the representatives or other persons who appear to be involved in such suspected violation to arrange a conference with the alleged violators or their authorized representatives for the purpose of attempting to ascertain the facts relating to such suspected violation, and, in the event it appears that any violation has occurred or is threatened, to arrive at an adequate and effective means of correcting or preventing such violation.

Proceedings under this subsection shall not be governed by any formal procedural requirements and may be conducted in such manner as the Division may deem appropriate under the circumstances.

(d) The Division may issue an order directing a provider sponsored organization or a representative of a provider sponsored organization to cease and desist from engaging in any act or practice in violation of the provisions of this Article.

Within 30 days after service of the order of cease and desist, the respondent may request a hearing on the question of whether acts or practices in violation of this Article have occurred. These hearings shall be conducted pursuant to Chapter 150B of the General Statutes, and judicial review shall be available as provided by this Chapter.

(e) In the case of any violation of the provisions of this Article, if the Division elects not to issue a cease and desist order, or in the event of noncompliance with a cease and desist order issued pursuant to subsection (d) of this section, the Division may institute a proceeding to obtain injunctive relief, or seeking other appropriate relief, in the Superior Court of Wake County. (1998-227, s. 1.)

§ 131E-308. Statutory construction and relationship to other laws.

(a) Except as otherwise provided in this Article, provisions of the insurance laws and provisions of hospital or medical service corporation laws shall not be applicable to any provider sponsored organization granted a license under this Article or to its sponsoring providers when operating under such a license. This provision shall not apply to an insurer or hospital or medical service corporation licensed and regulated pursuant to the insurance laws or the hospital or medical service corporation laws of this State except with respect to its provider sponsored organization activities authorized and regulated pursuant to this Article.

(b) Solicitation of beneficiaries by a provider sponsored organization granted a license, or its representatives, shall not be construed to violate any provision of law relating to solicitation or advertising by health professionals or health care providers.

(c) Any provider sponsored organization licensed under this Article shall not be considered to be a provider of medicine and shall be exempt from the provisions of Chapter 90 of the General Statutes relating to the practice of medicine: provided, however, that this exemption does not apply to individual providers under contract with or employed by the provider sponsored organization or sponsoring providers or to the sponsoring providers.

(d) Except as otherwise limited by this Article, a PSO may organize in the same manner and may exercise the same prerogatives, powers, and privileges as other entities that are organized and existing under the same laws as the PSO. (1998-227, s. 1.)

§ 131E-309. Filings and reports as public documents.

Except for information that constitutes a bona fide trade secret, proprietary information or competitively sensitive information of a sponsoring provider or parent of a sponsoring provider, all applications, filings, and reports required under this Article shall be treated as public documents. (1998-227, s. 1.)

§ 131E-310. Confidentiality of medical information.

Any data or information pertaining to the diagnosis, treatment, or health of any beneficiary or applicant obtained from the person or from any provider by any provider sponsored organization or by any provider acting pursuant to its provider contract with a provider sponsored organization shall be held in confidence and shall not be disclosed to any person except to the extent that it may be necessary to carry out the purposes of this Article; or upon the express consent of the beneficiary or applicant; or pursuant to statute; or pursuant to court order for the production of evidence or the discovery thereof; or in the event of claim or litigation between such person and the provider sponsored organization wherein such data or information is pertinent. A provider sponsored organization shall be entitled to claim any statutory privileges against such disclosure which the provider who furnished such information to the provider sponsored organization is entitled to claim. (1998-227, s. 1; 1999-272, s. 2.)

§ 131E-311. Conflicts; severability.

To the extent that the provisions of this Article may be in conflict with any other provision of this Chapter, the provisions of this Article shall prevail and apply with respect to provider sponsored organizations. Notwithstanding the absence of adopted rules, the Division shall continue to process applications for provider sponsored organization licenses as described in this Article. If any section, term, or provision of this Article shall be adjudged invalid for any reason, these judgments shall not affect, impair, or invalidate any other section, term, or provision of this Article, but the remaining sections, terms, and provisions shall be and remain in full force and effect. (1998-227, s. 1.)

§ 131E-312. Regulations.

This Article shall be self-implementing. No later than six months after the date of enactment of this Article, the Division may adopt rules consistent with this Article to authorize and regulate provider sponsored organizations to contract directly with the federal Medicare program to provide health care services to the beneficiaries of such programs. The Division shall issue permanent rules and, may issue temporary rules, to the extent these rules may be necessary. The Division shall limit its regulation of provider sponsored organizations to the licensing and regulating of these organizations as risk-bearing entities contracting directly with the Medicare program and to the consumer protection and quality standards as provided in G.S. 131E-294 and shall not regulate any matters described in 42 U.S.C. § 1395W-26(b)(3), or any successor thereof. (1998-227, s. 1.)

§ 131E-313. Utilization review and grievances.

Unless otherwise preempted by federal law or mandated by the Medicare program, the provisions of G.S. 58-50-61 and G.S. 58-50-62 apply to a PSO licensed under this Article as if the PSO was an “insurer” under those sections, except that the Division rather than the Commissioner of Insurance shall regulate a PSO’s compliance with those sections. (1998-227, s. 1.)

§ 131E-314. Division Reporting.

The Division of Medical Assistance of the Department of Health and Human Services shall report quarterly to the Joint Legislative Health Care Oversight Committee on its regulatory activities in the enforcement of this act [Article] and shall provide the Committee with a summary of nonconfidential information on the financial plans and operations of PSOs. The report to the Committee shall include a description and explanation of any regulations or regulatory interpretations that differ from Department of Insurance regulations applicable to HMOs. The report shall also include PSO efforts to improve community health status. The Division shall develop processes or methods to measure improvements in health outcomes for Medicare beneficiaries served by managed care organizations and shall report quarterly to the Joint Legislative Health Care Oversight Committee on the development of these standards. (1998-227, ss. 4, 5.)

Editor’s Note. — Session Laws 1998-227, s. 4, effective November 5, 1998, was codified as G.S. 131E-314 at the direction of the Revisor of Statutes, and was amended by Session Laws 1998-227, s. 5, effective January 1, 2000, also codified as this section at the direction of the Revisor of Statutes.

Chapter 131F.

Solicitation of Contributions.

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ARTICLE 1.

General Provisions.

§ 131F-1. Purpose.

The General Assembly recognizes the right of persons or organizations to conduct solicitation activities. It is the intent of the General Assembly to protect the public by requiring full disclosure by persons who solicit contributions from the public of the purposes for which the contributions are solicited and how the contributions are actually used. It is the intent of the General Assembly to prohibit deception, fraud, and misrepresentation in the solicitation and reporting of contributions. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

Editor's Note. — Session Laws 1998-212, s. 12.14(a), provides all functions, powers, duties, and obligations previously vested in the Department of Health and Human Services under Chapter 131F of the General Statutes are transferred to and vested in the Department of the Secretary of State as if by a Type I transfer defined in G.S. 143A-6; all statutory authority, powers, duties, functions, records, personnel, property, and unexpended balances of appropriations or other funds of the program transferred pursuant to this section shall be transferred in their entirety.

Session Laws 1998-212, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 1.1, provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.5, contains a severability clause.

Legal Periodicals. — For survey, "An Informed Consumer is the Best Defense: Charitable Solicitation Regulation in North Carolina Under N.C. Gen. Stat. G.S. 131F-1 to -28," see 73 N.C.L. Rev. 2303 (1995).

CASE NOTES

Constitutionality of Former Charitable Solicitation Licensure Act. — See Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

Purpose. — The former Charitable Solicitation Licensure Act was enacted to protect the general public and to establish and enforce standards for the use and solicitation of charitable funds. Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

Where corporate solicitor operated bingo games in connection with promotion of the sale of combs and candies, the element of bingo in corporate solicitor's fundraising scheme brought all activity connected to the operation of that game within the ambit of the bingo statutes, even if corporate solicitor fit within the former Charitable Solicitation Licensure Act's definition of "charitable sales promotion." Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 131F-2. Definitions.

The following definitions apply in this Chapter:

(1) "Association" means any voluntary statewide organization of persons for common ends especially as in an organized group working together or periodically meeting because of common interests, beliefs, or professions. These associations may serve charitable organizations including environmental, health, educational, humane, patriotic, scientific, artistic, social welfare, and civic.

(2) "Charitable" means for a benevolent purpose, including environmental, health, educational, humane, patriotic, scientific, artistic, social welfare, and civic.

(3) "Charitable organization" means any person who has or holds out as having a section 501(c)(3) tax exempt determination by the Internal Revenue Service and operates for a charitable purpose, or a person who is or holds himself out to be established for a charitable or civic purpose; or a person who employs a charitable or civic appeal as the basis of a solicitation, or employs an appeal that suggests there is a charitable or civic purpose for the appeal. "Charitable organization" includes a chapter, branch, area office, or similar affiliate soliciting contributions within the State for a charitable organization which has its principal place of business outside the State.

(4) "Charitable sales promotion" means an advertising or sales campaign that represents that the purchase or use of goods or services offered by a coventurer is to benefit a charitable organization. The provision of advertising services alone to a charitable organization does not constitute a charitable sales promotion.

(5) "Contribution" means a promise, pledge, grant of any money or property, financial assistance, or any other thing of value in response to a solicitation. "Contribution" includes, in the case of a charitable organization or sponsor offering a good or service to the public, the excess of the price at which the charitable organization or sponsor or any person acting on behalf of the charitable organization or sponsor sells the good or service to the public over the fair market value of the good or service. "Contribution" does not include bona fide fees, dues, or assessments paid by members if the membership is not conferred solely as consideration for making a contribution in response to a solicitation. "Contribution" does not include funds obtained by a charitable organization or sponsor under government grants or contracts.

(6) "Coventurer" means any person who, for compensation, conducts a charitable sales promotion or a sponsor sales promotion, other than in connection with the solicitation of contributions.

(7) "Department" means the Department of the Secretary of State.

(8) "Emergency service employees" means employees who are firefighters, ambulance drivers, emergency medical technicians, or paramedics.

(9) "Federated fund-raising organization" means a federation of independent charitable organizations which have voluntarily joined together, including a united way, united arts fund, or community chest, for the purpose of raising and distributing contributions and where membership does not confer operating authority and control of the individual organization upon the federated group organization.

(10) "Fund-raising consultant" means any person who meets all of the following:

a. Is retained by a charitable organization or sponsor for a fixed fee or rate under a written agreement to plan, manage, conduct, consult, or prepare material for the solicitation of contributions in this State.

b. Does not solicit contributions or employ, procure, or engage any person to solicit contributions.

c. Does not at any time have custody or control of contributions.

(11) "Fund-raising costs" means those costs incurred in inducing others to make contributions to a charitable organization or sponsor for which the contributors will receive no direct economic benefit. Fund-raising costs include salaries, rent, acquiring and obtaining mailing lists, printing, mailing, all direct and indirect costs of soliciting, and the cost of unsolicited merchandise sent to encourage contributions.

(12) "Law enforcement officers" means persons who are elected, appointed, or employed by the State or any political subdivision of the State and who meet either of the following:

a. Are vested with the authority to bear arms and make arrests and have primary responsibility to prevent and detect crime or enforce the criminal, traffic, or highway laws of the State.

b. Have responsibility for supervision, protection, care, custody, or control of inmates within a correctional institution.

(13) "Membership" means the relationship of a person to an organization that entitles that person to the privileges, professional standing, honors, or other direct benefits of the organization in addition to the right to vote, elect officers, and hold office in the organization.

(14) "Owner" means any person who has a direct or indirect interest in any fund-raising consultant or solicitor.

(15) "Parent organization" means that part of a charitable organization or sponsor which coordinates, supervises, or exercises control over policy, fund-raising, and expenditures, or assists or advises one or more chapters, branches, or affiliates of a charitable organization or sponsor.

(16) "Person" means any individual, organization, trust, foundation, association, group, entity, partnership, corporation, society, or any combination of these acting as a unit.

(17) "Religious institution" means any church, ecclesiastical, or denominational organization, or any established physical place for worship in this State at which nonprofit religious services and activities are regularly conducted, and any bona fide religious groups that do not maintain specific places of worship. "Religious institution" includes any separate group or corporation that forms an integral part of a religious institution that is exempt from federal income tax under the

provisions of section 501(c)(3) of the Internal Revenue Code, and that is primarily supported by funds solicited inside its own membership or congregation.

(18) "Solicitation" means a request, directly or indirectly, for money, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable or sponsor purpose or will benefit a charitable organization or sponsor. "Solicitation" may occur by any of the following methods:

a. Any oral or written request.

b. Any announcement to the press, radio, or television, by telephone or telegraph, or by any other communication device.

c. Distributing, posting, or publishing any handbill, written advertisement, or other publication that directly or by implication seeks to obtain any contribution.

d. Selling or offering or attempting to sell any good, service, chance, right, or any thing of value to benefit a charitable organization or sponsor.

The selling or offering or attempting to sell is a "solicitation" whether or not the person making the solicitation receives any contribution. It is not a "solicitation" when a person applies for a grant or an award to the government or to an organization that is exempt from federal income taxation under section 501(a) of the Internal Revenue Code and described in section 501(c) of the Internal Revenue Code.

(19) "Solicitor" means any person who, for compensation, does not qualify as a fund-raising consultant and does either of the following:

a. Performs any service, including the employment or engagement of other persons or services, to solicit contributions for a charitable organization or sponsor.

b. Plans, conducts, manages, consults, whether directly or indirectly, in connection with the solicitation of contributions for a charitable organization or sponsor.

(20) "Sponsor" means a person who is or holds out to others as soliciting contributions by the use of any name that implies affiliation with emergency service employees or law enforcement officers and who is not a charitable organization. "Sponsor" includes a chapter, branch, or affiliate that has its principal place of business outside the State, if this chapter, branch, or affiliate solicits or holds out to be soliciting contributions in this State.

(21) "Sponsor purpose" means any program or endeavor performed to benefit emergency service employees or law enforcement officers.

(22) "Sponsor sales promotion" means an advertising or sales campaign conducted by a coventurer who represents that the purchase or use of goods or services offered by the coventurer will be used for a sponsor purpose or donated to a sponsor. The provision of advertising services alone to a sponsor does not constitute a sponsor sales promotion. (1981, c. 886, s. 1; 1985, c. 497, s. 2; 1993 (Reg. Sess., 1994), c. 759, s. 2; 1997-443, s. 11A.118(a); 1998-212, s. 12.14(b).)

CASE NOTES

Leasing Office Space Not a Fund-Raising Expense. — To "solicit" under the former Charitable Solicitation Licensure Act included oral and written requests, announcements through the press, television, or telephone, distribution and circulation of handbills and advertisements, and the sale of advertisements, advertising space, subscriptions, and tickets, but nothing in the definition of solicitation encompassed an activity such as leasing office space or indicated that leasing space could be considered "a part" of solicitation; therefore, leasing office space was not a fund-raising expense. Kirkland v. National Civic Assistance Group, Inc., 108 N.C. App. 326, 423 S.E.2d 822 (1992).

§ 131F-3. Exemptions.

The following are exempt from the provisions of this Chapter:

(1) Any person who solicits charitable contributions for a religious institution.

(2) Solicitation of charitable contributions by the federal, State, or local government, or any of their agencies.

(3) Any person who receives less than twenty-five thousand dollars ($25,000) in contributions in any calendar year and does not provide compensation to any officer, trustee, organizer, incorporator, fundraiser, or solicitor.

(4) Any educational institution, the curriculum of which, in whole or in part, is registered, approved, or accredited by the Southern Association of Colleges and Schools or an equivalent regional accrediting body, and any educational institution in compliance with Article 39 of Chapter 115C of the General Statutes, and any foundation or department having an established identity with any of these educational institutions.

(5) Any hospital licensed pursuant to Article 5 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes and any foundation or department having an established identity with that hospital if the governing board of the hospital, authorizes the solicitation and receives an accounting of the funds collected and expended.

(6) Any noncommercial radio or television station.

(7) A qualified community trust as provided in 26 C.F.R. § 1.170A-9(e)(10) through (e)(14).

(8) A bona fide volunteer or bona fide employee or salaried officer of a charitable organization or sponsor.

(9) An attorney, investment counselor, or banker who advises a person to make a charitable contribution.

(10) A volunteer fire department, REACT (Radio Emergency Associated Communications Teams), rescue squad, or emergency medical service.

(11) A Young Men's Christian Association or a Young Women's Christian Association.

(12) A nonprofit continuing care facility licensed under Article 64 of Chapter 58 of the General Statutes.

(13) Any tax exempt nonprofit fire or emergency medical service organization involved in the sale of goods or services that does not ask for a donation. (1981, c. 886, s. 1; 1983, c. 320, ss. 1, 2; 1991, c. 45, s. 24; 1993 (Reg. Sess., 1994), c. 759, s. 2; 1995 (Reg. Sess., 1996), c. 650, s. 1; 1997-329, s. 1; 2003-373, s. 3; 2005-230, s. 1.)

§ 131F-4: Reserved for future codification purposes.

ARTICLE 2.

Charitable Organizations and Sponsors.

§ 131F-5. Licensure of charitable organizations and sponsors required.

(a) License Required. — Unless exempted under G.S. 131F-3, a charitable organization, sponsor, or person that intends to solicit contributions in this

State, to have funds solicited on its behalf, or to participate in a charitable sales promotion or sponsor sales promotion shall obtain a license by filing an application with the Department, obtaining approval of that application by the Department, and paying the applicable fee.

(b) Departmental Review. — The Department shall examine each application filed by a charitable organization or sponsor and shall determine whether the licensing requirements are satisfied. If the Department determines that the requirements are not satisfied, the Department shall notify the charitable organization or sponsor within 10 days after its receipt of the application. If the Department does not notify the charitable organization or sponsor within 10 days, the application is deemed to be approved and the license shall be granted. Within seven days after receipt of a notification that the requirements are not satisfied, the charitable organization or sponsor may file a petition for a contested case. The State has the burden of proof in the contested case. The contested case hearing must be held within seven days after the petition is filed. A recommended decision must be made within three days of the hearing. A final decision must be made within two days after the recommended decision. The contested case hearing proceedings shall be conducted in accordance with Chapter 150B of the General Statutes except that the time limits and provisions set forth in this section shall prevail to the extent of any conflict. The applicant shall be permitted to continue to operate or continue operations pending judicial review of the Department's denial of the application. The Department shall make rules regarding the custody and control of any funds collected during the review period and disposal of such funds in the event the denial of the application is affirmed on appeal.

(c) License Renewal. — The license shall be renewed on an annual basis. Any change in information from the original application for a license shall be filed annually on or before the fifteenth day of the fifth calendar month after the close of each fiscal year in which the charitable organization or sponsor solicited in this State, or by the date of any applicable extension of the federal filing date, whichever is later, provided that extensions given under this section shall not exceed three months after the initial renewal date or eight months after the conclusion of the year for which financial information is due at the time of renewal. A charitable organization or sponsor whose federal filing date has been extended shall, within seven days after receipt, forward a copy of the document granting the extension to the Department.

(d) Extension of Time. — For good cause shown, the Department may extend the time for the license renewal and the annual filing of updated information for a period not to exceed 60 days, during which time the previous license shall remain in effect. (1981, c. 886, s. 1; 1985, c. 497, s. 3; 1987, c. 827, ss. 1, 239; 1989, c. 566, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

Legal Periodicals. — For survey, "An Informed Consumer is the Best Defense: Charitable Solicitation Regulation in North Carolina Under N.C. Gen. Stat. G.S. 131F-1 to -28," see 73 N.C.L. Rev. 2303 (1995).

§ 131F-6. Information required for licensure.

(a) Initial Information Required. — The initial application for a license for a charitable organization or sponsor shall be submitted on a form provided by the Department, signed under oath by the treasurer or chief fiscal officer of the charitable organization or sponsor, and shall include the following:

(1) The name of the charitable organization or sponsor, the purpose for which it is organized, the name under which it intends to solicit contributions, and the purpose for which the contributions to be solicited will be used.

(2) The principal street address and telephone number of the charitable organization or sponsor and the street address and telephone numbers of any offices in this State or, if the charitable organization or sponsor does not maintain an office in this State, the name, street address, and telephone number of the person who has custody of its financial records. The parent organization that files a consolidated registration statement under G.S. 131F-7 on behalf of its chapters, branches, or affiliates shall additionally provide the street addresses and telephone numbers of all of its locations in this State.

(3) The names and street addresses of the officers, directors, trustees, and the salaried executive personnel.

(4) The date when the charitable organization's or sponsor's fiscal year ends.

(5) A list or description of the major program activities.

(6) The names, street addresses, and telephone numbers of the individuals or officers who have final responsibility for the custody of the contributions and who will be responsible for the final distribution of the contributions.

(7) The name of the individuals or officers who are in charge of any solicitation activities.

(8) A financial report for the immediately preceding fiscal year upon a form provided by the Department. The report shall include the following:
   a. The balance sheet.
   b. A statement of support, revenue, and expenses, and any change in the fund balance.
   c. Repealed by Session Laws 1995 (Regular Session, 1996), c. 748, s. 1.3.
   d. A statement of expenses in the following categories:
      1. Program.
      2. Management and general.
      3. Fund-raising.

(9) In substitution for the information described in subdivisions (3), (4), (5), (6), and (8) of this subsection, a charitable organization or sponsor may submit, at the time the application is filed, a copy of its Internal Revenue Service Form 990 and Schedule A filed for the preceding fiscal year, or a copy of its Form 990-EZ filed for the preceding fiscal year.

(10) A charitable organization or sponsor may include a financial report which has been audited by an independent certified public accountant or an audit with opinion by an independent certified public accountant. In the event that a charitable organization or sponsor elects to file this, this optional filing shall be noted in the Department's annual report submitted under G.S. 131F-30.

(11) A newly organized charitable organization or sponsor with no financial history shall file a budget for the current fiscal year.

(12) A statement indicating all of the following:
   a. Whether or not the charitable organization or sponsor is authorized by any other state to solicit contributions.
   b. Whether or not the charitable organization or sponsor or any of its officers, directors, trustees, or salaried executive personnel have been enjoined in any jurisdiction from soliciting contributions or have been found to have engaged in unlawful practices in the solicitation of contributions or administration of charitable assets.
   c. Whether or not the charitable organization or sponsor has had its authority denied, suspended, or revoked by any governmental

agency, together with the reasons for the denial, suspension, or revocation.

d. Whether or not the charitable organization or sponsor has voluntarily entered into an assurance of voluntary compliance or agreement similar to that set forth in G.S. 131F-24(c), together with a copy of that agreement.

(13) The names, street addresses, and telephone numbers of any solicitor, fund-raising consultant, or coventurer who is acting or has agreed to act on behalf of the charitable organization or sponsor, together with a statement setting forth the specific terms of the arrangements for salaries, bonuses, commissions, expenses, or other compensation to be paid the fund-raising consultant, solicitor, or coventurer, and the amounts received from each of them, if any.

(14) With initial licensing only, when and where the organization was established, the tax-exempt status of the organization, and a copy of any federal tax exemption determination letter. If the charitable organization or sponsor has not received a federal tax exemption determination letter at the time of initial licensing, a copy of the determination shall be filed with the Department within 30 days after receipt of the determination by the charitable organization or sponsor. If the organization is subsequently notified by the Internal Revenue Service of any challenge to its continued entitlement to federal tax exemption, the charitable organization or sponsor shall notify the Department of this fact within 30 days after receipt.

(b) Renewal Information Required. — A license shall be renewed on an annual basis. The charitable organization or sponsor shall submit any changes in the information submitted from the initial application. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2; 1995 (Reg. Sess., 1996), c. 748, s. 1.3.)

§ 131F-7. Consolidated application and renewal.

(a) Election to File Consolidated Application. — Each chapter, branch, member, or affiliate of a parent organization or association that is required to obtain a license under G.S. 131F-5 shall either file a separate application or shall report the required information to its parent organization or association. The parent organization or association may then file, on a form provided by the Department, a consolidated application for the parent organization or association and its chapters, branches, members, and affiliates located in this State.

(b) Consolidated Financial Information. — If all contributions received by chapters, branches, or affiliates are remitted directly into the parent organization's centralized accounting system from which all disbursements are made, the parent organization may submit one consolidated financial report as part of the application on a form provided by the Department.

(c) Renewal Information. — The parent organization or association may file the information required for a renewal of a license in a consolidated form provided by the Department. (1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-8. License fees.

(a) Required Fees. — Except as provided in subsections (b) and (c) of this section, every charitable organization or sponsor shall pay the following fees with each license application:

(1) Fifty dollars ($50.00), if the contributions received for the last fiscal year were less than one hundred thousand dollars ($100,000).

(2) One hundred dollars ($100.00), if the contributions received for the last fiscal year were one hundred thousand dollars ($100,000) or more, but less than two hundred thousand dollars ($200,000).

(3) Two hundred dollars ($200.00), if the contributions received for the last fiscal year were two hundred thousand dollars ($200,000) or more.

(b) Exemption. — A licensed charitable organization or sponsor that received less than five thousand dollars ($5,000) in the last calendar or fiscal year shall not pay a fee.

(c) Parent Organization. — A parent organization or association filing on behalf of one or more chapters, branches, members, or affiliates shall pay a single license fee for itself and its other chapters, branches, members, or affiliates. These license fees shall be imposed as follows:

(1) One hundred dollars ($100.00) for a parent organization or association and one to five chapters, branches, members, or affiliates.
(2) Two hundred dollars ($200.00) for a parent organization or association and 6 to 10 chapters, branches, members, or affiliates.
(3) Two hundred fifty dollars ($250.00) for a parent organization or association and 11 to 15 chapters, branches, members, or affiliates.
(4) Four hundred dollars ($400.00) for a parent organization or association and 16 or more chapters, branches, members, or affiliates.

(d) Late Filing. — A charitable organization or sponsor which fails to file the renewal information by the due date may be assessed an additional fee for the late filing. The late filing fee shall be established by rule of the Department and shall not exceed twenty-five dollars ($25.00) for each month or part of a month after the date on which the information was due to be filed or after the period of extension granted for the filing. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-9. Disclosure requirements of charitable organizations and sponsors.

(a) Contributions for Expressed Purpose. — A charitable organization or sponsor shall solicit contributions only for the purpose expressed in its application and may apply contributions only in a manner substantially consistent with that purpose.

(b) Disclosures. — A charitable organization or sponsor soliciting in this State shall include all of the following disclosures at the point of solicitation:

(1) The name of the charitable organization and state of the principal place of business of the charitable organization or sponsor.
(2) A description of the purpose for which the solicitation is being made.
(3) Upon request, the name and either the address or telephone number of a representative to whom inquiries could be addressed.
(4) Upon request, the amount of the contribution which may be deducted as a charitable contribution under federal income tax laws.
(5) Upon request, the source from which a written financial statement may be obtained. The financial statement shall be for the immediate past fiscal year and shall be consistent with G.S. 131F-6. The written financial statement shall be provided within 14 days after the request and shall state the purpose for which funds are raised, the total amount of all contributions raised, the total costs and expenses incurred in raising contributions, the total amount of contributions dedicated to the stated purpose or disbursed for the stated purpose, and whether the services of another person or organization have been contracted to conduct solicitation activities.

(c) Printed Disclosure. — Every charitable organization or sponsor that is required to obtain a license under G.S. 131F-5 shall conspicuously display in type of a minimum size nine points, the following statement on every printed solicitation, written confirmation, receipt, or reminder of a contribution:

"Financial information about this organization and a copy of its license are available from the State Solicitation Licensing Branch at [telephone number]. The license is not an endorsement by the State."

The statement shall be made conspicuous by use of one or more of the following: underlining, a border, or bold type. When the solicitation consists of more than one piece, the statement shall be displayed prominently in the solicitation materials, but not necessarily on every page. (1985, c. 497, s. 8; 1989, c. 566, s. 3; 1993 (Reg. Sess., 1994), c. 759, s. 2; 1995 (Reg. Sess., 1996), c. 748, s. 1.1.)

§§ 131F-10 through 131F-14: Reserved for future codification purposes.

Article 3.

Fund-Raising Consultants, Solicitors, and Coventurers.

§ 131F-15. License required for fund-raising consultant.

(a) License Required. — Unless exempted under G.S. 131F-3, a person shall not act as a fund-raising consultant in this State unless that person has obtained a license from the Department.

(b) License Application. — Applications for a license or renewal of a license shall be submitted on a form provided by the Department, shall be signed under oath, and shall include the following:

(1) The street address and telephone number of the principal place of business of the applicant and any street addresses of business locations in this State if the principal place of business is located outside this State.

(2) The form of the applicant's business.

(3) The names and residence addresses of all officers, directors, and owners.

(4) Whether any of the owners, directors, officers, or employees of the applicant are related as parent, child, spouse, or sibling to any of the following individuals:

  a. Other directors, officers, owners, or employees of the applicant.

  b. Any officer, director, trustee, or employee of any charitable organization or sponsor under contract to the applicant.

  c. Any supplier or vendor providing goods or services to any charitable organization or sponsor under contract to the applicant.

(5) Whether the applicant or any of the applicant's officers, directors, employees, or owners have, within the last five years, been convicted of any felony, or of any misdemeanor arising from the conduct of a solicitation for a charitable organization or sponsor or charitable or sponsor purpose, or been enjoined from violating a charitable solicitation law in this or any other state.

(c) Fees. — The application for an initial or renewal license shall be accompanied by a license fee of two hundred dollars ($200.00). A fund-raising consultant that is a partnership or corporation may obtain a license for and pay a single fee on behalf of all of its partners, members, officers, directors, agents, and employees. In that case, the names and street addresses of all of the officers, employees, and agents of the fund-raising consultant and all other persons with whom the fund-raising consultant has contracted to work under its direction shall be listed in the license application. Each license is valid for one year or a part of one year and expires on March 31 of each year. The license may be renewed on or before March 31 of each year for additional one-year periods upon application to the Department and payment of the license fee.

(d) Contracts. — Every contract or agreement between a fund-raising consultant and a charitable organization or sponsor shall be in writing, signed by two authorized officials of the charitable organization or sponsor, and filed by the fund-raising consultant with the Department at least five days prior to the performance of any service by the fund-raising consultant. Solicitation under the contract or agreement shall not begin before the filing of the contract or agreement. The contract shall contain all of the following provisions:

(1) A statement of the charitable purpose or sponsor purpose for which the solicitation campaign is being conducted.
(2) A statement of the respective obligations of the fund-raising consultant and the charitable organization or sponsor.
(3) A clear statement of the fee that will be paid to the fund-raising consultant.
(4) The effective and termination dates.
(5) A statement that the fund-raising consultant shall not, at any time, have control or custody of contributions.

(e) Departmental Review. — The Department shall examine each application or renewal filed by a fund-raising consultant and determine whether the requirements are satisfied. If the Department determines that the requirements are not satisfied, the Department shall notify the fund-raising consultant within 10 days after its receipt of the application or renewal. If the Department does not respond within 10 days, the license is deemed approved. Within seven days after receipt of a notification that the license requirements are not satisfied, the applicant may file a petition for a contested case. The State has the burden of proof in the contested case. The contested case hearing must be held within seven days after the petition is filed. A recommended decision must be made within three days of the hearing. A final decision must be made within two days after the recommended decision. The contested case hearing proceedings shall be conducted in accordance with Chapter 150B of the General Statutes, except that the time limits and provisions set forth in this section shall prevail to the extent of any conflict. The applicant shall be permitted to continue to operate or continue operations pending judicial review of the Department's denial of the application. The Department shall make rules regarding the custody and control of any funds collected during the review period and disposal of such funds in the event the denial of the application is affirmed on appeal.

(f) Fund. — All license fees shall be paid to the Department and deposited into the Solicitation of Contributions Fund to be used to pay the costs incurred in administering and enforcing this Chapter.

(g) Change in Information. — Unless otherwise provided, any material change in information filed with the Department pursuant to this section shall be reported in writing to the Department within seven working days after the change occurred. (1981, c. 886, s. 1; 1985, c. 497, s. 1; 1989, c. 566, s. 2; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-16. License required for solicitors.

(a) Licensure Required. — Unless exempted under G.S. 131F-3, a person shall not act as a solicitor in this State unless that person has obtained a license from the Department and paid the applicable fees.

(b) Applications. — Applications for a license or renewal of a license shall be submitted on a form provided by the Department, shall be signed under oath, and shall include the following information:

(1) The street address and telephone number of the principal place of business of the applicant and any North Carolina street addresses if the principal place of business is located outside this State.

(2) The form of the applicant's business.
(3) The place and date when the applicant, if other than an individual, was legally established.
(4) The names and residence addresses of all officers, directors, and owners.
(5) A statement as to whether any of the owners, directors, officers, or employees of the applicant are related as parent, spouse, child, or sibling to:
 a. Any other directors, officers, owners, or employees of the applicant.
 b. Any officer, director, trustee, or employee of any charitable organization or sponsor under contract to the applicant.
 c. Any supplier or vendor providing goods or services to any charitable organization or sponsor under contract to the applicant.
(6) A statement as to whether the applicant or any of the directors, officers, persons with a controlling interest in the applicant, or employees or agents involved in solicitation have been convicted, within the last five years, of any felony, or of a misdemeanor arising from the conduct of a solicitation for any charitable organization or sponsor or charitable or sponsor purpose, or been enjoined from violating a charitable solicitation law in this or any other state.
(7) The names of all persons in charge of any solicitation activity.

(c) Fees. — The application for an initial or renewal license shall be accompanied by a fee of two hundred dollars ($200.00). A solicitor that is a partnership or corporation may register for and pay a single fee on behalf of all of the partners, members, officers, directors, agents, and employees. In that case, the names and street addresses of all the officers, employees, and agents of the solicitor and all other persons with whom the solicitor has contracted to work under that solicitor's direction, including solicitors, shall be listed in the license application or furnished to the Department within five days after the date of employment or contractual arrangement. Each license is valid for one year or a part of one year and expires on March 31 of each year. The license may be renewed on or before March 31 of each year for an additional one-year period upon application to the Department and payment of the license fee.

(d) Bond. — A solicitor shall, at the time of application or renewal of the license, file with and have approved by the Department a bond with a surety authorized to do business in this State and to which the solicitor is the principal obligor. The amount of the bond shall be determined as follows:
(1) Twenty thousand dollars ($20,000), if the contributions received for the last fiscal year were less than one hundred thousand dollars ($100,000).
(2) Thirty thousand dollars ($30,000), if the contributions received for the last fiscal year were at least one hundred thousand dollars ($100,000) but less than two hundred thousand dollars ($200,000).
(3) Fifty thousand dollars ($50,000), if the contributions received for the last fiscal year were at least two hundred thousand dollars ($200,000).

The solicitor shall maintain the bond in effect as long as the license is in effect. The liability of the surety under the bond shall not exceed an all-time aggregate liability of fifty thousand dollars ($50,000). The bond, which may be in the form of a rider to a larger blanket liability bond, shall be payable to the State and to any person who may have a cause of action against the principal obligor of the bond for any liability arising out of a violation by the obligor of any provision of this Chapter or any rule adopted under this Chapter.

(d1) In lieu of the bond required under subsection (d) of this section, a solicitor may submit a certificate of deposit in the amount as for a bond pursuant to subsection (d) of this section. The certificate of deposit shall be payable to the State and unrestrictively endorsed to the Department; or, in the case of a negotiable certificate of deposit, unrestrictively endorsed to the Department; or, in the case of a nonnegotiable certificate of deposit, assigned to the Department in a form satisfactory to the Department. Access to the certificate of deposit in favor of the State is subject to the same conditions as for a bond under subsection (d) of this section and shall extend for a period not less than four years after the solicitor ceases activities that are subject to this Chapter. The Department shall deliver to the State Treasurer certificates of deposit submitted under this section.

(e) Departmental Review. — The Department shall examine each application filed by a solicitor. If the Department determines that the requirements are not satisfied, the Department shall notify the solicitor within 10 days after its receipt of the application. If the Department does not respond within 10 days, the license is deemed approved. Within seven days after receipt of a notification that the requirements are not satisfied, the applicant may request a hearing. The state shall bear the burden of proof at such hearing. The hearing shall be held within seven days after receipt of the request. Any recommended order, if one is issued, shall be rendered within three days after the hearing. The final order shall then be issued within two days after the recommended order. If there is no recommended order, the final order shall be issued within five days after the hearing. The proceedings shall be conducted in accordance with Chapter 150B of the General Statutes, except that the time limits and provision set forth in this subsection prevail to the extent of any conflict. The applicant shall be permitted to continue to operate or continue operations pending judicial review of the Department's denial of the application. The Department shall make rules regarding the custody and control of any funds collected during the review period and disposal of such funds in the event the denial of the application is affirmed on appeal.

(f) Solicitation Notice. — No less than five days before commencing any solicitation campaign or event, the solicitor shall file with the Department a solicitation notice on a form provided by the Department. The notice shall be signed and sworn to by the contracting officer of the solicitor and shall include:

(1) A description of the solicitation event or campaign.
(2) Each location and telephone number from which the solicitation is to be conducted.
(3) The legal name and residence address of each person responsible for directing and supervising the conduct of the campaign.
(4) A statement as to whether the solicitor will, at any time, have custody of contributions.
(5) The account number and location of each bank account where receipts from the campaign are to be deposited.
(6) A full and fair description of the charitable or sponsor program for which the solicitation campaign is being carried out as provided in the contract between the solicitor and the charitable organization or sponsor.
(7) The fund-raising methods to be used.
(8) A copy of the contract executed in accordance with subsection (g) of this section.

(g) Contracts. — Each contract or agreement between a solicitor and a charitable organization or sponsor for each solicitation campaign shall be in writing, shall be signed by two authorized officials of the charitable organization or sponsor, one of whom shall be a member of the organization's governing body and one of whom shall be the authorized contracting officer for the solicitor. Each contract or agreement shall contain all of the following provisions:

(1) A statement of the charitable or sponsor purpose and program for which the solicitation campaign is being conducted.

(2) A statement of the respective obligations of the solicitor and the charitable organization or sponsor.

(3) A statement of the guaranteed minimum percentage of the gross receipts from contributions which will be remitted to the charitable organization or sponsor. If the solicitation involves the sale of goods, services, or tickets to a fund-raising event, the percentage of the purchase price which will be remitted to the charitable organization or sponsor. Any stated percentage shall exclude any amount which the charitable organization or sponsor shall pay as fund-raising costs.

(4) A statement of the percentage of the gross revenue for which the solicitor shall be compensated. If the compensation of the professional solicitor is not contingent upon the number of contributions or the amount of revenue received, the compensation shall be expressed as a reasonable estimate of the percentage of the gross revenue, and the contract shall clearly disclose the assumptions upon which the estimate is based. The stated assumptions shall be based upon all of the relevant facts known to the solicitor regarding the solicitation to be conducted by the solicitor.

(5) The effective and termination dates of the contract.

(h) Financial Report. — Within 90 days after a solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, the solicitor shall provide to the charitable organization or sponsor and file with the Department a financial report of the campaign, including the gross revenue received, an itemization of all expenses incurred, and the fixed percentage of the gross revenue that the charitable organization or sponsor received as a benefit from the solicitation campaign. The report shall be completed on a form provided by the Department and shall be signed by an authorized official of the solicitor who shall certify under oath that the report is true and correct.

(i) Handling of Contributions. — Each contribution collected by or in the custody of the solicitor shall be solely in the name of the charitable organization or sponsor on whose behalf the contribution was solicited. Not later than two days after receipt of each contribution, the solicitor shall deposit the entire amount of the contribution in an account at a bank or other federally insured financial institution, which account shall be in the name of that charitable organization or sponsor. The charitable organization or sponsor shall have sole control of all withdrawals from the account and the solicitor shall not be given the authority to withdraw any deposited funds from the account.

(j) Records of Solicitors. — During each solicitation campaign, and for not less than three years after its completion, the solicitor shall maintain the following records:

(1) The date and amount of each contribution received and the name, address, and telephone number of each contributor.

(2) The name and residence street address of each employee, agent, and any other person, however designated, who is involved in the solicitation, the amount of compensation paid to each, and the dates on which the payments were made.

(3) A record of all contributions that at any time are in the custody of the solicitor.

(4) A record of all expenses incurred by the solicitor for the payment of which the solicitor is liable.

(5) A record of all expenses incurred by the solicitor for the payment of which the charitable organization or sponsor is liable.

(6) The location of each bank or financial institution in which the solicitor has deposited revenue from the solicitation campaign and the account number of each account in which the deposits were made.

(7) A copy of each pitch sheet or solicitation script used during the completed solicitation campaign.

(8) If a refund of a contribution has been requested, the name and address of each person requesting the refund. If a refund was made, the amount and the date it was made.

(k) Records of Tickets. — If the solicitor sells tickets to any event and represents that the tickets will be donated for use by another person, the solicitor shall maintain for at least three years the following records:

(1) The name and address of each contributor who purchases or donates tickets and the number of tickets purchased or donated by the contributor.

(2) The name and address of each organization that receives the donated tickets for the use of others, and the number of tickets received by the organization.

(*l*) Review of Records. — Any of the records described in this section shall be made available to the Department upon request and shall be furnished within 10 days after the request.

(m) Change in Information. — Unless otherwise provided in this Chapter, any change in any information filed with the Department under this section shall be reported in writing to the Department within seven days after the change occurs.

(n) License Rescinded. — Any person licensed as a solicitor shall permanently lose that person's license if it is determined that that person, any officer or director thereof, any person with a ten percent (10%) or greater interest therein, or any person the solicitor employs, engages, or procures to solicit for compensation, has been convicted in the last five years of a crime arising from the conduct of a solicitation for a charitable organization or sponsor or a charitable purpose or sponsor purpose. (1981, c. 886, s. 1; 1985, c. 497, s. 1; 1989, c. 566, s. 2; 1993 (Reg. Sess., 1994), c. 759, s. 2; 1997-124, s. 1; 2003-373, s. 2.)

CASE NOTES

Unconstitutionally Overbroad. — North Carolina's licensure procedure, as it read prior to the 1989 amendment to the former Charitable Solicitation Licensure Act, infringed upon the rights protected by U.S. Const., Amend. I, of those organizations which, for various reasons, had to rely on professional solicitors. The fact that (1) the licensure process was subject to North Carolina's Administrative Procedure Act (Chapter 150B), and (2) licenses had in the past been considered expeditiously was not enough to save the statute. National Fed'n of Blind of N.C., Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), aff'd, 817 F.2d 102 (4th Cir. 1987), aff'd, 817 F.2d 102 (4th Cir. 1987), 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Subsection (b) of former G.S. 131C-4 and former G.S. 131C-6, 131C-16.1, 131C-17.2 and 131C-21.1(c), as they read prior to the 1989 amendment, were unconstitutionally overbroad and infringed upon rights protected by U.S. Const., Amend. I. National Fed'n of Blind of N.C., Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), aff'd, 817 F.2d 102 (4th Cir. 1987), aff'd, 817 F.2d 102 (4th Cir. 1987), 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

The licensing requirement of former G.S. 131C-6, as it read prior to the 1989 amendment, as to professional fundraisers was unconstitutional. A speaker's rights were not lost merely because compensation was received, and the State's asserted power to license professional fundraisers carried with it (unless properly constrained) the power directly and substantially to affect the speech they uttered. Consequently, the statute was subject to scrutiny under U.S. Const., Amend. I. Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Generally, speakers need not obtain a license to speak. Even assuming that the State's interest in regulating those who solicit money justifies requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor will, within a specified brief period, either issue a license or go to court. That requirement was not met in former G.S. 131C-6, for that section permitted a delay without limit. Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), decided prior to the 1989 amendments to the former Charitable Solicitation Licensure Act.

The purpose of the bond requirement of former G.S. 131C-10 was to protect those who had made charitable contributions; the bond was not meant to be used to satisfy obligations on a lease which was already in default at the time the bond was issued. Kirkland v. National Civic Assistance Group, Inc., 108 N.C. App. 326, 423 S.E.2d 822 (1992).

§ 131F-17. Disclosure requirements of solicitors.

(a) General Disclosures. — A solicitor shall comply with the following disclosures:

(1) Prior to orally requesting a contribution or along with a written request for a contribution, a solicitor shall clearly disclose:
  a. The name of the solicitor as on file with the Department.
  b. If the individual acting on behalf of the solicitor identifies himself by name, the individual's legal name.
  c. That the caller is a paid solicitor.

(2) In the case of a solicitation campaign conducted orally, whether by telephone or otherwise, any written confirmation, receipt, or reminder sent to any person who has contributed or has pledged to contribute, shall include a clear disclosure of the information required under subdivision (1) of this subsection.

(3) In addition to the information required by subdivision (1) of this subsection, any written confirmation, receipt, or reminder of contribution made pursuant to an oral solicitation and any written solicitation shall conspicuously state in type of a minimum of nine points:

"Financial information about the solicitor and a copy of its license are available from the State Solicitation Licensing Branch at [telephone number]. The license is not an endorsement by the State."

The statement shall be made conspicuous by use of one or more of the following: underlining, a border, or bold type. When the solicitation materials consist of more than one piece, the statement shall be displayed prominently in the solicitation materials, but not necessarily on every page.

(4) If requested by the person being solicited, the solicitor shall inform that person, in writing, within 14 days of the request, of the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign.

(5) If requested by the person being solicited, the solicitor shall inform that person, in writing, within 14 days of the request, of the percentage of the contribution which may be deducted as a charitable contribution under federal income tax laws.

(b) Tickets. — A solicitor shall not represent that tickets to any event will be donated for use by another person, unless:

(1) The solicitor has the written commitments from persons stating that they will accept donated tickets and specifying the number of tickets they are willing to accept.

(2) The written commitments are filed with the Department prior to any solicitation.

The contributions solicited for donated tickets shall not be more than the amount representing the number of ticket commitments received from persons and filed with the Department. At least seven days before the date of the event, the solicitor shall give all donated tickets to each person that made the written commitment to accept them. (1993 (Reg. Sess., 1994), c. 759, s. 2; 1995 (Reg. Sess., 1996), c. 748, s. 1.2.)

Legal Periodicals. — For survey, "An Informed Consumer is the Best Defense: Charitable Solicitation Regulation in North Carolina Under N.C. Gen. Stat. G.S. 131F-1 to -28," see 73 N.C.L. Rev. 2303 (1995).

CASE NOTES

Editor's Note. *— The case below was decided prior to the 1989 amendments to the former Charitable Solicitation Licensure Act.*

Unconstitutionally Overbroad. — Former G.S. 131C-16.1 and former G.S. 131C-4(b), former 131C-6, 131C-17.2 and 131C-21.1(c) were unconstitutionally overbroad and infringed upon rights protected under U.S. Const., Amend. I. National Fed'n of Blind of N.C., Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), aff'd, 817 F.2d 102 (4th Cir. 1987), aff'd, 817 F.2d 102 (4th Cir. 1987), 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Disclosure Requirement Unconstitutional. — The requirement of former G.S. 131C-16.1, as it read prior to the 1989 amendment, that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity, was unconstitutional. Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

State's Interest Not Sufficiently Weighty. — Under the former Charitable Solicitation Licensure Act, G.S. 131C-16.1, the State's interest in informing donors how the money they contribute was spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity, was not sufficiently weighty, and the means chosen to accomplish it were unduly burdensome and not narrowly tailored. Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

§ 131F-18. Requirements of coventurers.

(a) Written Consent. — Prior to the commencement of any charitable sales promotion or sponsor sales promotion in this State conducted by a coventurer on behalf of a charitable organization or sponsor, the coventurer shall obtain the written consent of the charitable organization or sponsor whose name will be used during the charitable sales promotion or sponsor sales promotion.

(b) Rules. — The Department may adopt rules requiring disclosure in advertising for a charitable sales promotion or sponsor sales promotion of information relating to the portion or amount that will benefit the charitable organization or sponsor or the charitable purpose or sponsor purpose.

(c) Final Accounting. — A final accounting for each charitable sales promotion or sponsor sales promotion shall be prepared by the coventurer following completion. The final accounting shall be provided to the charitable organization or sponsor on whose behalf the sales promotion was conducted within 10 days after a request by the charitable organization or sponsor. The final accounting shall be kept by the coventurer for a period of three years, unless the coventurer and the charitable organization or sponsor mutually agree that the accounting should be kept by the charitable organization or sponsor instead of the coventurer. A copy of the final accounting shall be provided to the Department no later than 10 days after the Department requests it. (1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-19: Reserved for future codification purposes.

ARTICLE 4.

Prohibited Acts and Enforcement.

§ 131F-20. Prohibited acts.

It is unlawful for any person to:

(1) Violate or fail to comply with the requirements of this Chapter.

(2) Act as a fund-raising consultant or solicitor after the expiration, suspension, or revocation of that person's license.

(3) Enter into any contract or agreement with or employ a fund-raising consultant or solicitor unless that fund-raising consultant or solicitor is licensed by the Department.

(4) Knowingly file false or misleading information in any document required to be filed with the Department or in response to any request or investigation by the Department or the Attorney General.

(5) Make misrepresentations or misleading statements to the effect that any other person sponsors or endorses the solicitation, approves of its purpose, or is connected therewith, when that person has not given written consent to the use of that person's name.

(6) Represent that a contribution is for or on behalf of a charitable organization or sponsor, or to use any emblem, device, or printed matter belonging to or associated with a charitable organization or sponsor, without first being authorized in writing to do so by the charitable organization or sponsor.

(7) Use a name, symbol, emblem, device, service mark, or statement so closely related or similar to that used by another charitable organization or sponsor that the use would mislead the public.

(8) Falsely state that the person is a member of or a representative of a charitable organization or sponsor or falsely state or represent that the person is a member of or represents law enforcement officers or emergency service employees.

(9) Misrepresent or mislead anyone by any manner, means, practice, or device to believe that the person on whose behalf the solicitation or sale is being conducted is a charitable organization or sponsor, or that any of the proceeds of the solicitation or sale will be used for charitable or sponsor purposes.

(10) Represent that a charitable organization or sponsor will receive a fixed or estimated percentage of the gross revenue from a solicitation campaign greater than that identified in filings with the Department under this Chapter, or that a charitable organization or sponsor will receive an actual or estimated dollar amount or percentage per unit of goods or services purchased or used in the charitable or sponsor sales promotion that is greater than that agreed to by the coventurer and the charitable organization or sponsor.

(11) Use or exploit the fact of registration or the filing of any report with any governmental agency to lead any person to believe that the registration in any manner constitutes an endorsement or approval by the State. However, use of the statement required in G.S. 131F-9(c) or G.S. 131F-17(a)(3) is not a prohibited use or exploitation.

(12) Make misrepresentations or misleading statements to the effect that the donation of a contribution or the display of any sticker, emblem, or insignia offered to contributors shall entitle a person to any special treatment by emergency service employees or law enforcement officers in the performance of their official duties.

(13) Solicit contributions from another person while wearing the uniform of an emergency service employee or law enforcement officer, or while on duty as an emergency service employee or law enforcement officer, except where the solicitation is for a charitable organization or sponsor or except when soliciting contributions to benefit an emergency service employee or law enforcement officer who has been injured in the line of duty or to benefit the family or dependents of an emergency service employee or law enforcement officer who has been killed in the line of duty.

(14) Solicit contributions on behalf of another person using any statement that the failure to make a contribution shall result in a reduced level of law enforcement services being provided to the public or the person solicited.

(15) Employ in any solicitation any device or scheme to defraud or to obtain a contribution by means of any deception, false pretense, misrepresentation, or false promise.

(16) Notify any other person by any means, as part of an advertising scheme or plan, that the other person has won a prize, received an award, or has been selected or is eligible to receive anything of value if the other person is required to purchase goods or services, pay any money to participate in, or submit to a promotion effort.

(17) Fail to provide complete and timely payment to a charitable organization or sponsor of the proceeds from a solicitation campaign or a charitable or sponsor sales promotion.

(18) Fail to apply contributions in a manner substantially consistent with the solicitation.

(19) Fail to identify the professional relationship to the person for whom the solicitation is being made.

(20) To send to any person a writing which simulates or resembles an invoice unless the intended recipient has contracted for goods, property, or services from the charitable organization or solicitor who sends the writing. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

CASE NOTES

Editor's Note. *— The case below was decided prior to the 1989 amendments to the former Charitable Solicitation Licensure Act.*

Former G.S. 131C-17.1 was a reasonable exercise of the State's police power. National Fed'n of Blind of N.C., Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), aff'd, 817 F.2d 102 (4th Cir. 1987), aff'd, 817 F.2d 102 (4th Cir. 1987), 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

§ 131F-21. Violation as deceptive or unfair trade practice.

Any person who commits an act or practice that violates any provision of this Chapter engages in an unfair trade practice in violation of G.S. 75-1.1. (1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-22. Criminal penalties.

Except as otherwise provided in this Chapter and in addition to any administrative or civil penalties, any person who willfully and knowingly violates a provision of this Chapter commits a Class 1 misdemeanor. (1981, c. 886, s. 1; 1993, c. 539, s. 952; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-23. Enforcement.

(a) Investigation. — The Department may conduct an investigation of any person whenever there is an allegation or appearance, either upon complaint or otherwise, that a violation of this Chapter or of any rule adopted or of any order issued pursuant to this Chapter has occurred or is about to occur.

(b) Subpoena Power. — The Department may issue and serve subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of all books, accounts, records, and other documents and materials relevant to an examination or investigation. The Department, or its duly authorized representative, may administer oaths and affirmations to any person.

(c) Court Action. — In the event of substantial noncompliance with a subpoena or subpoena duces tecum issued or caused to be issued by the Department, the Department may petition the superior court of the county in which the person subpoenaed resides or has the principal place of business for an order requiring the subpoenaed person to appear and testify and to produce any books, accounts, records, and other documents as are specified in the subpoena duces tecum. The court may grant injunctive relief restraining the person from collecting contributions and any other relief, including the restraint by injunction or appointment of a receiver, or any transfer, pledge, assignment, or other disposition of the person's assets, or any concealment, alteration, destruction, or other disposition of subpoenaed books, accounts, records, or other documents and materials as the court deems appropriate, until the person or organization has fully complied with the subpoena or subpoena duces tecum and the Department has completed its investigation or examination. The court may also order the person to produce a financial statement that has been audited by an independent certified public accountant. Costs incurred by the Department to obtain an order granting, in whole or in part, a petition for enforcement of a subpoena or subpoena duces tecum shall be taxed against the subpoenaed person and failure to comply with the order shall be contempt of court.

(d) Violations. — The Department may enter an order imposing one or more of the penalties set forth in subsection (e) of this section if the Department finds that a charitable organization, sponsor, fund-raising consultant, or solicitor, or their officers, agents, directors, or employees have engaged in any of the following acts:

(1) Violated or is operating in violation of any of the provisions of this Chapter or of the rules adopted or orders issued under this Chapter.
(2) Made a false statement in an application, statement, or report required to be filed under this Chapter.
(3) Refused or failed, after notice, to produce any records or to disclose any information required to be disclosed under this Chapter or the rules adopted by the Department.
(4) Made a false statement in response to any request or investigation by the Department or the Attorney General.

(e) Penalties. — Upon a finding as set forth in subsection (d) of this section, the Department may enter an order as follows:

(1) Imposing an administrative penalty not to exceed one thousand dollars ($1,000) for each act or omission which constitutes a violation of this Chapter or a rule or an order.
(2) Issuing a cease and desist order that directs that the person cease and desist specified fund-raising activities.
(3) Refusing to register or cancelling or suspending a registration.
(4) Placing the registrant on probation for a period of time, subject to such conditions as the Department may specify.
(5) Issuing of a letter of concern.
(6) Cancelling an exemption granted under G.S. 131F-3.

(f) Procedures. — Except as otherwise provided in this section, the administrative proceedings which could result in the entry of an order imposing any of the penalties specified in subsection (e) of this section are governed by Chapter 150B of the General Statutes.

(g) Disposition of Penalties. — The clear proceeds of penalties provided for in subsection (e) of this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1993 (Reg. Sess., 1994), c. 759, s. 2; 1998-215, s. 81.)

CASE NOTES

Editor's Note. — *The case below was decided prior to the 1989 amendments to the former Charitable Solicitation Licensure Act.*

Unconstitutionally Overbroad. — Subsection (c) of former G.S. 131C-21.1 and former G.S. 131C-4(b), former 131C-6, 131C-16.1, and former 131C-17.2, as they read prior to the 1989 amendment, were unconstitutionally overbroad and infringed upon rights protected by U.S. Const., Amend. I. National Fed'n of Blind of N.C., Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), aff'd, 817 F.2d 102 (4th Cir. 1987), aff'd, 817 F.2d 102 (4th Cir. 1987), 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

§ 131F-24. Civil remedies and enforcement.

(a) Civil Remedies. — In addition to other remedies authorized by law, the Attorney General may bring a civil action in superior court to enforce this Chapter. Upon a finding that any person has violated this Chapter, a court may make any necessary order or enter a judgment, including a temporary or permanent injunction, a declaratory judgment, the appointment of a master or receiver, the sequestration of assets, the reimbursement of persons from whom contributions have been unlawfully solicited, the distribution of contributions in accordance with the charitable or sponsor purpose expressed in the registration statement or in accordance with the representations made to the person solicited, the reimbursement of the Department for attorneys' fees and costs, including investigative costs, and any other equitable relief the court finds appropriate. Upon a finding that any person has violated any provision of this Chapter, a court may enter an order imposing a civil penalty in an amount not to exceed ten thousand dollars ($10,000) per violation.

The clear proceeds of penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Attorney General. — The Attorney General may conduct any investigation necessary to bring a civil action under this section, including administering oaths and affirmations, subpoenaing witnesses or material, and collecting evidence.

(c) Voluntary Compliance. — The Attorney General may terminate an investigation or an action upon acceptance of a person's written assurance of voluntary compliance with this Chapter. Acceptance of an assurance may be conditioned on commitment to reimburse donors or to take other appropriate corrective action. An assurance is not evidence of a prior violation of any of this Chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Chapter. (1993 (Reg. Sess., 1994), c. 759, s. 2; 1998-215, s. 82.)

§§ 131F-25 through 131F-29: Reserved for future codification purposes.

ARTICLE 5.

Miscellaneous.

§ 131F-30. Public information; annual report.

(a) Public Information Program. — The Department shall develop a public information program to further the purposes of this Chapter. The purpose of the program is to help the public recognize unlawful, misleading, deceptive, or fraudulent solicitations and make knowledgeable, informed decisions concerning contributions.

(b) Information to Be Included. — The program shall include information concerning:

(1) The laws governing solicitations, including licensing and disclosure requirements, prohibited acts, and penalties.

(2) The means by which the public can report suspected violations or file a complaint.

(3) Any other information the Department believes will assist the public in making knowledgeable and informed decisions concerning contributions.

(c) Annual Report. — The Department shall prepare an annual report to be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives and to be made available to the public by publishing it on the Department's web site, summarizing the information filed under this Chapter which the Department determines will assist the public in making informed and knowledgeable decisions concerning contributions. The report shall include the following:

(1) A list of complaints filed for which violations were found to have occurred in each of the following categories: charitable organizations, sponsors, solicitors, and fund-raising consultants.

(2) A list of the number of investigations by the Department, enforcement actions commenced under this Chapter, and the disposition of those actions.

(3) A list of those charitable organizations and sponsors that have voluntarily submitted an audited financial statement pursuant to G.S. 131F-6(a)(10) or an audit with an opinion prepared by an independent certified public accountant.

(4) A list of all solicitors licensed under this Chapter and the fixed percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign, the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign, or the guaranteed minimum percentage of the gross revenue that the charitable solicitation or sponsor will receive as a benefit from the solicitation campaign as provided in the contract between the solicitor and the charitable organization or sponsor, whichever of these three amounts is least. This list shall appear in order of percentages, from lowest to highest.

(d) Each year immediately following the submission of the report under subsection (c) of this section, the Secretary of State shall issue that report as a press release to all print and electronic news media that provide general coverage. (1993 (Reg. Sess., 1994), c. 759, s. 2; 2003-373, s. 1.)

Editor's Note. — The numbers of G.S. 131F-30 to 131F-33 were assigned by the Revisor of Statutes, the numbers in the enacting act having been G.S. 131F-25 to 131F-28.

§ 131F-31. Contributions solicited for, or accepted by or on behalf of, a named individual.

(a) Trust Account Required. — Contributions solicited for, or accepted by or on behalf of, a named individual shall be deposited in a trust account opened by a trustee named in a properly established trust document.

(b) Use of Trust Funds. — Contributions deposited in the trust fund may be used only for the purpose for which the contributions were solicited; if the contributions are no longer needed for the purpose for which they were solicited, they may be used for another similar charitable purpose. The trustee may disburse funds from the trust account only after making a written record verifying the purpose for which the funds will be used accompanied by documentation of the identity of the payee and the justification for the payment. The Trustee shall retain these records for each disbursement from the trust account for a period of three years after the disbursement. (1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-32. Records.

Each charitable organization, sponsor, fund-raising consultant, and solicitor shall keep, for a period of at least three years, true and accurate records as to their activities in the State. The records shall be made available to the Department for inspection and shall be furnished no later than 10 days after the request was made. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

§ 131F-33. Rule-making authority.

The Department shall have the authority to adopt rules necessary for the implementation of this Chapter or to prevent false or deceptive statements or conduct in the solicitation of charitable contributions. (1981, c. 886, s. 1; 1993 (Reg. Sess., 1994), c. 759, s. 2.)

Chapter 132.

Public Records.

Sec.
132-1. "Public records" defined.
132-1.1. Confidential communications by legal counsel to public board or agency; State tax information; public enterprise billing information; Address Confidentiality Program information.
132-1.2. Confidential information.
132-1.3. Settlements made by or on behalf of public agencies, public officials, or public employees; public records.
132-1.4. Criminal investigations; intelligence information records; Innocence Inquiry Commission records.
132-1.5. 911 database.
132-1.6. Emergency response plans.
132-1.7. Sensitive public security information.
132-1.8. Confidentiality of photographs and video or audio recordings made pursuant to autopsy.
132-1.9. Trial preparation materials.
132-1.10. Social security numbers and other personal identifying information.
132-1.11. Economic development incentives.
132-2. Custodian designated.
132-3. Destruction of records regulated.
132-4. Disposition of records at end of official's term.
132-5. Demanding custody.
132-5.1. Regaining custody; civil remedies.
132-6. Inspection and examination of records.
132-6.1. Electronic data-processing records.
132-6.2. Provisions for copies of public records; fees.
132-7. Keeping records in safe places; copying or repairing; certified copies.
132-8. Assistance by and to Department of Cultural Resources.
132-8.1. Records management program administered by Department of Cultural Resources; establishment of standards, procedures, etc.; surveys.
132-8.2. Selection and preservation of records considered essential; making or designation of preservation duplicates; force and effect of duplicates or copies thereof.
132-9. Access to records.
132-10. Qualified exception for geographical information systems.

§ 132-1. "Public records" defined.

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information. (1935, c. 265, s. 1; 1975, c. 787, s. 1; 1995, c. 388, s. 1.)

Local Modification. — Alamance: 1987 (Reg. Sess., 1988), c. 950, s. 1(c); Ashe: 1991, c. 163, s. 1(c), as amended by 2007-527, s. 21(dd); Caldwell: 1987, c. 472, s. 1(c), as amended by 2007-527, s. 21(s); Cleveland: 1989, c. 173, s. 1(c), as amended by 2007-527, s. 21(aa); Cumberland: 1993, ch. 413, s. 5; Davidson: 1993, c. 453, s. 1(c), as amended by 2007-527, s. 21(ii); Davie: 1989 (Reg. Sess., 1990), c. 928, s. 1(c); Gaston: 1987, c. 618, s. 1(c), as amended by 2007-527, s. 21(w); Guilford: 1993, c. 82, s. 1; 1995, c. 432, s. 1; Henderson: 1987, c. 172, s.

5(c), as amended by 2007-527, s. 21(p); Hertford: 1987 (Reg. Sess., 1988), c. 979, s. 1(c); Hyde: 1991, c. 230, s. 1(c), as amended by 2007-527, s. 21(ee); Lee: 1987, c. 538, s. 1(c), as amended by 2007-527, s. 21(u); Lenoir: 1987, c. 561, s. 1(c), as amended by 2007-527, s. 21(v); Lincoln: 1993, c. 549, s. 1, as amended by 2007-527, s. 21(jj); Mecklenburg: 1993, c. 82, s. 1; 1995, c. 432, s. 1; Mitchell: 1987, c. 141, s. 1(c), as amended by 2007-527, s. 21(m); Nash: 1987, c. 32; 1993, c. 82, s. 1; 1993, c. 545; 1995, c. 432, s. 1; New Hanover: 1995, c. 432, s. 1; Pender: 1987 (Reg. Sess., 1988), c. 970, s. 1(c) (repealed by 2001-439, s. 6.1, on effective date of a tax levied under the 2001 act); Pitt: 1987, c. 143, s. 1(c), as amended by 2007-527, s. 21(n); 1993, c. 82, s. 1; 1993, ch. 410, s. 1; 1995, c. 432, s. 1; Rowan: 1987, c. 379, s. 1(c); 1991 (Reg. Sess., 1992), c. 882; Rutherford: 1991, c. 577, s. 5(c), as amended by 2007-527, s. 21(gg); Wake: 1991, c. 594, s. 9, as amended by 2007-527, s. 21(hh); 1995, c. 458, s. 5; Washington: 1991 (Reg. Sess., 1992), c. 821; Wilson: 1987, c. 484, s. 1(c), as amended by 2007-527, s. 21(t); Yancey: 1987, c. 140, s. 1(c), as amended by 2007-527, s. 21(*l*); city of Albemarle: 1991 (Reg. Sess., 1992), c. 915 (repealed on effective date of a tax levied under 2001-434, ss. 6, 7, by the County of Stanly); (As to Chapter 132) city of Charlotte: 2000-26, s. 1, as amended by 2007-255, s.1; city of Conover: 1987, c. 319, s. 1; city of Greensboro: 1987, c. 51; 1989, c. 383, s. 1; 1993, c. 82, s. 1; 1995, c. 432, s. 1; city of Hickory: 1987, c. 319, s. 1; city of High Point: 1993, c. 82, s. 1; 1995, c. 432, s. 1; city of Kinston: 1993 (Reg. Sess., 1994), c. 648, s. 1(c), as amended by Session Laws 2007-527, s. 21(*ll*); city of Thomasville: 1993, c. 453, s. 1(c); city of Wilmington: 1995, c. 432, s. 1; town of Blowing Rock: 1987, c. 171, s. 1(c); town of Boone: 1987, c. 170, s. 1(c), as amended by 2007-527, s. 21(o); town of Cary: 1989 (Reg. Sess., 1990), c. 874, s. 1(c); town of Columbus: 1991, c. 632, s. 1(c); town of Garner: 1989, c. 660, s. 1(c); town of Hillsborough: 1993, c. 449, s. 1(e); town of Oriental: 1993 (Reg. Sess., 1994), c. 695, s. 1(c); town of Wake Forest: 1989, c. 604, s. 1(c); Averasboro Township: 1987, c. 142; village of Bald Head Island: 1991, c. 664, s. 2(c).

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq. As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8. For requirements regarding marking and issuance of license plates for publicly owned vehicles, see G.S. 20-39.1. For provision that the report and affidavit required by G.S. 58-21-35 and the quarterly report required by G.S. 58-21-80 are not public records under this section, see G.S. 58-21-35. For provision that records, papers, and other documents containing information collected and compiled by the Board of Law Examiners or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of this Chapter, see G.S. 84-24. As to records of education agencies, see G.S. 115C-3. As to diaries kept in connection with construction or repair contracts, see G.S. 136-28.5.

Legal Periodicals. — For comment on public access to government-held records, see 55 N.C.L. Rev. 1187 (1977).

For note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Legislative Intent. — By enacting the Public Records Act, the legislature intended to provide that, as a general rule, the public would have liberal access to public records. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Access to public records in this State is governed by Chapter 132 which provides for liberal access. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Construction. — The framers' use of the imperative word "shall" places constitutional limits on a court's discretion in exercising control of its proceedings and creates a strong presumption that court proceedings be open to the litigants and the public; however, there are some circumstances when a court may close proceedings and seal court records. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Trial court erred in granting summary judgment to a newspaper in its action under the Public Records Act, G.S. 132-1 et seq., and the Public Hospital Personnel Act, G.S. 131E-257 et seq., seeking disclosure of public hospital employee salary information, as such was protected from disclosure, except as to current salary, pursuant to G.S. 131E-257.2; information contained in an employee's personnel file was "gathered" by the hospital, pursuant to the use of that term under G.S. 131E-257.2(a), as it was not construed narrowly, but rather, read to mean amassed or collected in one place. Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

Because the North Carolina Public Records Law was enacted pursuant to the state's general policy that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law, and nothing in the Public Records Law refers to or specifically pertains to either pardons or clemency, it is not a law relative to the manner of applying for pardons under N.C. Const., Art. III, § 5(6). News & Observer Publ'g Co. v. Easley, — N.C. App. —, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

When a county employee wrote to the board of county commissioners about the employee's experience working with the county medical director, when the board was considering whether to renew the director's contract, and recommended another person for the director's job and discussed the employee's interaction with the board regarding the board's decision-making process, the letter was a public record because it was undisputed that the letter was written by a county employee, who was required to work with the medical director, and was received by the board in connection with the board's decision regarding whom to hire as medical director, an independent county contractor. News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

What Must Be Made Available for Inspection. — In the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Act must be made available for public inspection. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

It is beyond argument that minutes of a city council's closed session are "public records" within the meaning of North Carolina's Public Records Law, G.S. 132-1 et seq. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Under G.S. 143-318.10, minutes of all official meetings, including closed sessions, are public records within meaning of Public Records Law, G.S. 132-1 et seq. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Although documents under the definition of "public records" of G.S. 132-1(a) of the Public Records Act, G.S. 132-1 et seq., were usually subject to disclosure, an exemption existed for public hospital personnel files under the clear and unambiguous language of G.S. 131E-257.2 of the Public Hospital Personnel Act, and "personnel files" was defined broadly in G.S. 131E-257.2(a); the interpretation of what information was to be disclosed from those files was based on statutory history, including changes made from predecessor language, as well as the legislature's intent to carve out a privacy niche for public hospital employees for all information regarding compensation except "current salary." Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 616 S.E.2d 602, 2005 N.C. App. LEXIS 1784 (2005), cert. denied, — N.C. —, 626 S.E.2d 298,299 (2005).

In resolving a dispute as to whether certain records pertaining to clemency were subject to the North Carolina Public Records Law, the court noted that neither G.S. 147-16(a)(1) nor G.S. 147-21 included any provision specifying whether the records involved in the statutes were considered public records; thus, the court was unable to determine that the General Assembly, in exercising its constitutional authority under N.C. Const., Art. III, § 5(6), intended to provide that the application process for pardons was subject to the Public Records Law. News & Observer Publ'g Co. v. Easley, — N.C. App. —, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

When a county employee wrote to the board of county commissioners about the employee's experience working with the county medical director, when the board was considering whether to renew the director's contract, and recommended another person for the director's job and discussed the employee's interaction with the board regarding the board's decision-making process, the fact that the county manager chose to place the letter in the employee's personnel file had no bearing on whether the letter was exempt from public disclosure under G.S. 132-1 as a personnel record covered by G.S. 153A-98 because whether it was a personnel record depended on the nature of the document and not where it was filed, and an exemption on this basis would allow governmental officials to avoid public disclosure of a document by placing it in an employee's personnel file. News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

Parts of the letter to the board of county commissioners recommending a certain person for the medical director's job and discussing the employee's interaction with the board were subject to public disclosure under G.S. 132-1 because G.S. 153A-98(a), protecting certain employee information from public disclosure, did not protect all information "with respect to" an employee, as the information had to relate to an illustrative list of subjects arising out of the employment, and there was no basis for considering these parts of the letter to be "any information" gathered by the county "with respect to" the types of matters governed by G.S. 153A-98(a). News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

Chapter Contemplates Disclosure as Well as Storage. — A presumed legislative intent to mandate the extensive preservation of public records prescribed by this Chapter, with storage at public expense, but to which the public is denied access, is untenable. Preservation for its own sake, absent access, would be an absurdity. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

The phrase "pursuant to law or ordinance in connection with the transaction of public business" should include, in addition to those records required by law, those records that are kept in carrying out lawful duties. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 42 (1982).

No Deliberative Process Privilege Exception. — The North Carolina's Public Records Act contains no deliberative process privilege exception. Whether one should be made is a question for the legislature, not the court. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

This Chapter Compared with the Open Meetings Law. — The Public Records Act (G.S. 132-1 et seq.) and the Open Meetings Law (G.S. 143-318.10) are discrete statutes, each designed to promote in a different way openness in government. There is no suggestion in either statute that an agency not subject to one is, ipso facto, exempt from the other. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

The Public Records Law may apply to minutes from meetings of an agency exempt from the Open Meetings Law. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Open Courts Provision. — This statute only prohibits a court from restricting the publication of reports regarding matter presented "in open court"; thus, although court records may generally be public records under this section, a trial court may shield portions of court proceedings and records from public view subject to statutory and constitutional limitation. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Balance of Competing Interests. — In deciding whether to close court proceedings or seal court records, a court must balance the competing interests and policies at stake in light of the particular circumstances of the case but must give substantial weight to the presumption of open access. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Judicial Application of Exception in former G.S. 143-318.11(d). — Courts should ensure that the exception in former subsection (d) of G.S. 143-318.11 to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and Open Meetings Law. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

"Agency of North Carolina Government or Its Subdivisions". — The phrase "agency of North Carolina government or its subdivisions" in this section need be construed only upon the plain meaning of this section and in the context of the public records statutes. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 42 (1982).

Trial court did not err in holding that the records the newspaper sought, with limited exceptions, were public records that had to be made available by the town for public inspection and copying; the town could not assert that because the town attorneys, and not the town itself, possessed the records that the records were not public records, as the town attorneys were an agency or subdivision of the town, were public officers, and a ruling otherwise would mean that a town could give records to its town attorneys to shield what otherwise would be public records from disclosure. Womack Newspapers, Inc. v. Town of Kitty Hawk, — N.C. App. —, 639 S.E.2d 96, 2007 N.C. App. LEXIS 81 (2007).

Wake County Hospital System is an agency of the county under the North Carolina public records statutes. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 42 (1982).

By virtue of the definitions in G.S. 143-318.10(b) and 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions. The public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements were paid must be considered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 42 (1982).

Documents filed as exhibits attached to plaintiff's complaint entered the public domain for purposes of the Public Records Act, and the public's right to inspect court records under G.S. 7A-109, and became "public records" once the complaint was filed with the clerk of the court, even though these exhibits would otherwise have been shielded by G.S. 131E-95(b) of the Hospital Licensure Act. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Criminal Investigatory Information. — Copies of recordings the plaintiff sought to obtain pursuant to this section were unquestionably gathered by city police department in the course of a criminal investigation and were part of the State's file in a pending criminal action; however plaintiff was precluded under Article 48 of ch. 15A, G.S. 15A-901 et seq. Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 434 S.E.2d 176 (1993).

S.B.I. records are not public records and access to them is not available under the Public Records Act. Access to S.B.I. records is controlled entirely by G.S. 114-15. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Information contained in research applications for projects involving animal experiments was subject to disclosure, where such information could be redacted, and release would not cause a "chilling effect" on research. S.E.T.A. Unc-Ch, Inc. v. Huffines, 101 N.C. App. 292, 399 S.E.2d 340 (1991).

Letter from Engineer Consulting for City. — A letter received by the manager of defendant-city from a consulting engineer whom defendant-city employed to inspect construction work on additions and modifications to its water treatment plant is a public record subject to disclosure. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

Work product of local government attorney not protected from disclosure. — Language of G.S. 132-1(b) has been interpreted to only recognize an exception to the North Carolina Public Records Act in the face of a clear statutory exemption or exception to the Public Records Act; in other words, the Public Records Act grants public access to documents it defines as "public records," absent a specific statutory exemption. Therefore, because there was no statute specifically exempting from public access materials held by a local government attorney that qualified as work product, a city attorney's documents were not protected from disclosure as work product. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Records made by contractors and subcontractors (contractors) of the former North Carolina Low-Level Radioactive Waste Management Authority, kept by the contractors and not actually received by the Authority, are not public records, as defined under this section, until they are received by the Authority in the proper exercise of its discretion. Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 110 N.C. App. 607, 430 S.E.2d 441, cert. denied, 334 N.C. 619, 435 S.E.2d 334 (1993).

Application to Private Corporate Entity. — Though a housing authority was once a governmental agency, it was not subject to the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., and the North Carolina Public Records Law, G.S. 132-1 et seq., because it was changed to a private corporation and only public entities were subject to the Public Records Law. Chatfield v. Wilmington Hous. Fin. & Dev., Inc., 166 N.C. App. 703, 603 S.E.2d 837, 2004 N.C. App. LEXIS 2027 (2004), cert. denied, — N.C. —, 609 S.E.2d 393 (2005).

Cited in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972); Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Housing Auth. v. Montgomery, 55 N.C. App. 422, 286 S.E.2d 114 (1982); North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985); North Carolina Press Ass'n v. Spangler, 87 N.C. App. 169, 360 S.E.2d 138 (1987); News & Observer Publishing Co. v. Poole, 99 N.C. App. 352, 392 S.E.2d 775 (1990); North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993); Times-News Publishing Co. v. State, 124 N.C. App. 175, 476 S.E.2d 450 (1996), appeal dismissed, 345 N.C. 645, 483 S.E.2d 717 (1997); DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999); Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002); Barker v. N.C. State Bd. of Elections, 153 N.C. App. 804, 570 S.E.2d 897, 2002 N.C. App. LEXIS 1264 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 114 (2003).

OPINIONS OF ATTORNEY GENERAL

North Carolina's Northeast Partnership is an "agency" within the meaning of subsection (a) of this section, and accordingly is fully subject to the Public Records Act; the Northeastern North Carolina Regional Economic Development Commission from which it emerged is an agency located administratively in the North Carolina Department of Commerce although it has attempted to remove itself from the Department. See opinion of Attorney General to Melanie Thompson, Fiscal Manager, North Carolina's Northeast Partnership, 1999 N.C.A.G. 9 (3/9/99).

Police Arrest and Disposition Records Subject to Public Examination. — See opinion of Attorney General to Mr. Samuel M. Moore, 41 N.C.A.G. 407 (1971).

Documents generated by the Department of Administration relating to an internal workplace assessment survey are public records. See opinion of Attorney General to Mr. R. Glen Peterson, General Counsel, N.C. Department of Administration, 1999 N.C.A.G. 5 (1/12/99).

A governmental entity is not required to provide the public a means to monitor its 800 megahertz radio communications as such a communication is not a public record. See opinion of Attorney General to Mr. J. Mark Payne, Johnston County Attorney, 2002 N.C. AG LEXIS 3 (1/22/02).

Textbook lists of state universities are public records. See opinion of Attorney General to Mr. J.D. Wright, North Carolina State University at Raleigh, 41 N.C.A.G. 199 (1971).

Applications for licensure as speech and language pathologists and audiologists are public records. See opinion of Attorney General to Mariana Newton, Phd., Chairman, Board of Examiners for Speech and Language Pathologists and Audiologists, 45 N.C.A.G. 188 (1976).

Municipal records and papers, such as budgets, bank statements, tax levies, utility accounts, minutes of meetings, etc., are public records. See opinion of Attorney General to Honorable R.L. Davis, 43 N.C.A.G. 274 (1973).

Licensure Procedures. — The application and other information obtained during the Private Protective Services Board's licensure procedure which are not otherwise exempt by law are public records subject to public inspection and examination under G.S. 132-6. See opinion of Attorney General to W. A. "Doc" Hoggard, III PPS Board Administrator Private Protective Services Board, 1997 N.C.A.G. 50 (8/15/97).

Sheriff's department investigative reports and memoranda concerning investigation of crimes are not public records within the sense of this Chapter and are not thereby subject to public inspection. Opinion of Attorney General to Honorable J. Hubert Haynes, 44 N.C.A.G. 340 (1975).

Copies of Forms Maintained by Law Enforcement Officers. — The copy of form HP-332 (affidavit form) maintained by the arresting officer which is completed when a person refuses to take a chemical test to determine alcoholic content of the blood is not a public record and subject to inspection. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The copy of HP-332A (rights of person requested to take chemical test to determine alcoholic content of blood), maintained by arresting officer is not a public record and subject to inspection. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The copy of the alcohol influence report (HP-327) which is maintained by the arresting officer and the copy of which is maintained at troop headquarters is not a public record and subject to inspection. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The departmental copy of the N.C. uniform traffic ticket and complaint, which is submitted by a highway patrolman to the district first sergeant who transmits it to the Traffic Record Section of the Division of Motor Vehicles, is not a public record and subject to inspection during the time it is maintained at the patrol district headquarters. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The enforcement division copy of the N.C. uniform traffic ticket and complaint, which is maintained by the officer issuing the complaint and includes his notes and other evidence, is not a public record and subject to inspection prior to trial of the offense charged in the complaint. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The enforcement division copy of the N.C. uniform traffic ticket and complaint is not a public record and subject to inspection in the patrol district headquarters after the trial of the offense charged in the complaint. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The chemical test operator's log (DHS-2069) is not a public record and subject to inspection while in the possession of the chemical test operator. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

The breathalyzer operational checklist (DHS-2012) which is completed and maintained by the breathalyzer operator is not a public record and subject to inspection. See opinion of Attorney General to Barbara Smith, Assistant Secretary, Department of Crime Control and Public Safety, 48 N.C.A.G. 63 (1978).

Provisional Voters. — Ordinarily, applications to vote provisionally are viewed as public records which must be disclosed pursuant to this Chapter because these documents are separate from ballots and there are a sufficient quantity of provisional ballots so that no vote could be attributed to any particular provisional voter. However, when there is only one provisional voter, that voter has an overriding and personal right to a secret ballot under Article VI, Section 5 of the North Carolina Constitution, and a County Board of Elections is prohibited from disclosing any information that would identify the provisional voter. See opinion of Attorney General to Mr. Stephen T. Gheen, Chairman Gaston County Board of Elections, 1997 N.C.A.G. 67 (11/6/97).

Contracts Between Universities and Coaches. — Contracts under which institutions employ coaches and contracts between the institutions and certain vendors or suppliers which involve or concern those coaches or other documents related to those contracts are public records. See opinion of Attorney General to Charles J. Waldrup, Associate Vice President for Legal Affairs, University of North Carolina, 2003 N.C.A.G. 2 (2/6/03).

Applicability of Secrecy Law to Tax Review Board Members. — Members of the Tax Review Board and staff must comply with both the confidentiality obligations of G.S. 105-259 (b) section and the obligations for disclosure set forth in the Public Records Law with respect to the release of records and other information; the obligation does not vary based upon whether the Board receives a request for information prior to or after publication of an order by the Board. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

§ 132-1.1. Confidential communications by legal counsel to public board or agency; State tax information; public enterprise billing information; Address Confidentiality Program information.

(a) Confidential Communications. — Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

(b) State and Local Tax Information. — Tax information may not be disclosed except as provided in G.S. 105-259. As used in this subsection, "tax information" has the same meaning as in G.S. 105-259. Local tax records that contain information about a taxpayer's income or receipts may not be disclosed except as provided in G.S. 153A-148.1 and G.S. 160A-208.1.

(c) Public Enterprise Billing Information. — Billing information compiled and maintained by a city or county or other public entity providing utility services in connection with the ownership or operation of a public enterprise, excluding airports, is not a public record as defined in G.S. 132-1. Nothing contained herein is intended to limit public disclosure by a city or county of billing information:

(1) That the city or county determines will be useful or necessary to assist bond counsel, bond underwriters, underwriters' counsel, rating agencies or investors or potential investors in making informed decisions regarding bonds or other obligations incurred or to be incurred with respect to the public enterprise;

(2) That is necessary to assist the city, county, State, or public enterprise to maintain the integrity and quality of services it provides; or

(3) That is necessary to assist law enforcement, public safety, fire protection, rescue, emergency management, or judicial officers in the performance of their duties.

As used herein, "billing information" means any record or information, in whatever form, compiled or maintained with respect to individual customers by any owner or operator of a public enterprise, as defined in G.S. 160A-311, excluding subdivision (9), and G.S. 153A-274, excluding subdivision (4), or other public entity providing utility services, excluding airports, relating to services it provides or will provide to the customer.

(d) Address Confidentiality Program Information. — The actual address and telephone number of a program participant in the Address Confidentiality Program established under Chapter 15C of the General Statutes is not a public record within the meaning of Chapter 132. The actual address and telephone number of a program participant may not be disclosed except as provided in Chapter 15C of the General Statutes.

(e) Controlled Substances Reporting System Information. — Information compiled or maintained in the Controlled Substances Reporting System established under Article 5E of Chapter 90 of the General Statutes is not a public record as defined in G.S. 132-1 and may be released only as provided under Article 5E of Chapter 90 of the General Statutes.

(f) Personally Identifiable Admissions Information. — Records maintained by The University of North Carolina or any constituent institution, or by the Community Colleges System Office or any community college, which contain personally identifiable information from or about an applicant for admission to one or more constituent institutions or to one or more community colleges shall be confidential and shall not be subject to public disclosure pursuant to G.S. 132-6(a). Notwithstanding the preceding sentence, any letter of recommendation or record containing a communication from an elected official to The University of North Carolina, any of its constituent institutions, or to a community college, concerning an applicant for admission who has not enrolled as a student shall be considered a public record subject to disclosure pursuant to G.S. 132-6(a). Nothing in this subsection is intended to limit the disclosure of public records that do not contain personally identifiable information, including aggregated data, guidelines, instructions, summaries, or reports that do not contain personally identifiable information or from which it is feasible to redact any personally identifiable information that the record contains. As used in this subsection, the term "community college" is as defined in G.S. 115D-2(2), the term "constituent institution" is as defined in G.S. 116-2(4), and the term "Community Colleges System Office" is as defined in G.S. 115D-3. (1975, c. 662; 1993, c. 485, s. 38; 1995 (Reg. Sess., 1996), c. 646, s. 21; 2001-473, s. 1; 2002-171, s. 7; 2003-287, s. 1; 2005-276, s. 10.36(b); 2007-372, s. 2.)

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 10.36(b), effective January 1, 2006, added subsection (e).

Session Laws 2007-372, s. 2, effective August 19, 2007, and applicable to public records existing before, on, or after that date, added subsection (f).

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Only written communications to a public agency by its attorney are excepted from public inspection under the circumstances set out in this section. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Commission Minutes May Have Been Protected. — Trial court erred in not considering whether the minutes of a Commission formed to investigate improprieties in a university athletic program were protected by the Public Records Act attorney-client privilege provided in this section. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Because the portions of the documents a city was attempting to protect via the attorney-client privilege were more than three years old, the city lost the privilege by operation of the statute. MCI Constr., LLC v. Hazen & Sawyer, P.C., 213 F.R.D. 268, 2003 U.S. Dist. LEXIS 2560 (M.D.N.C. 2003).

Limited attorney-client privilege. — Statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege. According to N.C. Gen. Stat. § 132-1.1(a), the North Carolina Public Records Act provides only one exception (based on privilege) to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client privilege, and involving a claim, defense, settlement, litigation, or administrative proceeding. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Cited in News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981); North Carolina Press Ass'n v. Spangler, 87 N.C. App. 169, 360 S.E.2d 138 (1987); State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

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Attorney-Client Communications to City on Personnel Matters. — Written attorney-client communications to a city (including the city manager and city council) on specific personnel matters related to an employee that are more than three years old, and which are confidential under G.S. 160A-168(a), are not public records; by its specific terms, G.S. 160A-168(a) supersedes the requirement in G.S. 132-1.1 that privileged attorney-client communications must be disclosed three years after they are received. See opinion of Attorney General to Mr. Grady Joseph Wheeler, Jr., Esq., Attorney, 2001 N.C. AG LEXIS 15 (5/30/2001).

§ 132-1.2. Confidential information.

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:
  a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
  b. Is the property of a private "person" as defined in G.S. 66-152(2).
  c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.
  d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

(2) Reveals an account number for electronic payment as defined in G.S. 147-86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

(3) Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

(4) Reveals the electronically captured image of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document. (1989, c. 269; 1991, c. 745, s. 3; 1999-434, s. 7; 2001-455, s. 2; 2001-513, s. 30(b); 2003-226, s. 5; 2004-127, s. 17(b).)

Editor's Note. — Session Laws 2003-226, s. 1, provides: "The purpose of this act is to ensure that the State of North Carolina has a system for all North Carolina elections that complies with the requirements for federal elections set forth in the federal Help America Vote Act of 2002, Public Law 107-252, 116 Stat. 1666 (2002), codified at 42 U.S.C. §§ 15481-15485.

"The General Assembly finds that the education and training of election officials as required by G.S. 163-82.34 has met and continues to meet the mandate for the education and training of precinct officials and other election officials in section 254(a)(3) of the Help America Vote Act of 2002. The General Assembly further finds that the establishment, development, and continued operation of the statewide list maintenance program for voter registration set forth in G.S. 163-82.14 has met and continues to meet the mandates of section 303(a)(2) of the Help America Vote Act of 2002.

"In certain other areas of the election statutes and other laws, the General Assembly finds that the statutes must be amended to comply with the Help America Vote Act."

CASE NOTES

Private Corporation Classified as Public Agency. — Private corporations can be classified as a public agency for the purposes of this section; the critical inquiry is whether the corporation's independent authority is overshadowed by the governmental control of that corporation. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Public Utilities as Private Persons. — Telephone service providers were "private persons" under this section for purposes of their claim that information filed with an agency constituted "trade secrets," even though providers were public utilities subject to fair regulation, since such regulation was not comprehensive and did not overshadow independent authority exercised by providers over operation of their own businesses. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

The addition of the language "or indicated" acts to clarify the otherwise ambiguous word "designated." As such, any application of this section either before or after 1991, should interpret the word "designated" as meaning "designated or indicated." North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

Information Held Confidential. — Documents containing valuable business information such as projections by a cooperative electric membership corporation of electric rates for sales to its members and its methodologies for forecasting such price information, which was alleged to be of actual value to its competitors and would cause irreparable competitive harm to the corporation, were protected from disclosure by injunction under this Act. North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

Price Lists in Contract Between Hospital and HMO. — Where price lists in a contract between a public hospital and a private HMO are not property of a private person within the meaning of this section, they are not trade secrets as defined by G.S. 66-152(3) and are subject to disclosure under the North Carolina Public Records Act, pursuant to G.S. 132-1 et seq. Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Factors in Determining Whether Information Is Trade Secret. — Proper factors to consider in determining whether information is a trade secret are: (1) the extent to which it is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard its secrecy; (4) its value to the business and competitors; (5) the amount of money or effort expended in its development; and (6) the ease or difficulty with which it could properly be acquired or duplicated by others. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Applied in S.E.T.A. UNC-CH, Inc. v. Huffines, 107 N.C. App. 440, 420 S.E.2d 674 (1992).

§ 132-1.3. Settlements made by or on behalf of public agencies, public officials, or public employees; public records.

(a) Public records, as defined in G.S. 132-1, shall include all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility. No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.

(b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.

(c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts. (1989, c. 326.)

OPINIONS OF ATTORNEY GENERAL

Settlement Resulting from Investigation of Sheriff. — A conciliation agreement between an EEOC claimant and a county board of commissioners, resulting from an investigation of the sheriff and involving the appropriation of over $21,000.00, should be made available to the public. See opinion of Attorney General Mr. Charles L. Revelle, III, Assistant Hertford County Attorney, 1998 N.C.A.G. 14 (3/4/98).

Settlement Agreement Not Confidential. — Only medical malpractice settlements in which the State is a party are exempt from disclosure; a settlement agreement, not involving medical malpractice, between a doctor and a State hospital, even one purporting to keep the settlement or related matters confidential, must be released to the requestor in its unredacted form, with the exception of information from the doctor's personnel file which was first gathered by the hospital. See opinion of Attorney General to Mr. Fred M. Carmichael Summrell, Sugg, Carmichael & Ashton, P.A., 1997 N.C.A.G. 68 (11/26/97).

§ 132-1.4. Criminal investigations; intelligence information records; Innocence Inquiry Commission records.

(a) Records of criminal investigations conducted by public law enforcement agencies, records of criminal intelligence information compiled by public law enforcement agencies, and records of investigations conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.

(b) As used in this section:

(1) "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.

(2) "Records of criminal intelligence information" means records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.

(3) "Public law enforcement agency" means a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law.

(4) "Violations of the law" means crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1.

(5) "Complaining witness" means an alleged victim or other person who reports a violation or apparent violation of the law to a public law enforcement agency.

(c) Notwithstanding the provisions of this section, and unless otherwise prohibited by law, the following information shall be public records within the meaning of G.S. 132-1.

(1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

(2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

(3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

(4) The contents of "911" and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other information that may identify the caller, victim, or witness.

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.

(d) A public law enforcement agency shall temporarily withhold the name or address of a complaining witness if release of the information is reasonably likely to pose a threat to the mental health, physical health, or personal safety of the complaining witness or materially compromise a continuing or future criminal investigation or criminal intelligence operation. Information temporarily withheld under this subsection shall be made available for release to the public in accordance with G.S. 132-6 as soon as the circumstances that justify withholding it cease to exist. Any person denied access to information withheld under this subsection may apply to a court of competent jurisdiction for an order compelling disclosure of the information. In such action, the court shall balance the interests of the public in disclosure against the interests of the law enforcement agency and the alleged victim in withholding the information. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(e) If a public law enforcement agency believes that release of information that is a public record under subdivisions (c)(1) through (c)(5) of this section will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such action the law enforcement agency shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(f) Nothing in this section shall be construed as authorizing any public law enforcement agency to prohibit or prevent another public agency having custody of a public record from permitting the inspection, examination, or copying of such public record in compliance with G.S. 132-6. The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record.

(g) Disclosure of records of criminal investigations and criminal intelligence information that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by this section and Chapter 15A of the General Statutes.

(h) Nothing in this section shall be construed as requiring law enforcement agencies to disclose the following:

(1) Information that would not be required to be disclosed under Chapter 15A of the General Statutes; or

(2) Information that is reasonably likely to identify a confidential informant.

(i) Law enforcement agencies shall not be required to maintain any tape recordings of "911" or other communications for more than 30 days from the time of the call, unless a court of competent jurisdiction orders a portion sealed.

(j) When information that is not a public record under the provisions of this section is deleted from a document, tape recording, or other record, the law enforcement agency shall make clear that a deletion has been made. Nothing in this subsection shall authorize the destruction of the original record.

(k) The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders.

(*l*) Records of investigations of alleged child abuse shall be governed by Article 29 of Chapter 7B of the General Statutes. (1993, c. 461, s. 1; 1998-202, s. 13(jj); 2006-184, s. 7.)

Effect of Amendments. — Session Laws 2006-184, s. 7, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added "Innocence Inquiry Commission records" at the end of the section catchline; and, in the first sentence of subsection (a), substituted "agencies" for "agencies or" near the beginning and inserted "and records of investigations conducted by the North Carolina Innocence Inquiry Commission" and made minor punctuation changes.

Legal Periodicals. — For comment, "You

Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

City attorney's office qualifies as public law enforcement agency. — As the City Attorney's Office for the City of Raleigh was responsible for investigating, preventing, and solving zoning violations, it qualified as a "public law enforcement agency" under G.S. 132-1.4(b)(3); any organizational unit within a county or city that is responsible for enforcement of a statute, ordinance, or regulation that carries misdemeanor or infraction penalties is capable of generating records that are covered by the statute. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Continuing investigation. — Trial court ordered certain records withheld by a city attorney on the basis of G.S. 132-1.4 be produced because the statute of limitations for prosecuting a misdemeanor had expired. On appeal, the court agreed with the city attorney that the trial court erred in adopting a straight-line rule through the application of two-year statute of limitations for misdemeanors; in light of the broad scope and purposes behind the criminal investigation exception, the trial court should have conducted an in camera review, as requested by the city attorney, to properly determine, based on the purpose in compiling each withheld document and the definitions for "records of criminal investigations" and "records of criminal intelligence information" found in G.S. 132-1.4(b)(1)-(2), whether the material was subject to the exception. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Discretionary disclosure of non-public records G.S. 132-1.4(a) grants the trial court the discretion to disclose documents that do not qualify as public records under G.S. 132-1.4 if they could be obtained by defendant pursuant to the normal rules of discovery. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Records for Reinvestigation. — Where exhibits were returned to district attorney's office at the conclusion of first trial for use in the reinvestigation and preparation of a retrial, the exhibits again became "records of criminal investigations" and were specifically exempted from disclosure under subsection (g). Times-News Publishing Co. v. State, 124 N.C. App. 175, 476 S.E.2d 450 (1996), appeal dismissed, 345 N.C. 645, 483 S.E.2d 717 (1997).

Cited in Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

§ 132-1.5. 911 database.

Automatic number identification and automatic location identification information that consists of the name, address, and telephone numbers of telephone subscribers, or the e-mail addresses of subscribers to an electronic emergency notification or reverse 911 system, that is contained in a county or municipal 911 database, or in a county or municipal telephonic or electronic emergency notification or reverse 911 system, is confidential and is not a public record as defined by Chapter 132 of the General Statutes if that information is required to be confidential by the agreement with the telephone company by which the information was obtained. Dissemination of the information contained in the 911, electronic emergency notification or reverse 911 system, or automatic number and automatic location database is prohibited except on a call-by-call basis only for the purpose of handling emergency calls or for training, and any permanent record of the information shall be secured by the public safety answering points and disposed of in a manner which will retain that security except as otherwise required by applicable law. (1997-287, s. 1; 2007-107, s. 3.2(a).)

Editor's Note. — Session Laws 2007-107, s. 6.2, contains a severability clause.

Effect of Amendments. — Session Laws 2007-107, s. 3.2.(a), effective June 26, 2007, substituted "subscribers, or the e-mail addresses of subscribers to an electronic emergency notification or reverse 911 system, that is contained in a county or municipal 911 database, or in a county or municipal telephonic or electronic emergency notification or reverse 911 system," for "subscribers which contained in a county 911 database" near the beginning of the section; and inserted "electronic emergency notification or reverse 911 system, or" near the middle of the section.

§ 132-1.6. Emergency response plans.

Emergency response plans adopted by a constituent institution of The University of North Carolina, a community college, or a public hospital as defined in G.S. 159-39 and the records related to the planning and development of these emergency response plans are not public records as defined by G.S. 132-1 and shall not be subject to inspection and examination under G.S. 132-6. (2001-500, s. 3.1.)

§ 132-1.7. Sensitive public security information.

(a) Public records, as defined in G.S. 132-1, shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities.

(b) Public records as defined in G.S. 132-1 do not include plans to prevent or respond to terrorist activity, to the extent such records set forth vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public or the security of any governmental facility, building, structure, or information storage system.

(c) Information relating to the general adoption of public security plans and arrangements, and budgetary information concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records. (2001-516, s. 3; 2003-180, s. 1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in the 2001 act having been G.S. 132-1.6.

§ 132-1.8. Confidentiality of photographs and video or audio recordings made pursuant to autopsy.

Except as otherwise provided in G.S. 130A-389.1, a photograph or video or audio recording of an official autopsy is not a public record as defined by G.S. 132-1. However, the text of an official autopsy report, including any findings and interpretations prepared in accordance with G.S. 130A-389(a), is a public record and fully accessible by the public. For purposes of this section, an official autopsy is an autopsy performed pursuant to G.S. 130A-389(a). (2005-393, s. 1.)

Editor's Note. — Session Laws 2005-393, s. 4, provides: "This act becomes effective December 1, 2005, and applies to offenses committed on or after that date. This act applies to all unauthorized disclosures of autopsy photographs or video or audio recordings that occur on or after the effective date, regardless of whether the autopsy was performed before or after that date."

§ 132-1.9. Trial preparation materials.

(a) Scope. — A request to inspect, examine, or copy a public record that is also trial preparation material is governed by this section, and, to the extent this section conflicts with any other provision of law, this section applies.

(b) Right to Deny Access. — Except as otherwise provided in this section, a custodian may deny access to a public record that is also trial preparation material. If the denial is based on an assertion that the public record is trial preparation material that was prepared in anticipation of a legal proceeding that has not commenced, the custodian shall, upon request, provide a written justification for the assertion that the public record was prepared in anticipation of a legal proceeding.

(c) Trial Preparation Material Prepared in Anticipation of a Legal Proceeding. — Any person who is denied access to a public record that is also claimed to be trial preparation material that was prepared in anticipation of a legal proceeding that has not yet been commenced may petition the court pursuant to G.S. 132-9 for determination as to whether the public record is trial preparation material that was prepared in anticipation of a legal proceeding.

(d) During a Legal Proceeding. —

(1) When a legal proceeding is subject to G.S. 1A-1, Rule 26(b)(3), or subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to the pending legal proceeding, including any appeals and postjudgment proceedings, who is denied access to a public record that is also claimed to be trial preparation material that pertains to the pending proceeding may seek access to such record only by motion made in the pending legal proceeding and pursuant to the procedural and substantive standards that apply to that proceeding. A party to the pending legal proceeding may not directly or indirectly commence a separate proceeding for release of such record pursuant to G.S. 132-9 in any other court or tribunal.

(2) When a legal proceeding is not subject to G.S. 1A-1, Rule 26(b)(3), and not subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to the pending legal proceeding, including any appeals and postjudgment proceedings, who is denied access to a public record that is also claimed to be trial preparation material that pertains to the pending legal proceeding may petition the court pursuant to G.S. 132-9 for access to such record. In determining whether to require the custodian to provide access to all or any portion of the record, the court or other tribunal shall apply the provisions of G.S. 1A-1, Rule 26(b)(3).

(3) Any person who is denied access to a public record that is also claimed to be trial preparation material and who is not a party to the pending legal proceeding to which such record pertains, and who is not acting in concert with or as an agent for any party to the pending legal proceeding, may petition the court pursuant to G.S. 132-9 for a determination as to whether the public record is trial preparation material.

(e) Following a Legal Proceeding. — Upon the conclusion of a legal proceeding, including the completion of all appeals and postjudgment proceedings, or, in the case where no legal proceeding has been commenced, upon the expiration of all applicable statutes of limitations and periods of repose, the custodian of a public record that is also claimed to be trial preparation material shall permit the inspection, examination, or copying of such record if any law that is applicable so provides.

(f) Effect of Disclosure. — Disclosure pursuant to this section of all or any portion of a public record that is also trial preparation material, whether voluntary or pursuant to an order issued by a court, or issued by an officer in an administrative or quasi-judicial legal proceeding, shall not constitute a waiver of the right to claim that any other document or record constitutes trial preparation material.

(g) Trial Preparation Materials That Are Not Public Records. — This section does not require disclosure, or authorize a court to require disclosure, of trial preparation material that is not also a public record or that is under other provisions of this Chapter exempted or protected from disclosure by law or by an order issued by a court, or by an officer in an administrative or quasi-judicial legal proceeding.

(h) Definitions. — As used in this section, the following definitions apply:

(1) Legal proceeding. — Civil proceedings in any federal or State court. Legal proceeding also includes any federal, State, or local government administrative or quasi-judicial proceeding that is not expressly subject to the provisions of Chapter 1A of the General Statutes or the Federal Rules of Civil Procedure.

(2) Trial preparation material. — Any record, wherever located and in whatever form, that is trial preparation material within the meaning of G.S. 1A-1, Rule 26(b)(3), any comparable material prepared for any other legal proceeding, and any comparable material exchanged pursuant to a joint defense, joint prosecution, or joint interest agreement in connection with any pending or anticipated legal proceeding. (2005-332, s. 1; 2005-414, s. 4.)

§ 132-1.10. Social security numbers and other personal identifying information.

(a) The General Assembly finds the following:

(1) The social security number can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual. While the social security number was intended to be used solely for the administration of the federal Social Security System, over time this unique numeric identifier has been used extensively for identity verification purposes and other legitimate consensual purposes.

(2) Although there are legitimate reasons for State and local government agencies to collect social security numbers and other personal identifying information from individuals, government should collect the information only for legitimate purposes or when required by law.

(3) When State and local government agencies possess social security numbers or other personal identifying information, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public.

(b) Except as provided in subsections (c) and (d) of this section, no agency of the State or its political subdivisions, or any agent or employee of a government agency, shall do any of the following:

(1) Collect a social security number from an individual unless authorized by law to do so or unless the collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities as prescribed by law. Social security numbers collected by an agency must be relevant to the purpose for which collected and shall not be collected until and unless the need for social security numbers has been clearly documented.

(2) Fail, when collecting a social security number from an individual, to segregate that number on a separate page from the rest of the record, or as otherwise appropriate, in order that the social security number can be more easily redacted pursuant to a valid public records request.

(3) Fail, when collecting a social security number from an individual, to provide, at the time of or prior to the actual collection of the social security number by that agency, that individual, upon request, with a

statement of the purpose or purposes for which the social security number is being collected and used.

(4) Use the social security number for any purpose other than the purpose stated.

(5) **(For applicability date — See Editor's note)** Intentionally communicate or otherwise make available to the general public a person's social security number or other identifying information. "Identifying information", as used in this subdivision, shall have the same meaning as in G.S. 14-113.20(b), except it shall not include electronic identification numbers, electronic mail names or addresses, Internet account numbers, Internet identification names, parent's legal surname prior to marriage, or drivers license numbers appearing on law enforcement records. Identifying information shall be confidential and not be a public record under this Chapter. A record, with identifying information removed or redacted, is a public record if it would otherwise be a public record under this Chapter but for the identifying information. The presence of identifying information in a public record does not change the nature of the public record. If all other public records requirements are met under this Chapter, the agency of the State or its political subdivisions shall respond to a public records request, even if the records contain identifying information, as promptly as possible, by providing the public record with the identifying information removed or redacted.

(6) **(Effective July 1, 2007)** Intentionally print or imbed an individual's social security number on any card required for the individual to access government services.

(7) **(Effective July 1, 2007)** Require an individual to transmit the individual's social security number over the Internet, unless the connection is secure or the social security number is encrypted.

(8) **(Effective July 1, 2007)** Require an individual to use the individual's social security number to access an Internet Web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet Web site.

(9) **(Effective July 1, 2007)** Print an individual's social security number on any materials that are mailed to the individual, unless state or federal law required that the social security number be on the document to be mailed. A social security number that is permitted to be mailed under this subdivision may not be printed, in whole or in part, on a postcard or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.

(c) Subsection (b) of this section does not apply in the following circumstances:

(1) To social security numbers or other identifying information disclosed to another governmental entity or its agents, employees, or contractors if disclosure is necessary for the receiving entity to perform its duties and responsibilities. The receiving governmental entity and its agents, employees, and contractors shall maintain the confidential and exempt status of such numbers.

(2) To social security numbers or other identifying information disclosed pursuant to a court order, warrant, or subpoena.

(3) To social security numbers or other identifying information disclosed for public health purposes pursuant to and incompliance with Chapter 130A of the General Statutes.

(4) To social security numbers or other identifying information that have been redacted.

(5) To certified copies of vital records issued by the State Registrar and other authorized officials pursuant to G.S. 130A-93(c). The State

Registrar may disclose any identifying information other than social security numbers on any uncertified vital record.

(6) To any recorded document in the official records of the register of deeds of the county.

(7) To any document filed in the official records of the courts.

(c1) If an agency of the State or its political subdivisions, or any agent or employee of a government agency, experiences a security breach, as defined in Article 2A of Chapter 75 of the General Statutes, the agency shall comply with the requirements of G.S. 75-65.

(d) No person preparing or filing a document to be recorded or filed in the official records of the register of deeds, the Department of the Secretary of State, or of the courts may include any person's social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in that document, unless otherwise expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted. Any loan closing instruction that requires the inclusion of a person's social security number on a document to be recorded shall be void. Any person who violates this subsection shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars ($500.00) for each violation.

(e) The validity of an instrument as between the parties to the instrument is not affected by the inclusion of personal information on a document recorded or filed with the official records of the register of deeds or the Department of the Secretary of State. The register of deeds or the Department of the Secretary of State may not reject an instrument presented for recording because the instrument contains an individual's personal information.

(f) **(Expires July 1, 2007)** Any person has the right to request that the Department of the Secretary of State, a register of deeds or clerk of court remove, from an image or copy of an official record placed on the Department of the Secretary of State's, a register of deeds' or court's Internet Website available to the general public or an Internet Web site available to the general public used by the Department of the Secretary of State, a register of deeds or court to display public records by the Department of the Secretary of State, the register of deeds or clerk of court, the person's social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in that official record. The request must be made in writing, legibly signed by the requester, and delivered by mail, facsimile, or electronic transmission, or delivered in person to the Department of the Secretary of State, the register of deeds or clerk of court. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. The request for redaction shall be considered a public record with access restricted to the Department of the Secretary of State, the register of deeds, the clerk of court, their staff, or upon order of the court. The Department of the Secretary of State, the register of deeds or clerk of court shall have no duty to inquire beyond the written request to verify the identity of a person requesting redaction and shall have no duty to remove redaction for any reason upon subsequent request by an individual or by order of the court, if impossible to do so. No fee will be charged for the redaction pursuant to such request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars ($500.00) for each violation.

(f) **(Effective July 1, 2007)** Any person has the right to request that a register of deeds or clerk of court remove, from an image or copy of an official record placed on a register of deeds' or court's Internet Website available to the general public or an Internet Web site available to the general public used by a register of deeds or court to display public records by the register of deeds or clerk of court, the person's social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in that official record. The request must be made in writing, legibly signed by the requester, and delivered by mail, facsimile, or electronic transmission, or delivered in person to the register of deeds or clerk of court. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. The request for redaction shall be considered a public record with access restricted to the register of deeds, the clerk of court, their staff, or upon order of the court. The register of deeds or clerk of court shall have no duty to inquire beyond the written request to verify the identity of a person requesting redaction and shall have no duty to remove redaction for any reason upon subsequent request by an individual or by order of the court, if impossible to do so. No fee will be charged for the redaction pursuant to such request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars ($500.00) for each violation.

(g) **(Expires July 1, 2007)** The Department of the Secretary of State, a register of deeds or clerk of court shall immediately and conspicuously post signs throughout his or her offices for public viewing and shall immediately and conspicuously post a notice on any Internet Web site available to the general public used by the Department of the Secretary of State, a register of deeds or clerk of court a notice stating, in substantially similar form, the following:

(1) Any person preparing or filing a document for recordation or filing in the official records may not include a social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in the document, unless expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted so that no more than the last four digits of the identification number is included.

(2) Any person has a right to request the Department of the Secretary of State, a register of deeds or clerk of court to remove, from an image or copy of an official record placed on the Department of the Secretary of State's, a register of deeds' or clerk of court's Internet Web site available to the general public or on an Internet Web site available to the general public used by the Department of the Secretary of State, a register of deeds or clerk of court to display public records, any social security, employer taxpayer identification, drivers license, state iden-

tification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in an official record. The request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the Department of the Secretary of State, the register of deeds or clerk of court. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. No fee will be charged for the redaction pursuant to such a request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars ($500.00) for each violation.

(g) **(Effective July 1, 2007)** A register of deeds or clerk of court shall immediately and conspicuously post signs throughout his or her offices for public viewing and shall immediately and conspicuously post a notice on any Internet Web site available to the general public used by a register of deeds or clerk of court a notice stating, in substantially similar form, the following:

(1) Any person preparing or filing a document for recordation or filing in the official records may not include a social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in the document, unless expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted so that no more than the last four digits of the identification number is included.

(2) Any person has a right to request a register of deeds or clerk of court to remove, from an image or copy of an official record placed on a register of deeds' or clerk of court's Internet Web site available to the general public or on an Internet Web site available to the general public used by a register of deeds or clerk of court to display public records, any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in an official record. The request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the register of deeds or clerk of court. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. No fee will be charged for the redaction pursuant to such a request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars ($500.00) for each violation.

(h) **(Expires July 1, 2007)** Any affected person may petition the court for an order directing compliance with this section. No liability shall accrue to the

G.S. 132-1.10(f), (g), and (h) are set out twice. See note.

Department of the Secretary of State, a register of deeds or clerk of court or to their agents for any action related to provisions of this section or for any claims or damages that might result from a social security number or other identifying information on the public record or on the Department of the Secretary of State's, a register of deeds' or clerk of court's Internet website available to the general public or an Internet Web site available to the general public used by the Department of the Secretary of State, a register of deeds or clerk of court.

(h) **(Effective July 1, 2007)** Any affected person may petition the court for an order directing compliance with this section. No liability shall accrue to a register of deeds or clerk of court or to his or her agent for any action related to provisions of this section or for any claims or damages that might result from a social security number or other identifying information on the public record or on a register of deeds' or clerk of court's Internet website available to the general public or an Internet Web site available to the general public used by a register of deeds or clerk of court. (2005-414, s. 4; 2006-173, ss. 1-7.)

Subsections (f), (g) and (h) Set Out Twice. — The first version of subsections (f), (g) and (h) set out above expire on July 1, 2007. The second version of subsections (f), (g) and (h) set out above are effective July 1, 2007.

Editor's Note. — This section was originally enacted as G.S. 132-1.8. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2005-414, s. 11, provides in part that subdivisions (b)(6), (7), (8) and (9) of this section become effective July 1, 2007. The remainder of the section becomes effective December 1, 2005.

Session Laws 2005-414, s. 10, is a severability clause.

The number of this section was assigned by the Revisor of Statutes, the number in the 2005 act having been G.S. 132-1.9.

Session Laws 2006-173, s. 8, provides: "The provisions of G.S. 132-1.10(b)(5) shall not apply to identifying information accessible on the Internet Web site of the Department of the Secretary of State or by magnetic tapes, electronic data feeds, or electronic file transfers of all records or updates of records on file with the Secretary of State until July 1, 2007. Notwithstanding the exemption provided by this section, the Department of the Secretary of State shall, whenever funds are made available, make it a priority to first remove identifying information contained in Uniform Commercial Code financing statements filed with the Department of the Secretary of State under Chapter 25 of the General Statutes no later than June 30, 2007."

Session Laws 2006-173, s. 9, provides: "The Department of the Secretary of State shall study the alternatives and costs for redacting identifying information contained in the records of the Department of the Secretary of State, including the Internet Web site of the Department, and shall report the results of its study to the Office of State Budget and Management and to the House and Senate cochairs of the Joint Appropriations Subcommittee on General Government on or before February 1, 2007. This study shall focus on the most expeditious, cost-effective method of redacting identifying information on or before January 1, 2007."

Effect of Amendments. — Session Laws 2006-173, s. 1, effective October 1, 2006, added subsection (c1).

Session Laws 2006-173, s. 2, effective August 1, 2006, but not applicable to identifying information accessible on the Internet Web site of the Department of Secretary of State or by magnetic tapes, electronic data feeds, or electronic file transfer of all records or updates of records on file with the Secretary of State until July 1, 2007, added the last four sentences in subdivision (b)(5).

Session Laws 2006-173, ss. 3 and 4, effective August 1, 2006, in subsection (d), substituted "of" for "by," and inserted "the Department of the Secretary of State"; and inserted "or the Department of the Secretary of State" both times it appears in subsection (e).

Session Laws 2006-173, ss. 5 through 7, effective August 1, 2006, and expiring July 1, 2007, inserted "the Department of the Secretary of State" and "the Department of the Secretary of State's" throughout subsections (f) through (h); and substituted "their agents" for "his or her agent" in the second sentence of subsection (h).

§ 132-1.11. Economic development incentives.

(a) Assumptions and Methodologies. — Subject to the provisions of this Chapter regarding confidential information and the withholding of public records relating to the proposed expansion or location of specific business or industrial projects when the release of those records would frustrate the purpose for which they were created, whenever a public agency or its subdivision performs a cost-benefit analysis or similar assessment with respect to economic development incentives offered to a specific business or industrial project, the agency or its subdivision must describe in detail the assumptions and methodologies used in completing the analysis or assessment. This description is a public record and is subject to all provisions of this Chapter and other law regarding public records.

(b) Disclosure of Public Records Requirements. — Whenever an agency or its subdivision first proposes, negotiates, or accepts an application for economic development incentives with respect to a specific industrial or business project, the agency or subdivision must disclose that any information obtained by the agency or subdivision is subject to laws regarding disclosure of public records. In addition, the agency or subdivision must fully and accurately describe the instances in which confidential information may be withheld from disclosure, the types of information that qualify as confidential information, and the methods for ensuring that confidential information is not disclosed. (2005-429, s. 1.2.)

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

The number of this section was assigned by the Revisor of Statutes, the number in the 2005 act having been G.S. 132-1.8.

§ 132-2. Custodian designated.

The public official in charge of an office having public records shall be the custodian thereof. (1935, c. 265, s. 2.)

§ 132-3. Destruction of records regulated.

(a) Prohibition. — No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with G.S. 121-5 and G.S. 130A-99, without the consent of the Department of Cultural Resources. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a Class 3 misdemeanor and upon conviction only fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00).

(b) Revenue Records. — Notwithstanding subsection (a) of this section and G.S. 121-5, when a record of the Department of Revenue has been copied in any manner, the original record may be destroyed upon the order of the Secretary of Revenue. If a record of the Department of Revenue has not been copied, the original record shall be preserved for at least three years. After three years the original record may be destroyed upon the order of the Secretary of Revenue.

(c) Employment Security Commission Records. — Notwithstanding subsection (a) of this section and G.S. 121-5, when a record of the Employment Security Commission has been copied in any manner, the original record may be destroyed upon the order of the Chairman of the Employment Security Commission. If a record of the Commission has not been copied, the original record shall be preserved for at least three years. After three years the original record may be destroyed upon the order of the Chairman of the Employment Security Commission. (1935, c. 265, s. 3; 1943, c. 237; 1953, c. 675, s. 17; 1957, c. 330, s. 2; 1973, c. 476, s. 48; 1993, c. 485, s. 39; c. 539, s. 966; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 12; 2001-115, s. 2.)

Cross References. — For section further regulating destruction of records, see G.S. 121-5.

Editor's Note. — Session Laws 1997-309, s. 15, provides that the removal and destruction by a register of deeds of any out-of-county birth certificates prior to the effective date of that act is valid, and the register of deeds is not in violation of G.S. 121-5 or G.S. 132-3.

CASE NOTES

Applied in State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976); State v. Caldwell, 53 N.C. App. 1, 279 S.E.2d 852 (1981).

Cited in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 132-4. Disposition of records at end of official's term.

Whoever has the custody of any public records shall, at the expiration of his term of office, deliver to his successor, or, if there be none, to the Department of Cultural Resources, all records, books, writings, letters and documents kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for the space of 10 days after request made in writing by any citizen of the State to deliver as herein required such public records to the person authorized to receive them shall be guilty of a Class 1 misdemeanor. (1935, c. 265, s. 4; 1943, c. 237; 1973, c. 476, s. 48; 1975, c. 696, s. 1; 1993, c. 539, s. 967; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 132-5. Demanding custody.

Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for 10 days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a Class 1 misdemeanor. (1935, c. 265, s. 5; 1975, c. 696, s. 2; 1993, c. 539, s. 968; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

§ 132-5.1. Regaining custody; civil remedies.

(a) The Secretary of the Department of Cultural Resources or his designated representative or any public official who is the custodian of public records which are in the possession of a person or agency not authorized by the custodian or by law to possess such public records may petition the superior court in the county in which the person holding such records resides or in which the materials in issue, or any part thereof, are located for the return of such public records. The court may order such public records to be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records. If the order of delivery does not receive compliance, the petitioner may request that the court enforce such order through its contempt power and procedures.

(b) At any time after the filing of the petition set out in subsection (a) or contemporaneous with such filing, the public official seeking the return of the public records may by ex parte petition request the judge or the court in which the action was filed to grant one of the following provisional remedies:

(1) An order directed at the sheriff commanding him to seize the materials which are the subject of the action and deliver the same to the court under the circumstances hereinafter set forth; or

(2) A preliminary injunction preventing the sale, removal, disposal or destruction of or damage to such public records pending a final judgment by the court.

(c) The judge or court aforesaid shall issue an order of seizure or grant a preliminary injunction upon receipt of an affidavit from the petitioner which alleges that the materials at issue are public records and that unless one of said provisional remedies is granted, there is a danger that such materials shall be sold, secreted, removed out of the State or otherwise disposed of so as not to be forthcoming to answer the final judgment of the court respecting the same; or that such property may be destroyed or materially damaged or injured if not seized or if injunctive relief is not granted.

(d) The aforementioned order of seizure or preliminary injunction shall issue without notice to the respondent and without the posting of any bond or other security by the petitioner. (1975, c. 787, s. 2.)

CASE NOTES

Public records and documents are the property of the State and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976), aff'd, 293 N.C. 18, 235 S.E.2d 150 (1977).

Since ownership of bills of indictment is in the State, it cannot be disposed of except as provided by law. It cannot be forfeited through the oversight, carelessness or even intentional conduct of any of the agents of the State. Thus, the documents in question left the custody of the court in an unlawful manner and legal title thereto cannot pass to the individual who happens, at the moment, to have them in his possession. State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976), aff'd, 293 N.C. 18, 235 S.E.2d 150 (1977).

§ 132-6. Inspection and examination of records.

(a) Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law. As used herein, "custodian" does not mean an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.

(b) No person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request.

(c) No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information. If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation on the following schedule:

State agencies after June 30, 1996;

Municipalities with populations of 10,000 or more, counties with populations of 25,000 or more, as determined by the 1990 U.S. Census, and public hospitals in those counties, after June 30, 1997;

Municipalities with populations of less than 10,000, counties with populations of less than 25,000, as determined by the 1990 U.S. Census, and public hospitals in those counties, after June 30, 1998;

Political subdivisions and their agencies that are not otherwise covered by this schedule, after June 30, 1998.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section, public records relating to the proposed expansion or location of specific business or industrial projects may be withheld so long as their inspection, examination or copying would frustrate the purpose for which such public records were created; provided, however, that nothing herein shall be construed to permit the withholding of public records relating to general economic development policies or activities. Once the State, a local government, or the specific business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so and the business has communicated that commitment or decision to the State or local government agency involved with the project, the provisions of this subsection allowing public records to be withheld by the agency no longer apply. Once the provisions of this subsection no longer apply, the agency shall disclose as soon as practicable, and within 25 business days, public records requested for the announced project that are not otherwise made confidential by law. An announcement that a business or industrial project has committed to expand or locate in the State shall not require disclosure of local government records relating to the project if the business has not selected a specific location within the State for the project. Once a specific location for the project has been determined, local government records must be disclosed, upon request, in accordance with the provisions of this section. For purposes of this section, "local government records" include records maintained by the State that relate to a local government's efforts to attract the project.

(e) The application of this Chapter is subject to the provisions of Article 1 of Chapter 121 of the General Statutes, the North Carolina Archives and History Act.

(f) Notwithstanding the provisions of subsection (a) of this section, the inspection or copying of any public record which, because of its age or condition could be damaged during inspection or copying, may be made subject to reasonable restrictions intended to preserve the particular record. (1935, c. 265, s. 6; 1987, c. 835, s. 1; 1995, c. 388, s. 2; 2005-429, s. 1.1.)

Local Modification. — Durham: 1993, c. 227, s. 9; New Hanover: 1981, c. 960; Orange: 1993, c. 358, s. 14; 1995, c. 339, s. 2; city of Asheville: 1999, c. 206, s. 9; city of Durham: 1993, c. 227, s. 9; city of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 8; 1991, c. 557, s. 1.

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Legal Periodicals. — For comment on public access to government-held records, see 55 N.C.L. Rev. 1187 (1977).

For note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

"Any Person" Includes Corporation. — The General Assembly did not intend to exclude corporate entities from the scope of the phrase "any person" in this section. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

What Must Be Made Available for Inspection. — In the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Act must be made available for public inspection. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

When a county employee wrote to the board of county commissioners about the employee's experience working with the county medical director, when the board was considering whether to renew the director's contract, and recommended another person for the director's job and discussed the employee's interaction with the board regarding the board's decision-making process, disclosure of those parts of the letter discussing the employee's experience working with the director were exempt from disclosure because they were any information in any form gathered by the county with respect to the employee relating to the employee's performance, under G.S. 153A-98(a), as they discussed the employee's ability to work with the director and related to the employee's performance as a county employee. News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

Parts of the letter to the board of county commissioners recommending a certain person for the medical director's job and discussing the employee's interaction with the board were subject to public disclosure under G.S. 132-1 because G.S. 132-6 did not allow disclosure of this information to be denied on the basis that the information was found in the same document as personnel information that was exempt from disclosure. News Reporter Co. v. Columbus County, — N.C. App. —, 646 S.E.2d 390, 2007 N.C. App. LEXIS 1471 (2007).

Draft reports of individual members of an investigative Commission were subject to disclosure under the Public Records Act. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

But, the courts have jurisdiction to issue injunctions to prevent the disclosure of documents which are exempt from disclosure under the Public Records Act. North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

SBI Reports That Become Part of Public Agency's Records. — When State Bureau of Investigation investigative reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

When the State Bureau of Investigation submitted investigative reports to an investigative Commission appointed by the president of The University of North Carolina system of higher education, they became Commission records. As such they were subject to the Public Records Act and had to be disclosed to the same extent that other Commission materials had to be disclosed under that law. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

Cited in Barker v. N.C. State Bd. of Elections, 153 N.C. App. 804, 570 S.E.2d 897, 2002 N.C. App. LEXIS 1264 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 114 (2003); MCI Constr., LLC v. Hazen & Sawyer, P.C., 213 F.R.D. 268, 2003 U.S. Dist. LEXIS 2560 (M.D.N.C. 2003).

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Test scores and applications for licensure and related materials received by the North Carolina Board for Licensing Geologists are not subject to public inspection and examination under this section. See opinion of the Attorney General to Charles H. Gardner, Dir., Division of Land Resources Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources], 60 N.C.A.G. 76 (1991).

Licensure Procedures. — The application and other information obtained during the Private Protective Services Board's licensure procedure which are not otherwise exempt by law are public records subject to public inspection and examination under this section. See opinion of Attorney General to W. A. "Doc" Hoggard, III PPS Board Administrator Private Protective Services Board, 1997 N.C.A.G. 50 (8/15/97).

§ 132-6.1. Electronic data-processing records.

(a) After June 30, 1996, no public agency shall purchase, lease, create, or otherwise acquire any electronic data-processing system for the storage, manipulation, or retrieval of public records unless it first determines that the system will not impair or impede the agency's ability to permit the public inspection and examination, and to provide electronic copies of such records. Nothing in this subsection shall be construed to require the retention by the public agency of obsolete hardware or software.

(b) Every public agency shall create an index of computer databases compiled or created by a public agency on the following schedule:

State agencies by July 1, 1996;

Municipalities with populations of 10,000 or more, counties with populations of 25,000 or more, as determined by the 1990 U.S. Census, and public hospitals in those counties, by July 1, 1997;

Municipalities with populations of less than 10,000, counties with populations of less than 25,000, as determined by the 1990 U.S. Census, and public hospitals in those counties, by July 1, 1998;

Political subdivisions and their agencies that are not otherwise covered by this schedule, after June 30, 1998.

The index shall be a public record and shall include, at a minimum, the following information with respect to each database listed therein: a list of the data fields; a description of the format or record layout; information as to the frequency with which the database is updated; a list of any data fields to which public access is restricted; a description of each form in which the database can be copied or reproduced using the agency's computer facilities; and a schedule of fees for the production of copies in each available form. Electronic databases compiled or created prior to the date by which the index must be created in accordance with this subsection may be indexed at the public agency's option. The form, content, language, and guidelines for the index and the databases to be indexed shall be developed by the Office of Archives and History in consultation with officials at other public agencies.

(c) Nothing in this section shall require a public agency to create a computer database that the public agency has not otherwise created or is not otherwise required to be created. Nothing in this section requires a public agency to disclose security features of its electronic data processing systems, information technology systems, telecommunications networks, or electronic security systems, including hardware or software security, passwords, or security standards, procedures, processes, configurations, software, and codes.

(d) The following definitions apply in this section:

(1) Computer database. — A structured collection of data or documents residing in a database management program or spreadsheet software.

(2) Computer hardware. — Any tangible machine or device utilized for the electronic storage, manipulation, or retrieval of data.

(3) Computer program. — A series of instructions or statements that permit the storage, manipulation, and retrieval of data within an electronic data-processing system, together with any associated documentation. The term does not include the original data, or any analysis, compilation, or manipulated form of the original data produced by the use of the program or software.

(4) Computer software. — Any set or combination of computer programs. The term does not include the original data, or any analysis, compilation, or manipulated form of the original data produced by the use of the program or software.

(5) Electronic data-processing system. — Computer hardware, computer software, or computer programs or any combination thereof, regardless of kind or origin. (1995, c. 388, s. 3; 2000-71, s. 1; 2002-159, s. 35(i).)

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Computer software developed by the State with the assistance of a private contractor is not a "record," and its disclosure may cause a breach in software security inconsistent with this section. See opinion of Attorney General to Commissioner Janice Faulkner, North Carolina Division of Motor Vehicles, 1998 N.C.A.G. 25 (5/28/98).

The Employment Security Commission was not required to replace confidential social security numbers with a non-identifying code in order to allow the analysis of data in the Common Follow-Up System without revealing confidential, personally identifiable information. See opinion of Attorney General to Mr. T.S. Whitaker, Deputy Chairman for Programs, Employment Security Commission of N.C., 1999 N.C. AG LEXIS 26 (9/20/99).

Confidentiality of Security Features. — Members of the Information Resources Management Commission, or their delegates, who are representatives of other agencies may be present at the committee meeting during which information will be reported about audits of the security practices of information technology systems in specific agencies; the presence of these representatives does not waive the confidentiality of the security features of the systems under subsection (c) of this section. See opinion of Attorney General to Beverly Eaves Perdue, Lieutenant Governor, 2002 N.C.A.G. 28 (11/8/02).

§ 132-6.2. Provisions for copies of public records; fees.

(a) Persons requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them. No request for copies of public records in a particular medium shall be denied on the grounds that the custodian has made or prefers to make the public records available in another medium. The public agency may assess different fees for different media as prescribed by law.

(b) Persons requesting copies of public records may request that the copies be certified or uncertified. The fees for certifying copies of public records shall be as provided by law. Except as otherwise provided by law, no public agency shall charge a fee for an uncertified copy of a public record that exceeds the actual cost to the public agency of making the copy. For purposes of this subsection, "actual cost" is limited to direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles and does not include costs that would have been incurred by the public agency if a request to reproduce a public record had not been made. Notwithstanding the provisions of this subsection, if the request is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or if producing the record in the medium requested results in a greater use of information technology resources than that established by the agency for reproduction of the volume of information requested, then the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the actual cost incurred for such extensive use of information technology resources or the labor costs of the personnel providing the services, or for a greater use of information technology resources that is actually incurred by the agency or attributable to the agency. If anyone requesting public information from any public agency is charged a fee that the requester believes to be unfair or unreasonable, the requester may ask the State Chief Information Officer or his designee to mediate the dispute.

(c) Persons requesting copies of computer databases may be required to make or submit such requests in writing. Custodians of public records shall respond to all such requests as promptly as possible. If the request is granted, the copies shall be provided as soon as reasonably possible. If the request is denied, the denial shall be accompanied by an explanation of the basis for the denial. If asked to do so, the person denying the request shall, as promptly as possible, reduce the explanation for the denial to writing.

(d) Nothing in this section shall be construed to require a public agency to respond to requests for copies of public records outside of its usual business hours.

(e) Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist. If a public agency, as a service to the requester, voluntarily elects to create or compile a record, it may negotiate a reasonable charge for the service with the requester. Nothing in this section shall be construed to require a public agency to put into electronic medium a record that is not kept in electronic medium. (1995, c. 388, s. 3; 2004-129, s. 38.)

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A governmental entity is not required to record its 800 megahertz radio communications. See opinion of Attorney General to Mr. J. Mark Payne, Johnston County Attorney, 2002 N.C. AG LEXIS 3 (1/22/02).

CASE NOTES

In Custody. — Trial court did not err in holding that the records the newspaper sought, with limited exceptions, were public records that had to be made available by the town for public inspection and copying; the town could not assert that because the town attorneys, and not the town itself, possessed the records that the records were not public records, as the town attorneys were an agency or subdivision of the town, were public officers, and a ruling otherwise would mean that a town could give records to its town attorneys to shield what otherwise would be public records from disclosure. Womack Newspapers, Inc. v. Town of Kitty Hawk, — N.C. App. —, 639 S.E.2d 96, 2007 N.C. App. LEXIS 81 (2007).

§ 132-7. Keeping records in safe places; copying or repairing; certified copies.

Insofar as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read. Whenever any State, county, or municipal records are in need of repair, restoration, or rebinding, the head of such State agency, department, board, or commission, the board of county commissioners of such county, or the governing body of such municipality may authorize that the records in need of repair, restoration, or rebinding be removed from the building or office in which such records are ordinarily kept, for the length of time required to repair, restore, or rebind them. Any public official who causes a record book to be copied shall attest it and shall certify on oath that it is an accurate copy of the original book. The copy shall then have the force of the original. (1935, c. 265, s. 7; 1951, c. 294.)

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

§ 132-8. Assistance by and to Department of Cultural Resources.

The Department of Cultural Resources shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, filing and making available the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Secretary of Cultural Resources, establishing a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the Department of Cultural Resources shall (subject to the availability of necessary space, staff, and other facilities for such purposes) make available space in its Records Center for the filing of semicurrent records so scheduled and in its archives for noncurrent records of permanent value, and shall render such other assistance as needed, including the microfilming of records so scheduled. (1935, c. 265, s. 8; 1943, c. 237; 1959, c. 68, s. 2; 1973, c. 476, s. 48.)

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

§ 132-8.1. Records management program administered by Department of Cultural Resources; establishment of standards, procedures, etc.; surveys.

A records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of official records shall be administered by the Department of Cultural Resources. It shall be the duty of that Department, in cooperation with and with the approval of the Department of Administration, to establish standards, procedures, and techniques for effective management of public records, to make continuing surveys of paper work operations, and to recommend improvements in current records management practices including the use of space, equipment, and supplies employed in creating, maintaining, and servicing records. It shall be the duty of the head of each State agency and the governing body of each county, municipality and other subdivision of government to cooperate with the Department of Cultural Resources in conducting surveys and to establish and maintain an active, continuing program for the economical and efficient management of the records of said agency, county, municipality, or other subdivision of government. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-8.2. Selection and preservation of records considered essential; making or designation of preservation duplicates; force and effect of duplicates or copies thereof.

In cooperation with the head of each State agency and the governing body of each county, municipality, and other subdivision of government, the Department of Cultural Resources shall establish and maintain a program for the selection and preservation of public records considered essential to the operation of government and to the protection of the rights and interests of persons, and, within the limitations of funds available for the purpose, shall make or cause to be made preservation duplicates or designate as preservation duplicates existing copies of such essential public records. Preservation duplicates shall be durable, accurate, complete and clear, and such duplicates made by a photographic, photostatic, microfilm, micro card, miniature photographic, or other process which accurately reproduces and forms a durable medium for so reproducing the original shall have the same force and effect for all purposes as the original record whether the original record is in existence or not. A transcript, exemplification, or certified copy of such preservation duplicate shall be deemed for all purposes to be a transcript, exemplification, or certified copy of the original record. Such preservation duplicates shall be preserved in the place and manner of safekeeping prescribed by the Department of Cultural Resources. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-9. Access to records.

(a) Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(b) In an action to compel disclosure of public records which have been withheld pursuant to the provisions of G.S. 132-6 concerning public records relating to the proposed expansion or location of particular businesses and industrial projects, the burden shall be on the custodian withholding the records to show that disclosure would frustrate the purpose of attracting that particular business or industrial project.

(c) In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow the prevailing party to recover its reasonable attorneys' fees if attributed to those public records, unless the court finds the agency acted with substantial justification in denying access to the public records or the court finds circumstances that would make the award of attorneys' fees unjust.

Any attorneys' fees assessed against a public agency under this section shall be charged against the operating expenses of the agency; provided, however, that the court may order that all or any portion of any attorneys' fees so assessed be paid personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of this Article. No order against any public employee or public official shall issue in any case where the public employee or public official seeks the advice of an attorney and such advice is followed.

(d) If the court determines that an action brought pursuant to this section was filed in bad faith or was frivolous, the court shall assess a reasonable attorney's fee against the person or persons instituting the action and award it to the public agency as part of the costs. (1935, c. 265, s. 9; 1975, c. 787, s. 3; 1987, c. 835, s. 2; 1995, c. 388, s. 4; 2005-332, s. 2.)

Local Modification. — Durham: 1993, c. 227, s. 9; New Hanover: 1981, c. 960; Orange: 1993, c. 358, s. 14; 1995, c. 339, s. 2; city of Asheville: 1999, c. 206, s. 9; city of Durham: 1993, c. 227, s. 9; city of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 8; 1991, c. 557, s. 1.

Legal Periodicals. — For comment on public access to government-held records, see 55 N.C.L. Rev. 1187 (1977).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

"Any Person" Includes Corporation. — The General Assembly did not intend to exclude corporate entities from the scope of the phrase "any person" in this section. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

The Public Records Act does not give a governmental agency the discretionary

authority to decline to comply with an order for release of records to the public until a time when the agency has determined that release would be prudent or timely. North Carolina Press Ass'n v. Spangler, 94 N.C. App. 694, 381 S.E.2d 187, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

The North Carolina Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

A suit brought to compel the disclosure of public records under this section is not a special proceeding, but is a civil action to which the Rules of Civil Procedure apply and which requires service of a summons to commence the action. Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998), cert. denied, 349 N.C. 228, 515 S.E.2d 701 (1998).

Contract to Buy Practice Not Competitive Health Care Information. — Because nothing suggested that other hospitals or entities were competing for a doctor's medical practice or that a medical center's contract to buy the doctor's practice contained "financial terms" or health care information directly related to financial terms, the contract was not confidential as "competitive health care information" pursuant to G.S. 131E-97.3. Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 178 N.C. App. 621, 633 S.E.2d 682, 2006 N.C. App. LEXIS 1653 (2006).

Public Release of Clemency Records. — Subject matter jurisdiction existed over the question of whether the Governor was required to release certain records relating to applications for clemency pursuant to the North Carolina Public Records Law because resolving the relevant issues required the court to exercise its fundamental responsibility to determine the proper meaning of N.C. Const., Art. III, § 5(6); the case did not raise a political question by requiring the court to intrude upon the Governor's clemency powers, but only required the court to identify where to draw the line between the Executive Branch and the Legislature with respect to clemency, given the separation of powers doctrine. News & Observer Publ'g Co. v. Easley, — N.C. App. —, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

Cited in Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Housing Auth. v. Montgomery, 55 N.C. App. 422, 286 S.E.2d 114 (1982); North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985); Shella v. Moon, 125 N.C. App. 607, 481 S.E.2d 363 (1997); Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

§ 132-10. Qualified exception for geographical information systems.

Geographical information systems databases and data files developed and operated by counties and cities are public records within the meaning of this Chapter. The county or city shall provide public access to such systems by public access terminals or other output devices. Upon request, the county or city shall furnish copies, in documentary or electronic form, to anyone requesting them at reasonable cost. As a condition of furnishing an electronic copy, whether on magnetic tape, magnetic disk, compact disk, or photo-optical device, a county or city may require that the person obtaining the copy agree in writing that the copy will not be resold or otherwise used for trade or commercial purposes. For purposes of this section, publication or broadcast by the news media, real estate trade associations, or Multiple Listing Services operated by real estate trade associations shall not constitute a resale or use of the data for trade or commercial purposes and use of information without resale by a licensed professional in the course of practicing the professional's profession shall not constitute use for a commercial purpose. For purposes of this section, resale at cost by a real estate trade association or Multiple Listing Services operated by a real estate trade association shall not constitute a resale or use of the data for trade or commercial purposes. (1995, c. 388, s. 5; 1997-193, s. 1.)

Editor's Note. — Session Laws 1995, c. 151 which made a qualified public records exception from the public records act for the Geographical information systems of the cities of Concord, Greensboro, High Point and Salisbury and Cabarrus, Cumberland and Gulford Counties was essentially the same as this section.

Chapter 133.

Public Works.

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General Provisions.

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133-1.1. Certain buildings involving public funds to be designed, etc., by architect or engineer.
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Article 3.

Regulation of Contractors for Public Works.

133-23. Definition.
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ARTICLE 1.

General Provisions.

§ 133-1. Employment of architects, etc., on public works when interested in use of materials prohibited.

It shall be unlawful for any architect, engineer, or other individual, firm, or corporation providing design services for any city, county or State work supported wholly or in part with public funds, knowingly to specify any building materials, equipment or other items which are manufactured, sold or distributed by any firm or corporation in which such designer or specifier has a financial interest by reason of being a partner, officer, employee, agent or substantial stockholder. (1933, c. 66, s. 1; 1977, c. 730.)

Local Modification. — (As to this Chapter) New Hanover: 1983, c. 365; Tyrrell: 1983, c. 208; 1985, c. 120; 1987, c. 58, s. 1; Tyrrell County Board of Education: 1983, c. 580; 1985, c. 120; 1987, c. 58, s. 2.

§ 133-1.1. Certain buildings involving public funds to be designed, etc., by architect or engineer.

(a) In the interest of public health, safety and economy, every officer, board, department, or commission charged with the duty of approving plans and specifications or awarding or entering into contracts involving the expenditure of public funds in excess of:

(1) Three hundred thousand dollars ($300,000) for the repair of public buildings where such repair does not include major structural change in framing or foundation support systems, or five hundred thousand dollars ($500,000) for the repair of public buildings by The University of North Carolina or its constituent institutions where such repair does not include major structural change in framing or foundation support systems,

(1a) One hundred thousand dollars ($100,000) for the repair of public buildings affecting life safety systems,

(2) One hundred thirty-five thousand dollars ($135,000) for the repair of public buildings where such repair includes major structural change in framing or foundation support systems, or

(3) One hundred thirty-five thousand dollars ($135,000) for the construction of, or additions to, public buildings or State-owned and operated utilities,

shall require that such plans and specifications be prepared by a registered architect, in accordance with the provisions of Chapter 83A of the General Statutes, or by a registered engineer, in accordance with the provisions of Chapter 89C of the General Statutes, or by both architect and engineer, particularly qualified by training and experience for the type of work involved, and that the North Carolina seal of such architect or engineer together with the name and address of such architect or engineer, or both, be placed on all these plans and specifications.

(b)(1) On all projects requiring the services of an architect, an architect shall conduct frequent and regular inspections or such inspections as required by contract and shall issue a signed and sealed certificate of compliance to the awarding authority that:

a. The inspections of the construction, repairs or installations have been conducted with the degree of care and professional skill and judgment ordinarily exercised by a member of that profession; and

b. To the best of his knowledge and in the professional opinion of the architect, the contractor has fulfilled the obligations of such plans, specifications, and contract.

(2) On all projects requiring the services of an engineer, an engineer shall conduct frequent and regular inspections or such inspections as required by contract and shall issue a signed and sealed certificate of compliance to the awarding authority that:

a. The inspections of the construction, repairs, or installations have been conducted with the degree of care and professional skill and judgment ordinarily exercised by a member of that profession; and

b. To the best of his knowledge and in the professional opinion of the engineer, the contractor has fulfilled the obligations of such plans, specifications, and contract.

(3) No certificate of compliance shall be issued until the architect and/or engineer is satisfied that the contractor has fulfilled the obligations of such plans, specifications, and contract.

(c) The following shall be excepted from the requirements of subsection (a) of this section:

(1) Dwellings and outbuildings in connection therewith, such as barns and private garages.
(2) Apartment buildings used exclusively as the residence of not more than two families.
(3) Buildings used for agricultural purposes other than schools or assembly halls which are not within the limits of a city or an incorporated village.
(4) Temporary buildings or sheds used exclusively for construction purposes, not exceeding 20 feet in any direction, and not used for living quarters.
(5) Pre-engineered garages, sheds, and workshops up to 5,000 square feet used exclusively by city, county, public school, or State employees for purposes related to their employment. For pre-engineered garages, sheds, and workshops constructed pursuant to this subdivision, there shall be a minimum separation of these structures from other buildings or property lines of 30 feet.

(d) On projects on which no registered architect or engineer is required pursuant to the provisions of this section, the governing board or awarding authority shall require a certificate of compliance with the State Building Code from the city or county inspector for the specific trade or trades involved or from a registered architect or engineer, except that the provisions of this subsection shall not apply to projects where any of the following apply:

(1) The plans and specifications are approved by the Department of Administration, Division of State Construction, and the completed project is inspected by the Division of State Construction and the State Electrical Inspector.
(2) The project is exempt from the State Building Code.
(3) The project has a total projected cost of less than $100,000 and does not alter life safety systems.

(e) All plans and specifications for public buildings of any kind shall be identified by the name and address of the author thereof.

(f) Neither the designer nor the contractor involved shall receive his final payment until the required certificate of compliance shall have been received by the awarding authority.

(g) On all facilities which are covered by this Article, other than those listed in subsection (c) of this section and which require any job-installed finishes, the plans and specifications shall include the color schedule. (1953, c. 1339; 1957, c. 994; 1963, c. 752; 1973, c. 1414, s. 2; 1979, c. 891; 1981, c. 687; 1983 (Reg. Sess., 1984), c. 970, s. 1; 1989, c. 24; 1997-412, s. 11; 1998-212, s. 11.8(e); 2001-496, ss. 6, 8(e); 2003-305, s. 1; 2005-300, s. 1; 2007-322, s. 1.)

Editor's Note. — See Session Laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b), for the exemption of the Office of State Budget and Management from the requirements of this section when contracting for and supervising the design, construction, or demolition of prison facilities designated in c. 1086, s. 123, subdivisions (1)through (5) of subsection (a); the requirement that contracts for such work include a penalty for failure to complete the work by a specified date; the construction of dormitories to comply with the consent judgment in the case of HUBERT v. WARD; and the expiration of c. 1086, s. 123(b), upon completion of the capital projects designated in c. 1086, s. 123, subdivisions (1) through (5) of subsection (a).

Session Laws 1989, c. 754, s. 28(a) provided: "(a) Of the funds appropriated in Section 4 of this act to the Office of State Budget and Management for the purpose of construction of prison facilities, the Office of State Budget and Management may contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of prison facilities without being subject to the requirements of the following statutes and rules implementing those statutes: G.S. 143-135.26(1), 143-128, 143-129, 143-132, 143-134, 143-131, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g). All contracts for the design, construction, or demolition of these facilities shall include a penalty for failure to complete the work by a specified date."

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in the implementation of providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of State Budget and Management from the requirements of subsection (b) of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b).

As to exemption of the Office of State Construction of the Department of Administration from subsection (g) of this section to the extent necessary to expedite delivery with respect to construction of certain state prison and youth service facilities, see Session Laws 1993, c. 550, s. 6.

As to exemption of the Office of State Construction of the Department of Administration from the requirements of subsection (g) of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, and 143-408.1 through 143-408.7.

Session Laws 1996, Second Extra Session, c. 18, s. 23.4(a), provides in part that the Department of Justice, in consultation with the Office of State Construction of the Department of Administration, shall contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of all facilities in order to implement the repairs and renovations of the Western Justice Academy without being subject to this statute.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1997-412, s. 14, provided that s. 11 of that act, which amended subsection (d), would expire July 1, 2001.

As to exemption of the Office of State Construction of the Department of Administration from subsection (g) and rules implementing subsection (g), to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

Session Laws 2001-496, s. 14, which provided that the amendments to subsection (d) of this section by Session Laws 2001-496, s. 8(e), would expire December 31, 2006, was subsequently amended by Session Laws 2005-300, s. 1, to delete the expiration clause.

Session Laws 2001-496, s. 13.1, is a severability clause.

Effect of Amendments. — Session Laws 2007-322, s. 1, effective July 30, 2007, applicable to construction projects for which bids or proposals are solicited on or after July 30, 2007, added "or five hundred thousand dollars ($500,000) for the repair of public buildings by The University of North Carolina or its constituent institutions where such repair does not include major structural change in framing or foundation support systems," at the end of subdivision (a)(1).

CASE NOTES

Applied in Barrett v. Craven County Bd. of Educ., 70 F.R.D. 466 (E.D.N.C. 1976).

Cited in Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972).

OPINIONS OF ATTORNEY GENERAL

Rest Area Structures Are Public Buildings Within the Meaning of This Section. — See opinion of Attorney General to Mr. John Davis, Chief Engineer, State Highway Commission, 40 N.C.A.G. 541 (1970).

Application of Subsection (g). — Subsection (g) of this section, which requires plans and specifications for the construction or repair of certain public buildings to include a "color schedule" for "job-installed finishes," applies to all finished material incorporated into the construction work at the site, such as paint, wall covering, flooring, tile, laminates and paneling. See opinion of Attorney General to Mr. Edward E. Hollowell, Attorney for Wake County Hospital, Inc., 49 N.C.A.G. 78 (1979).

§ 133-2. Drawing of plans by material furnisher prohibited.

It shall be unlawful for any architect, engineer, designer or draftsman, employed on county, State, or city works, to employ or allow any manufacturer, his representatives or agents, to write, plan, draw, or make specifications for such works or any part thereof. (1933, c. 66, s. 2.)

§ 133-3. Specifications to carry competitive items; substitution of materials.

All architects, engineers, designers, or draftsmen, when providing design services, or writing specifications, directly or indirectly, for materials to be used in any city, county or State work, shall specify in their plans the required performance and design characteristics of such materials. However, when it is impossible or impractical to specify the required performance and design characteristics for such materials, then the architect, engineer, designer or draftsman may use a brand name specification so long as they cite three or more examples of items of equal design or equivalent design, which would establish an acceptable range for items of equal or equivalent design. The specifications shall state clearly that the cited examples are used only to denote the quality standard of product desired and that they do not restrict bidders to a specific brand, make, manufacturer or specific name; that they are used only to set forth and convey to bidders the general style, type, character and quality of product desired; and that equivalent products will be acceptable. Where it is impossible to specify performance and design characteristics for such materials and impossible to cite three or more items due to the fact that there are not that many items of similar or equivalent design in competition, then as many items as are available shall be cited. On all city, county or State works, the maximum interchangeability and compatibility of cited items shall be required. The brand of product used on a city, county or State work shall not limit competitive bidding on future works. Specifications may list one or more preferred brands as an alternate to the base bid in limited circumstances. Specifications containing a preferred brand alternate under this section must identify the performance standards that support the preference. Performance standards for the preference must be approved in advance by the owner in an open meeting. Any alternate approved by the owner shall be approved only where (i) the preferred alternate will provide cost savings, maintain or improve the functioning of any process or system affected by the preferred item or items, or both, and (ii) a justification identifying these criteria is made available in writing to the public. Substitution of materials, items, or equipment of equal or equivalent design shall be submitted to the architect or engineer for approval or disapproval; such approval or disapproval shall be made by the architect or engineer prior to the opening of bids. The purpose of this statute is to mandate and encourage free and open competition on public contracts. (1933, c. 66, s. 3; 1951, c. 1104, s. 5; 1993, c. 334, s. 7.1; 2002-107, s. 5; 2002-159, s. 64(c).)

§ 133-4. Violation of Chapter made misdemeanor.

Any person, firm, or corporation violating the provisions of this Chapter shall be guilty of a Class 3 misdemeanor and upon conviction, license to practice his profession in this State shall be withdrawn for a period of one year and he shall only be subject to a fine of not more than five hundred dollars ($500.00). (1933, c. 66, s. 4; 1993, c. 539, s. 969; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Violation a Crime. — This section makes the violation of the provisions of Chapter 133, and the provisions of Chapter 83A, and its rules and regulations by incorporation by reference, a crime calling for specific punishment. Barrett v. Craven County Bd. of Educ., 70 F.R.D. 466 (E.D.N.C. 1976).

Applied in Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972).

§ 133-4.1. Guaranteed energy savings contracts.

Except for G.S. 133-1 and [G.S.] 133-1.1, the provisions of this Article shall not apply to energy conservation measures undertaken as part of a guaranteed energy savings contract entered into pursuant to the provisions of Part 2 of Article 3B of Chapter 143 of the General Statutes. (1993 (Reg. Sess., 1994), c. 775, s. 8; 2002-161, s. 11.1.)

Editor's Note. — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

ARTICLE 2.

Relocation Assistance.

§ 133-5. Short title.

This Article shall be cited as "The Uniform Relocation Assistance and Real Property Acquisition Policies Act." (1971, c. 1107, s. 1.)

Local Modification. — (As to this Article)
Durham: 1989, c. 513.

CASE NOTES

Relocation Assistance Act Held Constitutional. — See Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533, cert. denied, 285 N.C. 590, 205 S.E.2d 723 (1974).

§ 133-6. Declaration of purpose.

The purpose of this Article is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of public works programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to insure continuing eligibility for federal aid funds to the State and its agencies and subdivisions. (1971, c. 1107, s. 1.)

CASE NOTES

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974); Henry v. North Carolina Dep't of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-7. Definitions.

As used in this Article:

(1) "Agency" means the State of North Carolina or any board, bureau, commission, institution, or other agency of the State, or any board or governing body of a political subdivision of the State, or an agency, commission, or authority of a political subdivision of the State.

(2) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

a. For the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

b. For the sale of services to the public;

c. By a nonprofit organization; or

d. Solely for the purposes of G.S. 133-8(a), for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(3)a. "Displaced person" means, except as provided in subdivision (a)(ii) —

(i) Any person who moves from real property, or moves his personal property from real property — (A) as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by an agency; or (B) on which such person is a residential tenant or conducts a small business, a farm operation, or business defined in G.S. 133-7(2)(d) as a direct result of rehabilitation, demolition, or such other displacing activity as the agency may prescribe, under a program or project undertaken by an agency in any case in which the agency determines that such displacement is permanent; and

(ii) Solely for the purposes of G.S. 133-8(a) and (b) and G.S. 133-11, any person who moves from real property, or moves his personal property from real property — (A) as a direct result of a written notice of intent to acquire or the acquisition of other real property, in whole or in part, on which such person conducts a business or farm operation, for a program or project undertaken by an agency; or (B) as a direct result of rehabilitation, demolition, or such other displacing activity as the agency may prescribe, of other real property on which such person conducts a business or farm operation, under a program or project undertaken by an agency where the agency determines that such displacement is permanent.

b. The term "displaced person" does not include —

(i) A person who has been determined, according to criteria established by the agency, to be either unlawfully occupying the displacement dwelling or to have occupied such dwelling for the purpose of obtaining assistance under this Article;

(ii) In any case in which the agency acquires property for a program or project, any person (other than a person who was an occupant of such property at the time it was acquired) who occupies such property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project.

(4) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities,

including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(5) "Person" means any individual, partnership, corporation or association.

(6) "Program or project" for the purpose of this Article shall mean any construction or rehabilitation project undertaken by an agency, as herein defined or the utilization of real property by an agency for any other public purposes, and to which program or project the agency makes this Article applicable.

(7) "Relocation officer" means the head of the department delegated the authority to carry out relocation policies by the agency.

(8) "Comparable replacement dwelling" means any dwelling that is (i) decent, safe, and sanitary; (ii) adequate in size to accommodate the occupants; (iii) within the financial means of the displaced person; (iv) functionally equivalent; (v) in an area not subject to unreasonably adverse environmental conditions; and (vi) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

(9) "Appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

(10) "Lead agency" means the North Carolina Department of Transportation. The lead agency shall issue such rules and regulations as may be necessary to carry out this Article and to comply with federal aid regulations. (1971, c. 1107, s. 1; 1989, c. 28, s. 1.)

Editor's Note. — The reference to G.S. 133-7(2)(d) found in subdivision (3)a(i) of this section was apparently meant to be to G.S. 133-7(2)d.

CASE NOTES

The definition of "displaced person" does not unconstitutionally discriminate against persons who are forced to move from real property before January 1, 1972, by denying to them but granting to others who moved from the property "on or after January 1, 1972" assistance under the various provisions of the Relocation Assistance Act. Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533, cert. denied, 285 N.C. 590, 205 S.E.2d 723 (1974).

§ 133-8. Moving and related expenses.

(a) Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency shall make a payment to any displaced person, upon application as approved by the head of the agency for:

(1) Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the relocation officer; and

(3) Actual reasonable expenses in searching for a replacement business or farm in accordance with criteria established by the lead agency, but not to exceed two thousand five hundred dollars ($2,500); and

(4) Actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, in accordance with criteria to be established by the lead agency, but not to exceed ten thousand dollars ($10,000).

(b) Any displaced person eligible for payments under subsection (a) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive an expense and dislocation allowance, which shall be determined according to a schedule established by the lead agency.

(c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from the person's place of business or farm operation and who is eligible under criteria established by the lead agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section. Such payment shall consist of a fixed payment in an amount to be determined according to criteria established by the lead agency, except that such payment shall not be less than one thousand dollars ($1,000) nor more than twenty thousand dollars ($20,000). A person whose sole business at the displacement dwelling is the rental of such property to others shall not qualify for a payment under this subsection. (1971, c. 1107, s. 1; 1989, c. 28, s. 2; 2005-331, s. 1.)

CASE NOTES

Relocation Payments in Discretion of Agency Officials. — Subsections (a), (b), and (c) of this section commit the matter of relocation assistance payments absolutely and solely to the discretion of the officials of the agency involved. This section confers no right either to receive such payments or to demand that the amount of payments, if granted, be calculated other than as the agency officials determine. Henry v. North Carolina Dep't of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979), cert. denied, 299 N.C. 330, 265 S.E.2d 396 (1980).

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974).

§ 133-9. Replacement housing for homeowners.

(a) In addition to payments otherwise authorized by this Article and subject to the provisions of G.S. 133-10.1 the agency shall make an additional payment not in excess of twenty-two thousand five hundred dollars ($22,500) to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than 180 days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements:

(1) The amount, if any, which when added to the acquisition cost of the dwelling acquired by the agency, equals the reasonable cost of a comparable replacement dwelling. All determinations required to carry out this section shall be made in accordance with standards established by the lead agency.

(2) The amount, if any, which will compensate such displaced person for any increased interest costs and other debt service costs which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount shall be paid only if the dwelling acquired by the agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than 180 days immediately prior to the initiation of negotiations for the acquisition of such dwelling in accordance with criteria to be established by the lead agency.

(3) Reasonable expenses incurred by such displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(b) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a comparable replacement dwelling within one year after the date on which such person receives final payment from the agency for the acquired dwelling, except that the agency may extend such period for good cause. If such period is extended, the payment under this section shall be based on the costs, of relocating the person to a comparable replacement dwelling within one year of such date.

(c) The agency may, in cooperation with any federal agency upon application by a mortgagee, insure any mortgage (including advances during construction) on a comparable replacement dwelling executed by a displaced person assisted under this section, which mortgage is eligible for insurance under any federal law administered by such agency notwithstanding any requirements under such law relating to age, physical condition, or other personal characteristics of eligible mortgagors, and may make commitments for the insurance of such mortgage prior to the date of execution of the mortgage. (1971, c. 1107, s. 1; 1981, c. 101, s. 1; 1989, c. 28, s. 3.)

Local Modification. — City of Durham: 1993, c. 304, s. 1.

CASE NOTES

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974).

§ 133-10. Replacement housing for tenants and certain others.

(a) In addition to amounts otherwise authorized by this Article, the agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under G.S. 133-9 which dwelling was actually and lawfully occupied by such displaced person for not less than 90 days immediately prior to (1) the initiation of negotiations for acquisition of such dwelling, or (2) in any case in which displacement is not a direct result of acquisition, such other event as the agency shall prescribe. Such payment shall consist of the amount necessary to enable such person to lease or rent for a period not to exceed 42 months, a comparable replacement dwelling, but not to exceed five thousand two hundred fifty dollars ($5,250). At the discretion of the agency, a payment under this subsection may be made in periodic installments. Computation of a payment under this subsection to a low-income displaced person for a comparable replacement dwelling shall take into account such person's income.

(b) Any person eligible for a payment under subsection (a) of this section may elect to apply such payment to a down payment on, and other incidental expenses pursuant to, the purchase of a comparable replacement dwelling. Any such person may, at the discretion of the agency, be eligible under this subsection for the maximum payment allowed under subsection (a), except that, in the case of a displaced homeowner who has owned and occupied the displacement dwelling for at least 90 days but not more than 180 days immediately prior to the initiation of negotiations for the acquisition of such dwelling, such payment shall not exceed the payment such person would otherwise have received under G.S. 133-9(a) had the person owned and occupied the displacement dwelling 180 days prior to the initiation of such negotiations. (1971, c. 1107, s. 1; 1981, c. 101, s. 2; 1989, c. 28, s. 4.)

CASE NOTES

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974).

§ 133-10.1. Authorization for replacement housing.

(a) As a last resort, if a project cannot proceed to actual construction because of the lack of availability of comparable sale or rental housing, or because required federal-aid payments are in excess of those otherwise authorized by this Article, the State of North Carolina and its agencies may:

(1) Undertake through private contractors, after competitive bidding, to provide for the construction and renovation of the necessary housing,

(2) Purchase sites and improvements after publishing in a newspaper of general circulation in the county in which such sites are located a public notice of the proposed transaction, including a description of the sites and improvements to be purchased, the owner or owners thereof, the terms of the transaction including the price and date of the proposed purchase, and a brief description of the factors upon which the agency has based its determination that such housing is not otherwise available, and

(3) Sell or lease the premises to the displaced person upon such terms as the agency deems necessary.

(4) Exceed the limitation in G.S. 133-9(a) and 133-10.

(b) Cities, counties and other local governments and agencies may comply with and provide assistance authorized under the Federal Uniform Relocation and Real Property Acquisition Policy Act of 1970, as amended, for last resort housing. (1975, c. 515; 1981, c. 101, ss. 3, 4; 1989, c. 28, s. 5.)

§ 133-11. Relocation assistance advisory services.

(a) Programs or projects undertaken by an agency shall be planned in a manner that (1) recognizes, at any early stage in the planning of such programs or projects and before the commencement of any actions which will cause displacements of individuals, families, businesses, and farm operations, and (2) provides for the resolution of such problems in order to minimize adverse impacts on displaced persons and to expedite program or project advancement and completion.

(b) Agencies shall ensure that the relocation assistance advisory services described in subsection (c) of this section are made available to all persons displaced by such agency. If such agency determines that any person occupying property immediately adjacent to the property where the displacing activity occurs suffers substantial economic injury as a result thereof, the agency may make such advisory services available to that person.

(c) Each relocation assistance advisory program required by subsection (b) of this section shall include such measures, facilities, or services as may be necessary or appropriate in order to:

(1) Determine, and make timely recommendations on, the needs and preferences, if any, of displaced persons for relocation assistance;

(2) Provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations;

(3) Assist a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location;

(4) Supply (i) information concerning federal, State, and local programs which may be of assistance to displaced persons, and (ii) technical assistance to such persons in applying for assistance under such programs;

(5) Provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation; and

(6) The agency shall coordinate relocation activities performed by such agency with other federal, State, or local governmental actions in the community which could affect the efficient and effective delivery of relocation assistance and related services.

(d) Notwithstanding G.S. 133-7(3)b, in any case in which a displacing agency acquires property for a program or project, any person who occupies such property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project shall be eligible for advisory services to the extent determined by the agency. (1971, c. 1107, s. 1; 1989, c. 28, s. 6.)

CASE NOTES

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974).

§ 133-12. Expenses incidental to transfer of property.

(a) In addition to amounts otherwise authorized by this Article, the agency is authorized to reimburse or to pay on behalf of the owners of real property acquired for a program or project for reasonable and necessary expenses incurred for:

(1) Recording fees, transfer taxes, and similar expenses incidental to conveying such property;

(2) Penalty costs for prepayment of any preexisting mortgage recorded and entered into in good faith encumbering such real property; and

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to vesting of title in the agency, or the effective date of possession of such real property by the agency, whichever is earlier.

(b) Local taxing authorities shall accept prepayment of the agency's estimate of the amount of any taxes not levied but constituting a lien against real estate acquired by the agency, or the agency's estimate of its pro rata portion of such taxes, and such prepayment shall be applied to such taxes upon levy being made. (1971, c. 1107, s. 1.)

CASE NOTES

Cited in Quick v. City of Charlotte, 21 N.C. App. 401, 204 S.E.2d 533 (1974).

§ 133-13. Administration.

(a) The agency may enter into contracts with any individual, firm, association or corporation for services in connection with relocation assistance programs.

(b) The agency shall in carrying out relocation assistance activities utilize, whenever practicable, the services of other State or local agencies having experience in the administration or conduct in similar housing assistance activities.

(c) In acquisition of right-of-way for any State highway project, a municipality making the acquisition shall be vested with the same authority to render such services and to make such payments as is given the Board of Transportation in this Article. Such municipalities furnishing right-of-way are authorized to enter into contracts with any other municipal corporation, or State or federal agency, rendering such services. (1971, c. 1107, s. 1; 1973, c. 507, s. 5.)

§ 133-14. Regulations and procedures.

The agency is authorized to adopt such rules and regulations as it deems necessary and appropriate to carry out the provisions of this Article. The agency is authorized and empowered to adopt all or any part of applicable federal rules and regulations which are necessary or desirable to implement this Article. Such rules and regulations shall include, but not be limited to, provisions relating to:

(1) Payments authorized by this Article to assure that such payments shall be fair and reasonable and as uniform as possible on those projects to which this Article is applicable;
(2) Prompt payment after a move to displaced persons who make proper application and are entitled to payment, or, in hardship cases, payment in advance;
(3) Moving expense and allowances as provided for in G.S. 133-8;
(4) Standards for decent, safe and sanitary dwelling;
(5) Eligibility of displaced persons for relocation assistance payments, the procedure for such persons to claim such payments, and the amounts thereof;
(6) Procedure for an aggrieved displaced person to have his determination of eligibility or amount of payment reviewed by the agency head or its administrative officer;
(7) Projects or classes of projects on which payments as herein provided will be made. (1971, c. 1107, s. 1; 1973, c. 1446, s. 8.)

CASE NOTES

Cited in Henry v. North Carolina Dep't of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-15. Payments not to be considered as income.

No payment received under this Article shall be considered as income for the purposes of the State income tax law; nor shall such payments be considered as income or resources to any recipient of public assistance and such payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under the provisions of Chapter 108 of the General Statutes. (1971, c. 1107, s. 1.)

Editor's Note. — Chapter 108, referred to in this section, was repealed and recodified by Session Laws 1981, c. 275, ss. 1 to 3. Parts 1A, 2, and 3 of Article 3 of Chapter 108 were recodified as Chapters 131C and 131D, and Article 6 of Chapter 108 was recodified as Part 26 of Article 7 of Chapter 143B (now repealed).

§ 133-16. Real property furnished to the federal government.

Whenever real property is acquired by an agency and furnished as a required contribution to a federal project, the agency has the authority to make all payments and to provide all assistance in the same manner and to the same extent as in cases of acquisition by the agency of real property for a federal aid project. (1971, c. 1107, s. 1.)

§ 133-17. Administrative payments.

Nothing contained in this Article shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of this Article. Payments made and services rendered under this Article are administrative payments and in addition to just compensation as provided by the law of eminent domain. Nothing contained in this Article shall be construed as creating any right enforceable in any court and the determination of the agency under the procedure provided for in G.S. 133-14 shall be conclusive and not subject to judicial review. (1971, c. 1107, s. 1.)

CASE NOTES

Cited in Henry v. North Carolina Dep't of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979).

§ 133-18. Additional payments by political subdivision.

The additional payments required under G.S. 133-8, 133-9, and 133-10 shall not be mandatory for political subdivisions of the State unless federal law makes such payments a condition of federal funding. (1989, c. 28, s. 7.)

§§ 133-19 through 133-22: Reserved for future codification purposes.

ARTICLE 3.

Regulation of Contractors for Public Works.

§ 133-23. Definition.

(a) The term "governmental agency" shall include the State of North Carolina, its agencies, institutions, and political subdivisions, all municipal corporations and all other public units, agencies and authorities which are authorized to enter into public contracts for construction or repair or for procurement of goods or services.

(b) The term "person" shall mean any individual, partnership, corporation, association, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

(c) The term "subsidiary" shall mean a corporation with respect to which another corporation by virtue of its shareholdings alone has legal power, either directly or indirectly through another corporation or series of other corporations, domestic or foreign, to elect a majority of the directors. A corporation is a subsidiary of each such corporation, including any corporation through which this legal power may be indirectly exercised. (1981, c. 764, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 38.)

§ 133-24. Government contracts; violation of G.S. 75-1 and 75-2.

Every person who shall engage in any conspiracy, combination, or any other act in restraint of trade or commerce declared to be unlawful by the provisions of G.S. 75-1 and 75-2 shall be guilty of a felony under this section where the combination, conspiracy, or other unlawful act in restraint of trade involves:

(1) A contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a governmental agency;

(2) A subcontract for the purchase of equipment, goods, services or materials or for construction or repair with a prime contractor or proposed prime contractor for a governmental agency. (1981, c. 764, s. 1.)

§ 133-25. Conviction; punishment.

(a) Upon conviction of violating G.S. 133-24, any person shall be punished as a Class H felon. The court may also impose a fine of up to one hundred thousand dollars ($100,000) on any convicted individual and a fine of up to one million dollars ($1,000,000) on any convicted corporation. Any fine imposed pursuant to this section shall not be deductible on a State income tax return for any purpose.

(b) For a period of up to three years from the date of conviction, said period to be determined in the discretion of the court, no person shall be eligible to enter into a contract with any governmental agency, either directly as a contractor or indirectly as a subcontractor, if that person has been convicted of violating G.S. 133-24.

(c) In the event an individual is convicted of violating G.S. 133-24, the court may, in its discretion, for a period of up to three years from the date of conviction, provide that the individual shall not be employed by a corporation as an officer, director, employee or agent, if that corporation engages in public construction or repair contracts with a governmental agency, either directly as a contractor or indirectly as a subcontractor.

(d) The court shall also have authority to direct the appropriate contractor's licensing board to suspend the license of any contractor convicted of violating G.S. 133-24 for a period of up to three years from the date of conviction. (1981, c. 764, s. 1.)

§ 133-26. Individuals convicted may not serve on licensing boards.

No individual shall be eligible to serve as a member of any contractor's licensing board who has been convicted of criminal charges involving either:

(1) A conspiracy in restraint of trade in the courts of this State in violation of G.S. 75-1, 75-2, or 133-24, or similar charges in any federal court or in any other state court; or

(2) Bribery or commercial bribery in violation of G.S. 14-218 or 14-353 in the courts of this State, or of similar charges in any federal court or the court of any other state. (1981, c. 764, s. 1.)

§ 133-27. Suspension from bidding.

Any governmental agency shall have the authority to suspend for a period of up to three years from the date of conviction any person and any subsidiary or affiliate of any person from further bidding to the agency and from being a subcontractor to a contractor for the agency and from being a supplier to the agency if that person or any officer, director, employee or agent of that person has been convicted of charges of engaging in any conspiracy, combination, or other unlawful act in restraint of trade or of similar charges in any federal court or a court of any other state.

A governmental agency may order a temporary suspension of any contractor, subcontractor, or supplier or subsidiary or affiliate thereof charged in an indictment or an information with engaging in any conspiracy, combination, or other unlawful act in restraint of trade or of similar charges in any federal court or a court of this or any other state until the charges are resolved.

The provisions of this section are in addition to and not in derogation of any other powers and authority of any governmental agency. (1981, c. 764, s. 1.)

§ 133-28. Civil damages; liability; statute of limitations.

(a) Any governmental agency entering into a contract which is or has been the subject of a conspiracy prohibited by G.S. 75-1 or 75-2 shall have a right of action against the participants in the conspiracy to recover damages, as provided herein. The governmental agency shall have the option to proceed jointly and severally in a civil action against any one or more of the participants for recovery of the full amount of the damages. There shall be no right to contribution among participants not named defendants by the governmental agency.

(b) At the election of the governmental agency, the measure of damages recoverable under this section shall be either the actual damages or ten percent (10%) of the contract price which shall be trebled as provided in G.S. 75-16.

(c) The cause of action shall accrue at the time of discovery of the conspiracy by the governmental agency which entered into the contract. The action shall be brought within six years of the date of accrual of the cause of action. (1981, c. 764, s. 1; 1993, c. 441, s. 1.)

§ 133-29. Reporting of violations of G.S. 75-1 or 75-2.

Any person having knowledge of acts committed in violation of G.S. 75-1 or 75-2 involving a contract with a governmental agency who reports the same to that governmental agency and assists in any resulting proceedings may receive a reward as set forth herein. The governmental agency is authorized to pay to the informant up to twenty-five percent (25%) of any civil damages that it collects from the violator named by the informant by reason of the information furnished by the informant. The information and knowledge to be reported includes but is not limited to any agreement or proposed agreement or offer or request for agreement among contractors, subcontractors or suppliers to rotate bids, to share the profits with a contractor not the low bidder, to sublet work in advance of bidding as a means of preventing competition, to refrain from bidding, to submit prearranged bids, to submit complimentary bids, to set up territories to restrict competition, or to alternate bidding. (1981, c. 764, s. 1.)

§ 133-30. Noncollusion affidavits.

Noncollusion affidavits may be required by rule of any governmental agency from all prime bidders. Any such requirement shall be set forth in the invitation to bid. Failure of any bidder to provide a required affidavit to the governmental agency shall be grounds for disqualification of his bid. The provisions of this section are in addition to and not in derogation of any other powers and authority of any governmental agency. (1981, c. 764, s. 1.)

§ 133-31. Perjury; punishment.

Any person who shall willfully commit perjury in any affidavit taken pursuant to this Article or rules pursuant thereto shall be guilty of a felony and shall be punished as a Class I felon. (1981, c. 764, s. 1; 1993, c. 539, s. 1307; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 133-32. Gifts and favors regulated.

(a) It shall be unlawful for any contractor, subcontractor, or supplier who:

(1) Has a contract with a governmental agency; or
(2) Has performed under such a contract within the past year; or
(3) Anticipates bidding on such a contract in the future

to make gifts or to give favors to any officer or employee of a governmental agency who is charged with the duty of:

(1) Preparing plans, specifications, or estimates for public contract; or
(2) Awarding or administering public contracts; or
(3) Inspecting or supervising construction.

It shall also be unlawful for any officer or employee of a governmental agency who is charged with the duty of:

(1) Preparing plans, specifications, or estimates for public contracts; or
(2) Awarding or administering public contracts; or
(3) Inspecting or supervising construction

willfully to receive or accept any such gift or favor.

(b) A violation of subsection (a) shall be a Class 1 misdemeanor.

(c) Gifts or favors made unlawful by this section shall not be allowed as a deduction for North Carolina tax purposes by any contractor, subcontractor or supplier or officers or employees thereof.

(d) This section is not intended to prevent a gift a public servant would be permitted to accept under G.S. 138A-32, or the gift and receipt of honorariums for participating in meetings, advertising items or souvenirs of nominal value, or meals furnished at banquets. This section is not intended to prevent any contractor, subcontractor, or supplier from making donations to professional organizations to defray meeting expenses where governmental employees are members of such professional organizations, nor is it intended to prevent governmental employees who are members of professional organizations from participation in all scheduled meeting functions available to all members of the professional organization attending the meeting. This section is also not intended to prohibit customary gifts or favors between employees or officers and their friends and relatives or the friends and relatives of their spouses, minor children, or members of their household where it is clear that it is that relationship rather than the business of the individual concerned which is the motivating factor for the gift or favor. However, all such gifts knowingly made or received are required to be reported by the donee to the agency head if the gifts are made by a contractor, subcontractor, or supplier doing business directly or indirectly with the governmental agency employing the recipient of such a gift. (1981, c. 764, s. 1; 1987, c. 399, s. 1; 1993, c. 539, s. 970; 1994, Ex. Sess., c. 24, s. 14(c); 2007-348, s. 18.)

Effect of Amendments. — Session Laws 2007-348, s. 18, effective December 1, 2007, inserted "a gift a public servant would be permitted to accept under G.S. 138A-32" in the first sentence of subsection (d).

§ 133-33. Cost estimates; bidders' lists.

Any governmental agency responsible for letting public contracts may promulgate rules concerning the confidentiality of:

(1) The agency's cost estimate for any public contracts prior to bidding; and

(2) The identity of contractors who have obtained proposals for bid purposes for a public contract.

If the agency's rules require that such information be kept confidential, an employee or officer of the agency who divulges such information to any unauthorized person shall be subject to disciplinary action. This section shall not be construed to require that cost estimates or bidders' lists be kept confidential. (1981, c. 764, s. 1.)

Chapter 134.

Youth Development.

§§ 134-1 through 134-39: Recodified as G.S. 134A-1 to 134A-39.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 742, effective July 1, 1975, and recodified as Chapter 134A. Chapter 134A was subsequently repealed by Session Laws 1998-202, s. 1(a); see notes under G.S. 134A-1 through 134A-39.

Chapter 134A.

Youth Services.

§§ 134A-1 through 134A-39: Repealed by Session Laws 1998-202, s. 1(a), effective January 1, 1999.

Cross References. — As to the Department of Juvenile Justice and Delinquency Prevention, see G.S. 143B-511 et seq.

Editor's Note. — The following sections were formerly repealed by Session Laws 1977, c. 627, s. 5: G.S. 134A-3 through 134A-5, 134A-7, 134A-10 through 14. The following sections were formerly repealed by Session Laws 1979, c. 815, s. 3: G.S. 134A-18, 134A-19, 134A-23, 134A-24, 134A-27, 134A-28.

Chapter 135.

Retirement System for Teachers and State Employees; Social Security; Health Insurance Program for Children.

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Article 1.

Retirement System for Teachers and State Employees.

§ 135-1. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Accumulated contributions" shall mean the sum of all the amounts deducted from the compensation of a member and accredited to his individual account in the annuity savings fund, together with regular interest thereon as provided in G.S. 135-8.

(2) "Actuarial equivalent" shall mean a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the Board of Trustees, and regular interest.

(3) "Annuity" shall mean payments for life derived from that "accumulated contribution" of a member. All annuities shall be payable in equal monthly installments.

(4) "Annuity reserve" shall mean the present value of all payments to be made on account of any annuity or benefit in lieu of any annuity, computed upon the basis of such mortality tables as shall be adopted by the Board of Trustees, and regular interest.

(5) "Average final compensation" shall mean the average annual compensation of a member during the four consecutive calendar years of membership service producing the highest such average; but shall not include any compensation, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages. In the event a member is or has been in receipt of a benefit under the provisions of G.S. 135-105 or G.S. 135-106, the compensation used in the calculation of "average final compensation" shall be the higher of compensation of the member under the provisions of this Article or compensation used in calculating the payment of benefits under Article 6 of this Chapter as adjusted for percentage increases in the post disability benefit.

(6) "Beneficiary" shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter.

(7) "Board of Trustees" shall mean the Board provided for in G.S. 135-6 to administer the Retirement System.

(7a) a. "Compensation" shall mean all salaries and wages prior to any reduction pursuant to sections 125, 401(k), 403(b), 414(h)(2), and 457 of the Internal Revenue Code, not including any terminal payments for unused sick leave, derived from public funds which are earned by a member of the Retirement System for service as an employee or teacher in the unit of the Retirement System for which he is performing full-time work. In addition to the foregoing, "compensation" shall include:

1. Performance-based compensation (regardless of whether paid in a lump sum, in periodic installments, or on a monthly basis);
2. Conversion of additional benefits to salary (additional benefits such as health, life, or disability plans), so long as the benefits are other than mandated by State law or regulation;
3. Payment of tax consequences for benefits provided by the employer, so long as they constitute an adjustment or increase in salary and not a "reimbursement of expenses";

4. Payout of vacation leave so long as such payouts are permitted by applicable law and regulation; and
5. Employee contributions to eligible deferred compensation plans.

b. "Compensation" shall not include any payment, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages. "Compensation" includes all special pay contribution of annual leave made to a 401(a) Special Pay Plan for the benefit of an employee. Notwithstanding any other provision of this Chapter, "compensation" shall not include:

1. Supplement/allowance provided to employee to purchase additional benefits such as health, life, or disability plans;
2. Travel supplement/allowance (nonaccountable allowance plans);
3. Employer contributions to eligible deferred compensation plans;
4. Employer-provided fringe benefits (additional benefits such as health, life, or disability plans);
5. Reimbursement of uninsured medical expenses;
6. Reimbursement of business expenses;
7. Reimbursement of moving expenses;
8. Reimbursement/payment of personal expenses;
9. Incentive payments for early retirement;
10. Bonuses paid incident to retirement;
11. Contract buyout/severance payments; and
12. Payouts for unused sick leave.

c. In the event an employer reports as "compensation" payments not specifically included or excluded as "compensation", such payments shall be "compensation" for retirement purposes only if the employer pays the Retirement System the additional actuarial liability created by such payments.

(8) "Creditable service" shall mean the total of "prior service" plus "membership service" plus service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 135-4. In no event, however, shall "creditable service" be deemed "membership service" for the purpose of determining eligibility for benefits accruing under this Chapter.

(9) "Earnable compensation" shall mean the full rate of the compensation that would be payable to a teacher or employee if he worked in full normal working time. In cases where compensation includes maintenance, the Board of Trustees shall fix the value of that part of the compensation not paid in money.

(10) "Employee" shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments, bureaus and institutions other than educational, whether such employees are elected, appointed or employed: Provided that the term "employee" shall not include any person who is a member of the Consolidated Judicial Retirement System, any member of the General Assembly or any part-time or temporary employee. Notwithstanding any other provision of law, "employee" shall include all employees of the General Assembly except participants in the Legislative Intern Program, pages, and beneficiaries in receipt of a monthly retirement allowance under this Chapter who are reemployed on a temporary basis. In all cases of doubt, the Board of Trustees shall determine whether any person is an employee as defined in this Chapter. "Employee shall also

mean every full-time civilian employee of the army national guard and air national guard of this State who is employed pursuant to section 709 of Title 32 of the United States Code and paid from federal appropriated funds, but held by the federal authorities not to be a federal employee: Provided, however, that the authority or agency paying the salaries of such employees shall deduct or cause to be deducted from each employee's salary the employee's contribution in accordance with applicable provisions of G.S. 135-8 and remit the same, either directly or indirectly, to the Retirement System; coverage of employees described in this sentence shall commence upon the first day of the calendar year or fiscal year, whichever is earlier, next following the date of execution of an agreement between the Secretary of Defense of the United States and the Adjutant General of the State acting for the Governor in behalf of the State, but no credit shall be allowed pursuant to this sentence for any service previously rendered in the above-described capacity as a civilian employee of the national guard: Provided, further, that the Adjutant General, in his discretion, may terminate the Retirement System coverage of the above-described national guard employees if a federal retirement system is established for such employees and the Adjutant General elects to secure coverage of such employees under such federal retirement system. Any full-time civilian employee of the national guard described above who is now or hereafter may become a member of the Retirement System may secure Retirement System credit for such service as a national guard civilian employee for the period preceding the time when such employees became eligible for Retirement System coverage by paying to the Retirement System an amount equal to that which would have constituted employee contributions if he had been a member during the years of ineligibility, plus interest. Employees of State agencies, departments, institutions, boards, and commissions who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision. On and after August 1, 2001, a person who is a nonimmigrant alien and who otherwise meets the requirements of this subdivision shall not be excluded from the definition of "employee" solely because the person holds a temporary or time-limited visa.

(11) "Employer" shall mean the State of North Carolina, the county board of education, the city board of education, the State Board of Education, the board of trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, or any other agency of and within the State by which a teacher or other employee is paid.

(11a) "Filing" when used in reference to an application for retirement shall mean the receipt of an acceptable application on a form provided by the Retirement System.

(11b) "Law-Enforcement Officer" means a full-time paid employee of an employer who is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State of North Carolina or serving civil processes, and who possesses the power of arrest by virtue of an oath administered under the authority of the State.

(12) "Medical board" shall mean the board of physicians provided for in G.S. 135-6.

(13) "Member" shall mean any teacher or State employee included in the membership of the System as provided in G.S. 135-3 and 135-4.

(14) "Membership service" shall mean service as a teacher or State employee rendered while a member of the Retirement System.

(15) "Pension reserve" shall mean the present value of all payments to be made on account of any pension or benefit in lieu of any pension computed upon the basis of such mortality tables as shall be adopted by the Board of Trustees, and regular interest.

(16) "Pensions" shall mean payments for life derived from money provided by the State of North Carolina, and by county or city boards of education. All pensions shall be payable in equal monthly installments.

(17) "Prior service" shall mean service rendered prior to the date of establishment of the Retirement System for which credit is allowable under G.S. 135-4; provided, persons now employed by the Board of Transportation shall be entitled to credit for employment in road maintenance by the various counties and road districts prior to 1931.

(18) "Public school" shall mean any day school conducted within the State under the authority and supervision of a duly elected or appointed city or county school board, and any educational institution supported by and under the control of the State.

(19) "Regular interest" shall mean interest compounded annually at such a rate as shall be determined by the Board of Trustees in accordance with G.S. 135-7, subsection (b).

(20) "Retirement" means the termination of employment and the complete separation from active service with no intent or agreement, express or implied, to return to service. A retirement allowance under the provisions of this Chapter may only be granted upon retirement of a member. In order for a member's retirement to become effective in any month, the member must render no service, including part-time, temporary, substitute, or contractor service, at any time during the six months immediately following the effective date of retirement. For purposes of this subdivision, service as a member of a school board shall not be considered service.

(21) "Retirement allowance" shall mean the sum of the "annuity and the pensions," or any optional benefit payable in lieu thereof.

(22) "Retirement System" shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2.

(23) "Service" shall mean service as a teacher or State employee as described in subdivision (10) or (25) of this section.

(24) "Social security breakpoint" shall mean the maximum amount of taxable wages under the Federal Insurance Contributions Act as from time to time in effect.

(25) "Teacher" shall mean any teacher, helping teacher, teacher in a job-sharing position under G.S. 115C-326.5 except for a beneficiary in that position, librarian, principal, supervisor, superintendent of public schools or any full-time employee, city or county, superintendent of public instruction, or any full-time employee of Department of Public Instruction, president, dean or teacher, or any full-time employee in any educational institution supported by and under the control of the State: Provided, that the term "teacher" shall not include any part-time, temporary, or substitute teacher or employee except for a teacher in a job-sharing position, and shall not include those participating in an optional retirement program provided for in G.S. 135-5.1 or G.S. 135-5.4. In all cases of doubt, the Board of Trustees, hereinbefore defined, shall determine whether any person is a teacher as defined in this Chapter. On and after August 1, 2001, a person who is a nonimmigrant alien and who otherwise meets the requirements of

this subdivision shall not be excluded from the definition of "teacher" solely because the person holds a temporary or time-limited visa. Notwithstanding the foregoing, the term "teacher" shall not include any nonimmigrant alien employed in elementary or secondary public schools (whether employed in a full-time, part-time, temporary, permanent, or substitute teacher position) and participating in an exchange visitor program designated by the United States Department of State pursuant to 22 C.F.R. Part 62 or by the United States Department of Homeland Security pursuant to 8 C.F.R. Part 214.2(q).

(26) "Year" as used in this Article shall mean the regular fiscal year beginning July 1 and ending June 30 in the following calendar year unless otherwise defined by regulation of the Board of Trustees. (1941, c. 25, s. 1; 1943, c. 431; 1945, c. 924; 1947, c. 458, s. 6; 1953, c. 1053; 1955, c. 818; c. 1155, s. 81/2; 1959, c. 513, s. 1; c. 1263, s. 1; 1963, c. 687, s. 1; 1965, c. 750; c. 780, s. 1; 1969, c. 44, s. 74; c. 1223, s. 16; c. 1227; 1971, c. 117, ss. 1-5; c. 338, s. 1; 1973, c. 507, s. 5; c. 640, s. 2; c. 1233; 1975, c. 475, s. 1; 1977, c. 574, s. 1; 1979, c. 972, s. 1; 1981, c. 557, ss. 1, 2; 1983, c. 412, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 227; 1985, c. 649, s. 3; 1987, c. 738, ss. 29(a), 36(a); 1991, c. 51, s. 2; 1993 (Reg. Sess., 1994), c. 769, s. 7.31(c); 1998-1, s. 4(g); 2001-424, s. 32.24(b); 2001-426, ss. 2, 3; 2001-513, s. 24; 2002-110, s. 1; 2002-126, ss. 28.6(b), 28.12(a); 2002-174, s. 2; 2003-359, ss. 1, 2; 2004-81, s. 1; 2004-199, s. 34(a); 2005-276, s. 29.28(e); 2006-66, s. 22.21; 2007-143, s. 1.)

Cross References. — For the Retirement Systems Actuarial Note Act, see G.S. 120-112 et seq. As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see G.S. 143-34.1. As to the Board of Trustees of the North Carolina Public Employee Special Pay Plan, see G.S. 143B-426.41.

Open Enrollment — Contributory Death Benefit. — Session Laws 2007-388, s. 1, provides: "Notwithstanding any section of law or any rules and regulations adopted by the Boards of Trustees to the contrary, the Retirement Systems Division of the Department of State Treasurer shall allow for an open enrollment period in the Contributory Death Benefit for Retired Members of the Teachers' and State Employees' Retirement System, the Local Governmental Employees' Retirement System, the Consolidated Judicial Retirement System, and the Legislative Retirement System. This open enrollment period shall begin February 1, 2008, and end May 31, 2008. The Retirement Systems Division shall send notice by U.S. mail of the open enrollment period to all retirees who elected not to be covered under this benefit or who failed to make any election at the time of their retirement and shall send a second notice by U.S. mail to any such retiree who fails to make an election within 60 days of the notification of the open enrollment period. Notice, at minimum, shall consist of notification of the open enrollment period and the consequences of failure to respond within the specified time frames, informational materials explaining the benefit program and the associated costs, and a preprinted personalized enrollment application to facilitate the enrollment process indicating each individual retiree's contribution rate. The contribution rate for retirees electing coverage during the open enrollment period shall be increased by eleven and one-tenth percent (11.1%) the rate established for retirees who elected coverage when first eligible, at retirement. For retirees electing coverage during this open enrollment period, coverage shall become effective the first of the month following the month in which the election of coverage is received by the Retirement Systems Division but not before February 1, 2008. Contribution rates for coverage shall be based upon the retiree's nearest age as of the effective date of coverage and shall begin by deduction from the retiree's net monthly retirement allowance in the month in which coverage becomes effective. Coverage elected by retirees during this open enrollment period shall be subject to all other laws and rules and regulations adopted by the Board of Trustees governing the Contributory Death Benefit for Retired Members."

Editor's Note. — The 1998 amendment, effective May 7, 1998, added "Health Insurance Program for Children" to the chapter title.

Subdivision designations in subdivision (7a) were set out at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-77, s. 1, provides: "Notwithstanding any other provision of law, a member of the Teachers' and State Employees' Retirement System who was employed by a community college, who filed for retirement before August 31, 2005, for an effective retirement date of November 1, 2005, and who was provided with incorrect information about the period of time a retired member must wait before returning to employment in order to continue receiving retirement benefits, may be reemployed by the State under the reemployment law that existed at the time the member filed for retirement."

Effect of Amendments. — Session Laws 2005-276, s. 29.28(e), as amended by Session Laws 2006-66, s. 22.21, effective November 1, 2005, but not applicable to participants in The University of North Carolina Phased Retirement Program until the earlier of June 30, 2010, or 12 months after the issuance of final phased retirement regulations by the Internal Revenue Service, rewrote subdivision (20).

Session Laws 2007-143, s. 1, effective June 29, 2007, added the last sentence in subdivision (20).

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 508 (1941).

CASE NOTES

Actuarial Equivalent. — The actuarial value includes interest and there was no double recovery where the court was following the definition of actuarial equivalent as prescribed by this section and included interest in the underpayment award. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Retirement Law Is Valid. — It is the verdict of the General Assembly, embodied and expressed in this and the following sections, that the retirement plan has a definite relation to the just and efficient administration of the public school system which brings it within the scope of constitutional authority. Under the mandatory provisions of the retirement law, the public policy thus expressed is applied to the entire public school system and its administration at the hands of every administrative unit within it. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942).

The retirement law is sufficiently invested with a public purpose and is a constitutional and valid expression of the legislative will, both generally and in its application to the local administrative units with which it deals. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942).

Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled upon retirement constitute compensation for public services previously rendered and do not violate former N.C. Const., Art. I, § 32 (now N.C. Const., Art. I, § 16). Harrill v. Teachers' & State Employees' Retirement Sys., 271 N.C. 357, 156 S.E.2d 702 (1967).

The purpose of this and the following sections is to provide benefits on retirement for the teachers in the public school system of the State and for State employees. It is based not only upon the principle of justice to poorly paid State employees, but also upon the philosophy that a measure of freedom from apprehension of old age and disability will add to the immediate efficiency of those engaged in carrying on a work of first importance to society and the State. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942); Powell v. Board of Trustees, 3 N.C. App. 39, 164 S.E.2d 80 (1968).

Under G.S. 135-2, the Retirement System for Teachers and State Employees was established for the purpose of providing retirement allowances and other benefits under the provisions of G.S. 135-1 et seq., for teachers and State employees of the State of North Carolina. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

The intent of this Chapter is not to exclude, but to include, State employees under an umbrella of protections designed to provide maximum security in their work environment and to afford a measure of freedom from apprehension of old age and disability. Stanley v. Retirement & Health Benefits Div., 55 N.C. App. 588, 286 S.E.2d 643, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

The Teachers' and State Employees' Retirement System of North Carolina is an agency or instrumentality of the State. Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637, cert. denied and appeal dismissed, 310 N.C. 626, 315 S.E.2d 692 (1984).

Employee Status When Job Sharing. — Petitioner remained an "employee" under subsection (10) during the period of time when she participated in a job sharing program and was working full time and thus was entitled to credit for those years of service as reflected in her retirement records. Wiebenson v. Board of Trustees, 345 N.C. 734, 483 S.E.2d 153 (1997).

Transfer of Local Creditable Service to State System. — In determining the date of eligibility of state employee petitioner to purchase retirement credits under Teachers' and State Employees' Retirement System for time spent in the military service under repealed G.S. 135-4(f)(6), petitioner could not include service in the Local Governmental Employees' Retirement System. Worrell v. North Carolina Dep't of State Treas., 333 N.C. 528, 427 S.E.2d 871 (1993).

Interest Accrual and Compounding. — Consistent with the purposes of subdivision (19) of this section and G.S. 128-21(18), underpayments were found to accrue interest from the date they became due. Furthermore, court found that statutes entitled beneficiaries to interest, not only on the principle due, but also on the accrued or earned interest. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 133 N.C. App. 587, 515 S.E.2d 743, 1999 N.C. App. LEXIS 615 (1999), cert. denied, 351 N.C. 102, 540 S.E.2d 358 (1999).

Postjudgment Interest Not Awardable Against State. — Retirees under the state and local government retirement system were not entitled to post-judgment interest on retroactive disability benefits, because the state retirement statutes contain no provision for the allowance of such interest. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 132 N.C. App. 137, 510 S.E.2d 675, 1999 N.C. App. LEXIS 89 (1999), cert. denied, 350 N.C. 379, 536 S.E.2d 620 (1999).

Applied in Faulkenbury v. Teachers' & State Employees' Ret. Sys., 133 N.C. App. 587, 515 S.E.2d 743, 1999 N.C. App. LEXIS 615 (1999), cert. denied, 351 N.C. 102, 540 S.E.2d 358 (1999).

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 122, 349 S.E.2d 621 (1986); Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001); Wiebenson v. Board of Tr., 138 N.C. App. 489, 531 S.E.2d 500, 2000 N.C. App. LEXIS 627 (2000).

§ 135-1.1. Licensing and examining boards.

(a) Any State board or agency charged with the duty of administering any law relating to the examination and licensing of persons to practice a profession, trade or occupation, in its discretion, may elect on or before July 1, 1983, by an appropriate resolution of said board, to cause its employees so employed prior to July 1, 1983 to become members of the Teachers' and State Employees' Retirement System. Such Retirement System coverage shall be conditioned on such board's paying all of the employer's contributions or matching funds from funds of the board and on such board's collecting from its employees the employees' contributions, at such rates as may be fixed by law and by the regulations of the Board of Trustees of the Retirement System, all of such funds to be paid to the Retirement System and placed in the appropriate funds. Retroactive coverage of the employees of any such board may also be effected to the extent that such board requests provided the board pays all of the employer's contributions or matching funds necessary for such purpose and provided said board collects from its employees all employees' contributions necessary for such purpose, computed at such rates and in such amount as the Board of Trustees of the Retirement System determines, all of such funds to be paid to the Retirement System, together with such interest as may be due, and placed in the appropriate funds.

(b) Notwithstanding any other provision of this Chapter, any State board or agency charged with the duty of administering any law relating to the examination and licensing of persons to practice a profession, trade, or occupation, and who is subject to the provisions of the State Budget Act, Chapter 143C of the General Statutes, may make an irrevocable election by appropriate resolution of the board, on or before October 1, 2000, to become an employer in the Teachers' and State Employees' Retirement System. Retirement System coverage shall be conditioned on the board's payment of all of the employer's contributions or matching funds from funds of the board and on the board's collecting from its employees the employees' contributions, at such rates as may be fixed by law and by the rules of the Board of Trustees of the Retirement System, all of such funds to be paid to the Retirement System and placed in the appropriate funds. Any person who is an employee of the board on the date the board makes an irrevocable election to participate in the Retirement System may purchase creditable service for periods of employment with the board prior to the election by making a lump-sum payment equal to the full cost of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the system's liabilities, and shall take into account the additional retirement allowance arising on account of such additional service credit commencing at the earliest age at which a member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance. (1959, c. 1012; 1983, c. 412, s. 3; 2000-187, s. 1; 2006-203, s. 72.)

Editor's Note. — Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 72, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "State Budget Act, Chapter 143C" for "Executive Budget Act, Article 1 of Chapter 143" in the first sentence of subsection (b).

OPINIONS OF ATTORNEY GENERAL

Occupational Licensing Boards. — Those occupational licensing boards subject to the Personnel Act, G.S. 126-1 et seq., and the Budget Act, G.S. 143-1 et seq., are also subject to G.S. 135-1.1, just as are the occupational licensing boards not subject to the Personnel and Budget Acts. See opinion of Attorney General to Vicky Goudie, Executive Secretary, State Board of Cosmetology, 60 N.C.A.G. 54 (1990).

An occupational licensing board, even one such as the Cosmetic Arts Board and several others subject to the Personnel and Budget Acts, is not entitled to have any of its employees, who were employed on or after July 1, 1983, covered by and participating in the Retirement System. See opinion of Attorney General to Vicky Goudie, Executive Secretary, State Board of Cosmetology, 60 N.C.A.G. 54 (1990).

§ 135-2. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina. The Retirement System so created shall be established as of the first day of July, 1941.

It shall have the power and privileges of a corporation and shall be known as the "Teachers' and State Employees' Retirement System of North Carolina," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held. (1941, c. 25, s. 2.)

State Government Reorganization. — The Teachers' and State Employees' Retirement System was transferred to the Department of State Treasurer by G.S. 143A-34, enacted by Session Laws 1971, c. 864.

CASE NOTES

The Teachers' and State Employees' Retirement System of North Carolina is an agency or instrumentality of the State. Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637, cert. denied and appeal dismissed, 310 N.C. 626, 315 S.E.2d 692 (1984).

Cited in Powell v. Board of Trustees, 3 N.C. App. 39, 164 S.E.2d 80 (1968); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993).

§ 135-3. Membership.

The membership of this Retirement System shall be composed as follows:

(1) All persons who shall become teachers or State employees after the date as of which the Retirement System is established. On and after July 1, 1947, membership in the Retirement System shall begin 90 days after the election, appointment or employment of a "teacher or employee" as the terms are defined in this Chapter. On and after July 1, 1955, membership in the Retirement System shall begin immediately upon the election, appointment or employment of a "teacher or employee," as the terms are defined in this Chapter. Under such rules and regulations as the Board of Trustees may establish and promulgate, Cooperative Agricultural Extension Service employees excluded from coverage under Title II of the Social Security Act may in the discretion of the governing authority of a county, become members of the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county. On and after July 1, 1965, new extension service employees excluded from coverage under Title II of the Social Security Act in the employ of a county participating in the Local Governmental Employees' Retirement System are hereby excluded from participation in the Teachers' and State Employees' Retirement System to the extent of that part of their compensation derived from a county; provided that on and after July 1, 1965, new extension service employees excluded from coverage under Title II of the Social Security Act who are required to accept a federal civil service appointment may elect in writing, on a form acceptable to the Retirement System, to be excluded from the Teachers' and State Employees' Retirement System and the Local Retirement System; provided further, that effective July 1, 1985, an extension service employee excluded from coverage under Title II of the Social Security Act who is employed in part by a county and who is compensated in whole by the Cooperative Agricultural Extension Service pursuant to a contract where the Cooperative Agricultural Extension Service is reimbursed by the county for the county's share of the compensation shall participate exclusively in the Teachers' and State Employees' Retirement System to the extent of their full compensation. On or after July 1, 1979, upon election, appointment or employment, a legislative employee shall automatically become a member of the Teachers' and State Employees' Retirement System. At such time as Cooperative Agricultural Extension Service Employees excluded from coverage under Title II of the Social Security Act become covered by Title II of the Social Security Act, such employees shall no longer be covered by the provisions of this section, provided no accrued rights of these employees under this section prior to coverage by Title II of the Social Security Act shall be diminished.

(2) All persons who are teachers or State employees on February 17, 1941, or who may become teachers or State employees on or before July 1,

1941, except those who shall notify the Board of Trustees, in writing, on or before January 1, 1942, that they do not choose to become members of this Retirement System, shall become members of the Retirement System.

(3) Should any member in any period of six consecutive years after becoming a member be absent from service more than five years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member: Provided that on and after July 1, 1967, should any member in any period of eight consecutive years after becoming a member be absent from service more than seven years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member; provided further that the period of absence from service shall be computed from January 1, 1962, or later date of separation for any member whose contributions were not withdrawn prior to July 1, 1967: Provided that on and after July 1, 1971, a member shall cease to be a member only if he withdraws his accumulated contributions, or becomes a beneficiary, or dies.

Notwithstanding the foregoing, any persons whose membership was terminated under the provisions set forth above who had five or more years of creditable service and had not effected a return of contributions may elect to receive a retirement allowance on or after age 60; provided that this member may retire only upon written application to the Board of Trustees setting forth at which time, not less than 30 days nor more than 90 days subsequent to the execution and filing, he desires to be retired.

(4) Notwithstanding any provisions contained in this section, any employee of the State of North Carolina who was taken over and required to perform services for the federal government, on a loan basis, and by virtue of an executive order of the President of the United States effective on or after January 1, 1942, and who on the effective date of such executive order was a member of the Retirement System and had not withdrawn all of his or her accumulated contributions, shall be deemed to be a member of the Retirement System during such period of federal service or employment by virtue of such executive order of the President of the United States. Any such employee who within a period of 12 months after the cessation of such federal service or employment, is again employed by the State or any employer as said term is defined in this Chapter, or within said period of 12 months engages in service or membership service, shall be permitted to resume active participation in the Retirement System and to resume his or her contributions as provided by this Chapter. If such member so elects, he or she may pay to the Board of Trustees for the benefit of the proper fund or account an amount equal to his or her accumulated contributions previously withdrawn with interest from date of withdrawal to time of payment and the accumulated contributions, with interest thereon, that such member would have made during such period of federal employment to the same extent as if such member had been in service or engaged in the membership service for the State or an employer as defined in this Chapter, which such payment of accumulated contributions shall be computed on the basis of the salary or earnable compensation received by such member on the effective date of such executive order.

(5) Any teacher or State employee whose membership is contingent on his own election and who elects not to become a member may thereafter

apply for and be admitted to membership; but no such teacher or State employee shall receive prior service credit unless he elected to become a member prior to July 1, 1946. Any such member on or after June 30, 1965, anything in this Chapter to the contrary, may deposit in the annuity savings fund by a single payment the contributions plus interest which would have been credited to his account had he not signed a nonelection blank on or before January 1, 1942, and be entitled to such membership service credits and any prior service credits which became void upon execution of such nonelection blank; provided that the employer will pay the appropriate matching contributions.

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1396, s. 1.

(7) The provisions of this subdivision (7) shall apply to any member whose retirement became effective prior to July 1, 1963, and who became entitled to benefits hereunder in accordance with the provisions hereof. Such benefits shall be computed in accordance with the provisions of G.S. 135-5(b) as in effect at the date of such retirement.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years: Provided, that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the provisions of G.S. 135-5(b), subdivisions (1), (2) and (3).

b. In lieu of the benefits provided in paragraph a of this subdivision (7) any member who separates from service on or after July 1, 1951, and prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(d), after completing 30 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided further that such application shall be duly filed within 60 days following the date of such separation. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

c. In lieu of the benefits provided in paragraph a of this subdivision (7), any member who separated from service before July 1, 1951, and prior to the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(d), and who left his total accumulated contributions in said System, may elect to retire on an early retirement allowance; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, subsequent to July 1, 1951, and not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided that such application shall be duly filed not later than August 31, 1951. Such early retirement allowance so elected shall be the actuarial equivalent of the deferred retirement allowance otherwise payable at the attainment of the age of 60 years upon proper application therefor.

d. Should a teacher or employee who retired on an early or service retirement allowance be restored to service prior to the attainment of the age of 62 years, his allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate payable by all members. Upon his subsequent retirement, he shall be entitled to the allowance described in 1 below reduced by the amount in 2 below.

1. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement, and his creditable service after he was restored to service.

2. The actuarial equivalent of the retirement benefits he previously received.

e. Should a teacher or employee who retired on an early or service retirement allowance be restored to service after the attainment of the age of 62 years, his retirement allowance shall be reduced to the extent necessary (if any) so that the sum of the retirement allowance at the time of his retirement and earnings from employment by a unit of the Retirement System for any year (beginning January 1, and ending December 31) will not exceed the member's compensation received for the 12 months of service prior to retirement. Provided, however, that under no circumstances will the member's retirement allowance be reduced below the amount of his annuity as defined in G.S. 135-1(3).

(8) The provisions of this subsection (8) shall apply to any member whose membership is terminated on or after July 1, 1963 and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

a. Notwithstanding any other provision of this Chapter, any member who separates from service prior to the attainment of the age of 60 years for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 15 or more years of creditable service, and who leaves his total accumulated contributions in said System shall have the right to retire on a deferred retirement allowance upon attaining the age of 60 years; provided that such member may retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; and further provided that in the case of a member who so separates from service on or after July 1, 1967, or whose account is active on July 1, 1967, or has not withdrawn his contributions, the aforestated requirement of 15 or more years of creditable service shall be reduced to 12 or more years of creditable service; and further provided that in the case of a member who so separates from service on or after July 1, 1971, or whose account is active on July 1, 1971, the aforestated requirement of 12 or more years of creditable service shall be reduced to five or more years of creditable service. Such deferred retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to a member who is not a law enforcement officer or an eligible former law enforcement officer. Notwithstanding the foregoing, any member whose services as a teacher or employee are terminated for any reason other than retirement, who becomes employed by a nonprofit, nonsectarian private school in North Carolina below the college level within one year after such teacher or employee has ceased to be a teacher or employee, may elect to leave his total accumulated contributions in the Teachers' and State Employees' Retirement System during the period he is in the employment of such employer; provided that he files notice thereof in writing with the Board of Trustees of the Retirement System within five years after separation from service as a public school teacher or State employee; such member shall be deemed to have met the requirements of the above provisions of this subdivision upon attainment of age 60 while in such employment provided that he is otherwise vested.

b. In lieu of the benefits provided in paragraph a of this subdivision (8), any member who separates from service prior to the attainment of the age of 60 years, for any reason other than death or retirement for disability as provided in G.S. 135-5(c), after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on an early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such early retirement allowance so elected shall be equal to the deferred retirement allowance otherwise payable at the attainment of the age of 60 years reduced by the percentage thereof indicated below.

Age at Retirement	*Percentage Reduction*
59	7
58	14
57	20
56	25
55	30
54	35
53	39
52	43
51	46
50	50

b1. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law-enforcement officer at the time of separation from service prior to the attainment of the age of 50 years, for any reason other than death or disability as provided in this Article, after completing 15 or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 50 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law-enforcement officers.

b2. In lieu of the benefits provided in paragraphs a and b of this subdivision, any member who is a law-enforcement officer at the time of separation from service prior to the attainment of the age of 55 years, for any reason other than death or disability as provided in this Article, after completing five or more years of creditable service in this capacity immediately prior to separation from service, and who leaves his total accumulated contributions in this System may elect to retire on a deferred early retirement allowance upon attaining the age of 55 years or at any time thereafter; provided, that the member may commence retirement only upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to commence retirement. The deferred early retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to law-enforcement officers.

b3. Vested deferred retirement allowance of members retiring on or after July 1, 1994. — In lieu of the benefits provided in paragraphs a. and b. of this subdivision, any member who separates from service prior to attainment of age 60 years, after completing 20 or more years of creditable service, and who leaves his total accumulated contributions in said System, may elect to retire on a deferred retirement allowance upon attaining the age of 50 years or any time thereafter; provided that such member may so retire only upon written application to the Board of Trustees setting forth at what time, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Such deferred retirement allowance shall be computed in accordance with the service retirement provisions of this Article pertaining to a member who is not a law enforcement officer or an eligible former law enforcement officer.

c. **(Effective until October 1, 2009 — see Editor's notes)** Should a beneficiary who retired on an early or service retirement allowance under this Chapter be reemployed by, or otherwise engaged to perform services for, an employer participating in the Retirement System on a part time, temporary, interim, or on a fee for service basis, whether contractual or otherwise, and if such beneficiary earns an amount during the 12 month period immediately following the effective date of retirement or in any calendar year which exceeds fifty percent (50%) of the reported compensation, excluding terminal payments, during the 12 months of service preceding the effective date of retirement, or twenty thousand dollars ($20,000), whichever is greater, as hereinafter indexed, then the retirement allowance shall be suspended as of the first day of the month following the month in

G.S. 135-3(8)c is set out twice. See note.

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which the reemployment earnings exceed the amount above, for the balance of the calendar year, except when the reemployment earnings exceed the amount above in the month of December, in which case the retirement allowance shall not be suspended. The retirement allowance of the beneficiary shall be reinstated as of January 1 of each year following suspension. The amount that may be earned before suspension shall be increased on January 1 of each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent (1/10 of 1%).

The computation of postretirement earnings of a beneficiary under this sub-subdivision, who retired on or before October 1, 2007, and who has been retired at least six months and has not been employed in any capacity with a public school for at least six months immediately preceding the effective date of reemployment, shall not include earnings while the beneficiary is employed to teach in a permanent full-time or part-time capacity that exceeds fifty percent (50%) of the applicable workweek in a public school. The Department of Public Instruction shall certify to the Retirement System that a beneficiary is employed to teach by a local school administrative unit under the provisions of this sub-subdivision and as a retired teacher as the term is defined under the provisions of G.S. 115C-325(a)(5a).

The computation of postretirement earnings of a beneficiary under this sub-subdivision, who retired after October 1, 2007, after attaining (i) the age of at least 65 with five years of creditable service; or (ii) the age of at least 60 with 25 years of creditable service; or (iii) 30 years of service; and who has been retired at least six months and has not been employed in any capacity with a public school for at least six months immediately preceding the effective date of reemployment, shall not include earnings while the beneficiary is employed to teach in a permanent full-time or part-time capacity that exceeds fifty percent (50%) of the applicable workweek in a public school. The Department of Public Instruction shall certify to the Retirement System that a beneficiary is employed to teach by a local school administrative unit under the provisions of this sub-subdivision and as a retired teacher as the term is defined under the provisions of G.S. 115C-325(a)(5a).

Beneficiaries employed under this sub-subdivision are not entitled to any benefits otherwise provided under this Chapter as a result of this period of employment.

c. **(Effective October 1, 2009 — see Editor's notes)** Should a beneficiary who retired on an early or service retirement allowance under this Chapter be reemployed by, or otherwise engaged to perform services for, an employer participating in the Retirement System on a part-time, temporary, interim, or on a fee-for-service basis, whether contractual or otherwise, and if such beneficiary earns an amount during the 12-month period immediately following the effective date of retirement or in any calendar year which exceeds fifty percent (50%) of the reported compensation, excluding terminal payments, during the 12 months of service preceding the effective date of retirement, or twenty thousand dollars ($20,000), whichever is greater, as

G.S. 135-3(8)c is set out twice. See note.

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hereinafter indexed, then the retirement allowance shall be suspended as of the first day of the month following the month in which the reemployment earnings exceed the amount above, for the balance of the calendar year, except when the reemployment earnings exceed the amount above in the month of December, in which case the retirement allowance shall not be suspended. The retirement allowance of the beneficiary shall be reinstated as of January 1 of each year following suspension. The amount that may be earned before suspension shall be increased on January 1 of each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of a percent (1/10 of 1%).

d. Should a beneficiary who retired on an early or service retirement allowance under this Chapter be restored to service as an employee or teacher, then the retirement allowance shall cease as of the first of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

Upon his subsequent retirement, he shall be paid a retirement allowance determined as follows:

1. For a member who earns at least three years' membership service after restoration to service, the retirement allowance shall be computed on the basis of his compensation and service before and after the period of prior retirement without restrictions; provided, that if the prior allowance was based on a social security leveling payment option, the allowance shall be adjusted actuarially for the difference between the amount received under the optional payment and what would have been paid if the retirement allowance had been paid without optional modification.
2. For a member who does not earn three years' membership service after restoration to service, the retirement allowance shall be equal to the sum of the retirement allowance to which he would have been entitled had he not been restored to service, without modification of the election of an optional allowance previously made, and the retirement allowance that results from service earned since being restored to service; provided, that if the prior retirement allowance was based on a social security leveling payment option, the prior allowance shall be adjusted actuarially for the difference between the amount that would have been paid for each month had the payment not been suspended and what would have been paid if the retirement allowance had been paid without optional modification.

e. Any beneficiary who retired on an early or service retirement allowance as an employee of any State department, agency or institution under the Law Enforcement Officers' Retirement System and becomes employed as an employee by a State department, agency, or institution as an employer participating in the Retirement System shall become subject to the provisions of G.S. 135-3(8)c and G.S. 135-3(8)d on and after January 1, 1989.

(8a) Notwithstanding the provisions of paragraphs c and d of subdivision (8) to the contrary, a beneficiary who was a beneficiary retired on an early or service retirement with the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officers employed by the State and beneficiaries last employed by the State to this Retirement System on January 1, 1985, and who also was a contributing member of this Retirement System on January 1, 1985, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership.

(9) Members who are participating in an intergovernmental exchange of personnel under the provisions of Article 10 of Chapter 126 may retain their membership status and receive all benefits provided by this Chapter during the period of the exchange provided the requirements of Article 10 of Chapter 126 are met; provided further, that a member participating in an intergovernmental exchange of personnel under Article 10 of Chapter 126 shall, notwithstanding whether he and his employer are making contributions to the member's account during the exchange period, be entitled to the death benefit if he otherwise qualifies under the provisions of this Article and provided further that no duplicate benefits shall be paid. (1941, c. 25, s. 3; 1945, c. 799; 1947, c. 414; c. 457, ss. 1, 2; c. 458, s. 5; c. 464, s. 2; 1949, c. 1056, s. 1; 1951, c. 561; 1955, c. 1155, s. 91/2; 1961, c. 516, ss. 1, 2; 1963, c. 687, s. 2; 1965, c. 780, s. 1; c. 1187; 1967, c. 720, ss. 1, 2, 15; c. 1234; 1969, c. 1223, ss. 1, 2, 14; 1971, c. 117, ss. 6-8; c. 118, ss. 1, 2; 1973, c. 241, s. 1; c. 994, s. 5; c. 1363; 1977, c. 783, s. 3; 1979, c. 396; c. 972, s. 2; 1981, c. 979, s. 1; 1981 (Reg. Sess., 1982), c. 1396, ss. 1, 2; 1983, c. 556, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 228, 229, 236; c. 1106, ss. 1, 2, 4; 1985, c. 520, s. 1; c. 649, ss. 2, 11; 1987, c. 513, s. 1; c. 738, s. 38(b); 1989, c. 791; 1993 (Reg. Sess., 1994), c. 769, ss. 7.30(e), (f), 7.31(d), (e); 1995, c. 509, s. 73.1; 1998-212, s. 28.24(a); 1998-217, s. 67; 2000-67, s. 8.24(a); 2001-424, s. 32.25(a); 2002-126, ss. 28.10(a), (b), (d), 28.13(a); 2004-124, s. 31.18A(a), (b); 2004-199, s. 57(a); 2005-144, ss. 7A.1, 7A.2, 7A.4; 2005-276, ss. 29.28(a)-(d); 2005-345, s. 43; 2006-226, s. 25(a); 2007-145, s. 7(a), (b), (d)-(f); 2007-326, ss. 1, 3(a), (b), (d)-(f); 2007-431, s. 9.)

Subdivision (8)c. is set out twice. — The first version of subdivision (8)c. set out above is effective until October 1, 2009. The second version of subdivision (8)c. set out above is effective October 1, 2009.

Cross References. — As to exemption of temporary employees of the General Assembly from the provisions of G.S. 135-3(8)c. as to compensation earned in that status, see G.S. 120-32(1).

Editor's Note. — Session Laws 1953, c. 792, authorizes the Board of Trustees of the Teachers' and State Employees' Retirement System, in its discretion, to contract with the Fort Bragg School Board, the United States Office of Education, or the United States Commissioner of Education or his officers and agents, whereby teachers in the schools controlled and operated by the Fort Bragg School Board, who have previously taught in State public schools and accumulated creditable service of some type under the Teachers' and State Employees' Retirement Act, shall be covered under the provisions of the Act.

Session Laws 1998-212, s. 1.1, provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.5, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2002-126, s. 28.10(a), as amended by Session Laws 2004-124, s. 31.18A(a), as amended by Session Laws 2005-144, s. 7A.1, as amended by Session Laws 2007-145, s. 7(a) and as amended by Session Laws 2007-326, s. 3(a), amended Session Laws 1998-212, s. 28.24(d) to change the expiration date affecting subdivision (8)c, as amended by the 1998 act, from June 30, 2007, to October 1, 2007.

Session Laws 2002-126, s. 28.10(a1), provides: "The State Treasurer shall seek a private letter ruling from the Internal Revenue Service that G.S. 135-3(8) c. could be amended from six months to two months without adverse affect on the tax qualification of the Teachers' and State Employees' Retirement System."

Session Laws 2002-126, s. 28.10(b), as amended by Session Laws 2004-124, s. 31.18A(b), as amended by Session Laws 2005-144, s. 7A.2, Session Laws 2007-145, s. 7(b), and as amended by Session Laws 2007-326, s. 3(b), amended Session Laws 1998-217, s. 67, to change the expiration date affecting subdivision (8)c, as amended by the 1998 act, from June 30, 2007, to October 1, 2007.

Session Laws 2002-126, s. 28.10(d), as amended by Session Laws 2004-124, s. 31.18A(d), as amended by Session Laws 2005-441, s. 7A.4, amended by Session Laws 2007-145, s. 7(d), and as amended by Session Laws 2007-326, s. 3(d), amended Session Laws 2001-424, s. 32.25(c) to change the expiration date affecting subdivision (8)c, as amended by the 2001 act, from June 30, 2005, to October 1, 2007.

Session Laws 2002-126, s. 28.13(c), provides: "Subsections (a) and (b) of this section [which amended G.S. 135-3(8)c. and G.S. 128-24(5)c.] do not apply during the 2002-2003 fiscal year to any person who was retired on or before September 1, 2002, and also had entered into any employment contract or commitment for some or all of that year."

Session Laws 2002-126, s. 28.13(d), provides: "The State Treasurer shall seek a private letter ruling from the Internal Revenue Service relating to what constitutes a "bona fide termination of employment" and the period of time that a member of the Teachers' and State Employees' Retirement System must be separated from service before they can be reemployed either on a full-time or contract basis while continuing to receive retirement benefits."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, is a severability clause.

Session Laws 2004-124, s. 31.18A(e)-(g), as amended by Session Laws 2004-161, s. 53.2, provides: "(e) The Retirement Systems Division shall conduct an analysis of the postretirement reemployment issue, including a survey of peer State systems, cost analyses, review of relevant impacting federal regulations, and the administrative impact of various postretirement reemployment policies. The Retirement Systems Division shall develop findings and recommendations for the adoption of an efficient and fiscally sound policy on postretirement reemployment and shall report those findings and recommendations, as well as the analysis that produced them, to the General Assembly by February 1, 2005.

"(f) In order to facilitate the success of its request for a private letter ruling from the Internal Revenue Service, as mandated by Section 28.13(d) of S.L. 2002-126, the Retirement Systems Division may modify the scope of its inquiry to the extent that a substantive ruling may be obtained and used by the General Assembly to adopt an efficient and fiscally sound policy on postretirement reemployment.

"(g) Notwithstanding any other provision of law, effective July 1, 2004, each local school administrative unit or charter school participating in the Teachers' and State Employees' Retirement System shall pay to the Teachers' and State Employees' Retirement System a Reemployed Teacher Contribution Rate of eleven and seventy hundredths percent (11.70%) as a percentage of covered salaries that the retired teachers, who are exempt from the earnings cap, are being paid. Each local school administrative unit or charter school shall report monthly to the Retirement Systems Division on payments made pursuant to this subsection.

"Notwithstanding any other provision of law, effective July 1, 2004, any portion of the payment made by a local school administrative unit to a reemployed teacher who is exempt from the earnings cap, consisting of salary plus the Reemployed Teacher Contribution rate, that exceeds the State-supported salary level for that position shall be paid from local funds."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-199, s. 57(c), as amended by 2005-276, s. 29.28(d), as amended by 2007-145, s. 7(e), and as amended by Session Laws 2007-326, s. 3(e), provided that the amendment to subdivision (8)c., as amended by Session Laws 2004-199, would expire October 1, 2007.

This section was amended by Session Laws

2005-276, s. 29.28, and by Session Laws 2005-345, s. 42, in the coded bill drafting format provided by G.S. 120-20.1. Although the second and third paragraphs of sub-subdivision (8)c. have a sunset date of June 30, 2007, the amendments to the second paragraph by Session Laws 2005-276 and Session Laws 2005-345 did not include a sunset provision, and therefore will not expire with the rest of the second paragraph. The version of sub-subdivision (8)c. effective June 30, 2007 is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 29.28(c), provides: "Notwithstanding any other provision of law, each local school administrative unit shall pay to the Teachers' and State Employees' Retirement System a Reemployed Teacher Contribution Rate of eleven and seventy-hundredths percent (11.70%) as a percentage of covered salaries that the retired teachers, who are exempt from the earnings cap, are being paid. Each local school administrative unit shall report monthly to the Retirement Systems Division on payments made pursuant to this subsection.

"Notwithstanding any other provision of law, any portion of the payment made by a local school administrative unit to a reemployed teacher who is exempt from the earnings cap, consisting of salary plus the Reemployed Teacher Contribution Rate, that exceeds the State-supported salary level for that position, shall be paid from local funds. For similar provisions with an effective date of July 1, 2004, see Session Laws 2004-124, s. 31.18A(g) as amended by Session Laws 2004-161, s. 53.2."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5, is a severability clause.

Session Laws 2006-226, s. 25(b), as amended by Session Laws 2007-145, s.7(f), and as amended by Session Laws 2007-326, s. 3(f), provided that the amendment to subdivision (8)c. by Session Laws 2006-226, became effective August 1, 2007.

Session Laws 2007-145, s. 7(g), provides: "Notwithstanding any other provision of law, effective July 1, 2007, each local school administrative unit shall pay to the Teachers' and State Employees' Retirement System a Reemployed Teacher Contribution Rate of eleven and seventy-hundredths percent (11.70%) as a percentage of covered salaries that the retired teachers, who are exempt from the earnings cap, are being paid. Each local school administrative unit shall report monthly to the Retirement Systems Division on payments made pursuant to this section.

"Notwithstanding any other provision of law, effective July 1, 2007, any portion of the payment made by a local school administrative unit to a reemployed teacher who is exempt from the earnings cap, consisting of salary plus the Reemployed Teacher Contribution rate, that exceeds the State-supported salary level for that position shall be paid from local funds."

Session Laws 2007-145, s. 7(h), provides: "If the Internal Revenue Service determines that the provisions of G.S. 135-3(8)c. relating to the computation of postretirement earnings of retired teachers jeopardize the status of the Teachers' and State Employees' Retirement System of North Carolina under the Internal Revenue Code, then the final two paragraphs of G.S. 135-3(8)c. are repealed."

Session Laws 2007-326, s. 4, provides: "Notwithstanding any other provision of law, effective July 1, 2007, each local school administrative unit shall pay to the Teachers' and State Employees' Retirement System a Reemployed Teacher Contribution Rate of eleven and seventy-hundredths percent (11.70%) as a percentage of covered salaries that the retired teachers, who are exempt from the earnings cap, are being paid. Each local school administrative unit shall report monthly to the Retirement Systems Division on payments made pursuant to this section.

"Notwithstanding any other provision of law, effective July 1, 2007, any portion of the payment made by a local school administrative unit to a reemployed teacher who is exempt from the earnings cap, consisting of salary plus the Reemployed Teacher Contribution Rate, that exceeds the State-supported salary level for that position shall be paid from local funds."

Session Laws 2007-326, s. 5, provides that if the Internal Revenue Service determines that the provisions of G.S. 135-3(8)c. relating to the computation of postretirement earnings of retired teachers jeopardize the status of the Teachers' and State Employees' Retirement System of North Carolina under the Internal Revenue Code, then the final three paragraphs of G.S. 135-3(8)c. are repealed.

Effect of Amendments. — Session Laws 1998-212, s. 28.24(a), as amended by Session Laws 2002-126, s. 28.10(a), as amended by Session Laws 2004-124, s. 31.18A(a), as amended by Session Laws 2007-145, s. 7(a), and as amended by Session Laws 2007-326, s. 3(a), effective January 1, 1999, and expiring on October 1, 2007, added the second and third paragraphs in subdivision (8)c.

Session Laws 1998-217, s. 67, as amended by

Session Laws 2002-126, s. 28.10(b), as amended by Session Laws 2004-124, s. 31.18A(b), as amended by Session Laws 2005-144, s. 7A.2, and as amended by Session Laws 2007-326, s. 3(b), effective January 1, 1999, and expiring October 1, 2007, substituted "retired" for "probationary," and "G.S. 115C-325(a)(5a)" for "G.S. 115C-325-(a)(5)" in the present second paragraph of subdivision (8)c.

Session Laws 2006-226, s. 25(a), as amended by Session Laws 2007-145, s. 7(e), and as amended by Session Laws 2007-326, s. 3(f), effective October 1, 2007, deleted "in full time capacity that exceeds fifty percent (50%) of the applicable work-week" from the end of subdivision (8)c.

Session Laws 2007-326, s. 1, effective October 1, 2007, and expiring October 1, 2009, added the second, third, and fourth paragraphs of subdivision (8)c.

Session Laws 2007-431, s. 9, effective July 1, 2007, in the first sentence of subdivision (8)c., substituted "reemployed by, or otherwise engaged to perform services for" for "reemployed, or otherwise engaged to perform services, by" and added "except when the reemployment earnings exceed the amount above in the month of December, in which case the retirement allowance shall not be suspended."

CASE NOTES

Constitutionality of Subsection (8)d. — Because all retired officers and employees are subject to the provisions of subsection (8)d of this section, plaintiff retired judge was not treated differently than similarly situated persons, and the Retirement System's interpretation of subsection (8)d did not violate the Equal Protection Clause of either the United States or the North Carolina Constitution. Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

Suspension of Benefits. — In case involving suspension of plaintiff retired judge's retirement benefits after he was appointed to another state office, where the prohibition contained in subsection (8)d of this section existed as former (8)c when plaintiff's rights vested in the Retirement System, the prohibition applied to plaintiff, and plaintiff's contract under Chapter 135 provided that his benefits would cease if he returned to employment with the State of North Carolina following his retirement from the court. Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

Suspension of the retirement benefits of a retired judge who was appointed to state utilities commission, while he served on that commission, was proper even though the statute authorizing the suspension of a retired judge's pension only spoke of suspending the benefits of a retired judge who returned to judicial service, because the broader provisions of G.S. 135-3(8)(c), disallowing continued receipt of benefits by a contributor to the Teachers' and State Employees' Retirement System of North Carolina, applied to the judge. Wells v. Consolidated Judicial Ret. Sys., 354 N.C. 313, 553 S.E.2d 877, 2001 N.C. LEXIS 1098 (2001).

Cited in Harrill v. Teachers' & State Employees' Retirement Sys., 271 N.C. 357, 156 S.E.2d 702 (1967).

OPINIONS OF ATTORNEY GENERAL

Membership Compulsory; No Exemption for Member of Religious Order. — See opinion of Attorney General to Mr. J.E. Miller, Director, Teachers' and State Employees' Retirement System, 40 N.C.A.G. 625 (1970).

Employee Reentering State Employment After Retirement. — When an employee, age 62, retires on July 1, 1959, and receives retirement benefits until July 1, 1964, at which time he reenters State employment, when that employee subsequently retires on July 1, 1969, he is entitled to the resumption of payment of his retirement benefits suspended while he was reemployed, plus additional benefits based on a salary over the most recent 5 years' employment figured at the current formula rate. He is not entitled to benefits using the current formula and his total service recently plus that prior to his first retirement. Opinion of Attorney General to Mr. J.E. Miller, Director, Teachers' and State Employees' Retirement System, 40 N.C.A.G. 623 (1969).

§§ 135-3.1, 135-3.2: Repealed by Session Laws 1961, c. 516, s. 9.

§ 135-4. Creditable service.

(a) Under such rules and regulations as the Board of Trustees shall adopt, each member who was a teacher or State employee at any time during the five years immediately preceding the establishment of the System and who became a member prior to July 1, 1946, shall file a detailed statement of all North Carolina service as a teacher or State employee rendered by him prior to the date of establishment for which he claims credit; provided, that, notwithstanding the foregoing, any member retiring on or after July 1, 1965, with credit for not less than 10 years of membership service shall file such detailed statement of service as a teacher or State employee rendered by him prior to July 1, 1941, for which he claims credit; provided, that any member who retired on a service retirement allowance prior to July 1, 1965, who at the time of his retirement did not qualify for credit for his service as a teacher or State employee prior to July 1, 1941, may request on and after July 1, 1971, that his original benefit be recalculated, in accordance with the formula prevailing at the time of his retirement, to include credit for such service with the new benefit to become effective on the first of the month following certification of the prior service.

(b) The Board of Trustees shall fix and determine by appropriate rules and regulations how much service in any year is equivalent to one year of service, but in no case shall more than one year of service be creditable for all services in one year. Service rendered for the regular school year in any district shall be equivalent to one year's service. Service rendered by a school employee in a job-sharing position shall be credited at the rate of one-half year for each regular school year of employment.

(c) Subject to the above restrictions and to such other rules and regulations as the Board of Trustees may adopt, the Board of Trustees shall verify, as soon as practicable after the filing of such statements of service, the service therein claimed.

In lieu of a determination of the actual compensation of the members that was received during such period of prior service the Board of Trustees may use for the purpose of this Chapter the compensation rates which will be determined by the average salary of the members for five years immediately preceding the date this System became operative as the records show the member actually received. Creditable service for unused sick leave shall be allowed only for sick leave accrued monthly during employment under a duly adopted sick leave policy and for which the member may be able to take credits and be paid for sick leave without restriction.

(d) Any member may, up to his date of retirement and within one year thereafter, request the Board of Trustees to modify or correct his prior service credit.

(e) Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of service certified on his prior service certificate; and if he has sick leave standing to his credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof, but not less than one hour; sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for disability retirement or for a vested deferred allowance.

On and after July 1, 1971, a member whose account was closed on account of absence from service under the provisions of G.S. 135-3(3) and who subsequently returns to service for a period of five years, may thereafter repay in a lump sum the amount withdrawn plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service by the amount of creditable service lost when his account was closed.

On and after July 1, 1973, a member whose account in the North Carolina Local Governmental Employees' Retirement System was closed on account of absence from service under the provisions of G.S. 128-24(1a) and who subsequently became or becomes a member of this System with credit for five years of service, may thereafter repay in a lump sum the amount withdrawn from the North Carolina Local Governmental Employees' Retirement System plus regular interest thereon from the date of withdrawal through the year of repayment and thereby increase his creditable service in this System by the amount of creditable service lost when his account was closed.

On or after July 1, 1979, a member who has obtained 60 months of aggregate service, or five years of membership service, as an employee of the North Carolina General Assembly, except legislators, participants in the Legislative Intern Program and pages, may make a lump sum payment together with interest, and an administrative fee for such service, to the Teachers' and State Employees' Retirement System of an amount equal to what he would have contributed had he been a member on his first day of employment.

On and after January 1, 1985, the creditable service of a member who was a member of the Law-Enforcement Officers' Retirement System at the time of the transfer of law-enforcement officers employed by the State from that System to this Retirement System and whose accumulated contributions are transferred from that System to this Retirement System, shall include service that was creditable in the Law-Enforcement Officers' Retirement System; and membership service with that System shall be membership service with this Retirement System; provided, notwithstanding any provision of this Article to the contrary, any inchoate or accrued rights of such a member to purchase creditable service for military service, withdrawn service and prior service under the rules and regulations of the Law-Enforcement Officers' Retirement System shall not be diminished and may be purchased as creditable service with this Retirement System under the same conditions which would have otherwise applied.

(f) Armed Service Credit. —

(1) Teachers and other State employees who entered the armed services of the United States on or after September 16, 1940, and prior to February 17, 1941, and who returned to the service of the State within a period of two years after they were first eligible to be separated or released from such armed services under other than dishonorable conditions shall be entitled to full credit for all prior service.

(2) Teachers and other State employees who entered the armed services of the United States on or after September 16, 1940, and who returned to the service of the State prior to October 1, 1952, or who devote not less than 10 years of service to the State after they are separated or released from such armed services under other than dishonorable conditions, shall be entitled to full credit for all prior service, and, in addition they shall receive membership service credit for the period of service in such armed services up to the date they were first eligible to be separated or released therefrom, occurring after the date of establishment of the Retirement System.

(3) Teachers and other State employees who enter the armed services of the United States on or after July 1, 1950, or who engage in active military service on or after July 1, 1950, and who return to the service of the State within a period of two years after they are first eligible to be separated or released from such active military service under other than dishonorable conditions shall be entitled to full membership service credit for the period of such active service in the armed services.

(4) Under such rules as the Board of Trustees shall adopt, credit will be provided by the Retirement System with respect to each such teacher or other State employee in the amounts that he would have been paid

during such service in such armed services on the basis of his earnable compensation when such service commenced. Such contributions shall be credited to the individual account of the member in the annuity savings fund, in such manner as the Board of Trustees shall determine, but any such contributions so credited and any regular interest thereon shall be available to the member only in the form of an annuity, or benefit in lieu thereof, upon his retirement on a service, disability or special retirement allowance; and in the event of cessation of membership or death prior thereto, any such contributions so credited and regular interest thereon shall not be payable to him or on his account, but shall be transferred from the annuity savings fund to the pension accumulation fund. If any payments were made by a member on account of such service as provided by subdivision (5) of subsection (b) of G.S. 135-8, the Board of Trustees shall refund to or reimburse such member for such payments.

(5) The provisions of this subsection shall also apply to members of the national guard with respect to teachers and State employees who are called into federal service or who are called into State service, to the extent that such persons fail to receive compensation for performance of the duties of their employment other than for service in the national guard.

(6) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(7) Notwithstanding any other provision of this Chapter, any member and any retired member as herein described may purchase creditable service in the Armed Forces of the United States, not otherwise allowed, by paying a total lump sum payment determined as follows:

a. For members who completed 10 years of membership service, and retired members who completed 10 years of membership service prior to retirement, whose membership began on or prior to July 1, 1981, and who make this purchase within three years after first becoming eligible, the cost shall be an amount equal to the monthly compensation the member earned when he first entered membership service times the employee contribution rate at that time times the months of service to be purchased, with sufficient interest added thereto so as to equal one-half of the cost of allowing this service, plus an administrative fee to be set by the Board of Trustees.

b. For members who complete five years of membership service, and retired members who complete five years of membership service prior to retirement, and eligible members and retired members covered by paragraph a. of this subdivision, whose membership began on or before July 1, 1981, but who did not or do not make this purchase within three years after first becoming eligible, the cost shall be an amount equal to the full liability of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities and shall take into account the retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire on an unreduced allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed post-retirement allowance increases, as determined by the Board of

Trustees, from the earliest age at which a member could retire on an unreduced service retirement allowance.

Creditable service allowed under this subdivision shall be only for the initial period of "active duty", as defined in 38 U.S. Code Section 101(21), in the Armed Forces of the United States up to the date the member was first eligible to be separated and released and for subsequent periods of "active duty", as defined in 38 U.S. Code Section 101(21), as required by the Armed Forces of the United States up to the date of first eligibility for separation or release, but shall not include periods of active duty in the Armed Forces of the United States creditable in any other retirement system except the national guard or any reserve component of the Armed Forces of the United States, and shall not include periods of "active duty for training", as defined in 38 U.S. Code Section 101(22), or periods of "inactive duty training", as defined in 38 U.S. Code Section 101(23), rendered in any reserve component of the Armed Forces of the United States. Provided, creditable service may be allowed only for active duty in the Armed Forces of the United States of a member that resulted in a general or honorable discharge from duty. The member shall submit satisfactory evidence of the service claimed. For purposes of this subsection, membership service may include any membership or prior service credits transferred to this Retirement System pursuant to G.S. 135-18.1.

(g) Teachers and other State employees who served in the uniformed services as defined in the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4303, and who, after being honorably discharged, returned to the service of the State within a period of two years from date of discharge shall be credited with prior service for such period of service in the uniformed services for the maximum period that they are entitled to reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, et seq., or other federal law, and the salary or compensation of such a teacher or State employee during that period of service is deemed to be that salary or compensation the employee would have received but for the period of service had the employee remained continuously employed, if the determination of that salary or compensation is reasonably certain. If the determination of the salary or compensation is not reasonably certain, then it is deemed to be that employee's average rate of compensation during the 12-month period immediately preceding the period of service.

(h) During periods when a member is on leave of absence and is receiving less than his full compensation, he will be deemed to be in service only if he is contributing to the Retirement System as provided in G.S. 135-8(b)(5). If he is so contributing, the annual rate of compensation paid to such employee immediately before the leave of absence began will be deemed to be the actual compensation rate of the employee during the leave of absence.

(i) Any person who became a member after June 30, 1947, and before July 1, 1955, and did not subsequently withdraw his contributions may, prior to his retirement, increase his creditable service to the extent of the period of time from the date he became a "teacher or employee" as the terms are defined in this Chapter to the date he became a member, but not exceeding three months immediately preceding membership, provided that he makes an additional contribution in one lump sum equal to five per centum (5%) of the compensation he received for the aforesaid period of time plus regular interest thereon from the date he became a member to the date of payment.

(j) Creditable service at retirement shall include any service rendered by a member while on leave of absence to serve as a member or officer of the

General Assembly which is not creditable toward retirement under the Legislative Retirement Fund provided the allowance of such credit shall be contingent upon the cancellation of service credit in the Fund and the transfer of the member's contributions plus accumulated interest from the Fund to this System.

(j1) Any member may purchase creditable service for service as a member of the General Assembly not otherwise creditable under this section, provided the service is not credited in the Legislative Retirement Fund nor the Legislative Retirement System, and further provided the member pays a lump sum amount equal to the full cost of the additional service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which a member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(j2) The creditable service of a member who was a member of the Local Governmental Employees' Retirement System, the Consolidated Judicial Retirement System, or the Legislative Retirement System, and whose accumulated contributions and reserves are transferred from that System to this System, includes service that was creditable in the Local Governmental Employees' Retirement System, the Consolidated Judicial Retirement System, or the Legislative Retirement System, and membership service with those Retirement Systems is membership service with this Retirement System.

(k) Notwithstanding any other provision of this Chapter, any person who withdrew his contributions in accordance with the provisions of G.S. 128-27(f) or G.S. 135-5(f) or the rules and regulations of the Law-Enforcement Officers' Retirement System and who subsequently returns to service may, upon completion of five years of membership service, repay in a total lump sum any and all of the accumulated contributions previously withdrawn with interest compounded annually at the rate of six and one-half percent (6.5%) for each calendar year from the year of withdrawal to the year of repayment plus a fee to cover expense of handling which shall be determined by the Board of Trustees, and receive credit for the service forfeited at time of withdrawal. These provisions shall apply equally to retired members who had attained five years of membership service prior to retirement. The retirement allowance of a retired member who restores service under this subsection shall be increased the month following the month payment is received. The increase in the retirement allowance shall be the difference between the initial retirement allowance, under any optional allowance elected at the time of retirement, and the amount of the retirement allowance, under any optional allowance elected at the time of retirement, to which the retired member would have been entitled had the service not been previously forfeited, adjusted by any increases in the retirement accrual rate occurring between the member's date of retirement and the date of payment. The increase in the retirement allowance shall not include any adjustment for cost-of-living increases granted since the date of retirement.

Notwithstanding any provision to the contrary, a law enforcement officer who was transferred from the Law Enforcement Officers' Retirement System to this Retirement System pursuant to Article 12C of Chapter 143 of the General Statutes and withdrew his accumulated contributions prior to January 1, 1985, in accordance with G.S. 128-27(f) or G.S. 135-5(f) for non-law enforcement service and who has five years or more of membership service standing to his credit may repay in a total lump sum the accumulated contributions previously withdrawn with interest compounded annually at the rate of six and one-half percent (6.5%) for each calendar year from the year of withdrawal to the year of repayment plus a fee to cover expense of handling which shall be determined by the Board of Trustees, and receive credit for the service forfeited at time of withdrawal(s). The retirement allowance of a retired member who restores service under this subsection shall be increased the month following the month payment is received. The increase in the retirement allowance shall be the difference between the initial retirement allowance, under any optional allowance elected at the time of retirement, and the amount of the retirement allowance, under any optional allowance elected at the time of retirement, to which the retired member would have been entitled had the service not been previously forfeited, adjusted by any increases in the retirement accrual rate occurring between the member's date of retirement and the date of payment. The increase in the retirement allowance shall not include any adjustment for cost-of-living increases granted since the date of retirement.

(*l*) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(*l*1) Notwithstanding any other provision of this Chapter, any member and any retired member as herein described may purchase creditable service previously rendered to any state, territory, or other governmental subdivision of the United States other than this State by paying a total lump-sum payment determined as follows:

(1) For members who completed 10 years of current membership service, and retired members who completed 10 years of current membership service prior to retirement, whose membership began on or before July 1, 1981, and who make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the monthly compensation the member earned when he first entered membership service, times the employee contribution rate at that time, times the months of service to be purchased, times two, with sufficient interest added thereto so as to equal the full cost of allowing such service, plus an administrative fee to be set by the Board of Trustees.

(2) For members who complete five years of current membership service, and retired members who complete five years of current membership service prior to retirement, and eligible members and retired members covered by subdivision (1) of this subsection, whose membership began on or before July 1, 1981, but who did not or do not make such purchase within three years after first becoming eligible, the cost shall be an amount equal to the full liability of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities and shall take into account the retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire on an unreduced allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service retirement allowance. Notwithstanding the requirement of five years of current membership service, a member

whose membership began prior to the service the member desires to purchase shall be eligible to purchase creditable service under this subdivision upon returning to service as a teacher or employee upon completion of a total of five years of membership service and upon completion of one year of current membership service.

Current membership service shall mean membership service earned since the service previously rendered to any state, territory, or other governmental subdivision of the United States other than this State. Creditable service under this subsection shall be allowed only at the rate of one year of out-of-state service for each year of membership service in this State, with a maximum allowable of 10 years of out-of-state service. Such service is limited to full-time service which would be allowable under the laws governing this System. Credit will be allowed only if no benefit is allowable in another public retirement system as a result of the service.

(m) Notwithstanding any language to the contrary of any provision of this section, or of any repealed provision of this section that was repealed with the inchoate and accrued rights preserved, all repayments and purchases of service credits, allowed under the provisions of this section or of any repealed provision of this section that was repealed with inchoate and accrued rights preserved, must be made within three years after the member first becomes eligible to make such repayments and purchases. Any member who does not repay or purchase service credits within said three years after first eligibility to make such repayments and purchases may, under the same conditions as are otherwise required, repay or purchase service credits provided that the repayment or purchase equals the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities and shall take into account the additional retirement allowance arising on account of such additional service credit commencing at the earliest age at which such member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance. Notwithstanding the foregoing, on and after July 1, 2001, the provisions of this subsection shall not apply to the repayment of contributions withdrawn pursuant to subsection (k) of this section.

(n) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(o) Repealed by Session Laws 1981, c. 636, s. 1. For proviso as to inchoate or accrued rights, see Editor's Note below.

(p) Credit for prior temporary State employment. — Notwithstanding any other provision of this Chapter, a member may purchase service credit for temporary State employment upon completion of 10 years of membership service and subject to the condition that the member had been classified as a temporary employee for more than three years. Each employer shall certify to the Board of Trustees that an employee is eligible to purchase this service credit prior to the member making payment. Payment for the service credit shall be in a single lump sum based upon the amount the member would have contributed if he had been properly classified as a permanent employee and been a member of this retirement system.

(p1) Part-Time Service Credit. —

(1) Notwithstanding any other provision of this Chapter, upon completion of five years of membership service, any member may purchase service previously rendered as a part-time teacher or employee of an

employer as defined in G.S. 135-1(11) or G.S. 128-21(11), except for temporary or part-time service rendered while a full-time student in pursuit of a degree or diploma in a degree-granting program. Payment shall be made in a single lump sum in an amount equal to the full actuarial cost of providing credit for the service, together with interest and an administrative fee, as determined by the Board of Trustees on the advice of the Retirement System's actuary. Notwithstanding the provisions of G.S. 135-4(b), the Board of Trustees shall fix and determine by appropriate rules and regulations how much service in any year, as based on compensation, is equivalent to one year of service in proportion to "earnable compensation", but in no case shall more than one year of service be creditable for all service in one year. Service rendered for the regular school year in any district shall be equivalent to one year's service. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(2) Under all requirements and conditions set forth in the preceding subdivision of this subsection (p1), except for the requirement that the completion of five years of membership service be subsequent to service rendered as a part-time teacher or employee of the State, any member with five or more years of membership service standing to his credit may purchase additional membership service for service rendered as a part-time teacher or employee of the State if (i) the member terminates or has terminated employment in any capacity as a teacher or employee of the State, (ii) the purchase of the additional membership service causes the member to become eligible to commence an early or service retirement allowance, and (iii) the member immediately elects to commence retirement and become a beneficiary.

(3) Under all the requirements and conditions set forth in subdivision (1) of this subsection, except for the condition that part-time service rendered when a full-time student in pursuit of a degree or diploma in a degree-granting program is not eligible for purchase, any member with five or more years of membership service standing to the member's credit may purchase creditable service for service rendered as a part-time teacher or employee of the State if that service was rendered on a permanent part-time basis and required at least 20 hours of service per week.

(q) Notwithstanding any other provision of this Chapter, any member who entered service or was restored to service prior to July 1, 1982, and was excluded from membership service solely on account of having attained the age of 62 years, in accordance with former G.S. 135-3(6), may purchase membership service credits of such excluded service by making a lump-sum payment equal to the contributions that would have been deducted pursuant to G.S. 135-8(b) had he been a member of the Retirement System, increased by interest calculated at a rate of seven percent (7%) per annum.

(r) Notwithstanding any other provision of this Chapter, any member may purchase creditable service for periods of employer approved leaves of absence when in receipt of benefits under the North Carolina Workers' Compensation Act. This service shall be purchased by paying a cost calculated in the following manner:

(1) Leaves of Absence Terminated Prior to July 1, 1983. — The cost to a member whose employer approved leave of absence, when in receipt of benefits under the North Carolina Workers' Compensation Act, termi-

nated upon return to service prior to July 1, 1983, shall be a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities, and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the board of trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the board of trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(2) Leaves of Absence Terminating On and After July 1, 1983, but before January 1, 1988. — The cost to a member whose employer approved leave of absence, when in receipt of benefits under the North Carolina Workers' Compensation Act, terminates upon return to service on and after July 1, 1983, but before January 1, 1988, shall be a lump sum amount due and payable to the Annuity Savings Fund within six months from return to service equal to the total employee and employer percentage rates of contribution in effect at the time of purchase and based on the annual rate of compensation of the member immediately prior to the leave of absence; Provided, however, the cost to a member whose amount due is not paid within six months from return to service shall be the amount due plus one percent (1%) per month penalty for each month or fraction thereof the payment is made beyond the six-month period.

(3) Leaves of Absence Terminating On and After January 1, 1988. — The cost to a member whose employer approved leave of absence, when in receipt of benefits under the North Carolina Workers' Compensation Act, terminates upon or before a return to service on and after January 1, 1988, shall be due and payable to the Annuity Savings Fund within six months from return to service and shall be a lump sum amount equal to the employee percentage rate of contribution in effect at the time of purchase applied to the annual rate of compensation of the member immediately prior to the leave of absence. For members electing to make this payment, the member's employer which granted the leave of absence, or the member's employer upon a return to service, or both, shall make a matching lump sum payment to the Pension Accumulation Fund within six months from return to service equal to the employer percentage rate of contribution in effect at the time of purchase applied to the annual rate of compensation of the member immediately prior to the leave of absence. Such purchases of creditable service are applicable only when members have membership service credits within 30 days prior to the leave of absence and within 12 months following the leave of absence and such membership service is creditable service at the time of purchase. Notwithstanding any other provision of this subdivision, the cost to a member and to a member's employer or former employer or both employers whose amount due is not paid within six months from return to service shall be the amount due plus one percent (1%) per month penalty for each month or fraction thereof that the payment is made after the six-month period.

Notwithstanding the requirement of this provision that a member return to service, a member who is in receipt of Workers' Compensation during the period for which he or she would have otherwise been eligible to receive short-term benefits as provided in G.S. 135-105 and who subsequently becomes a beneficiary in receipt of a benefit as provided in G.S. 135-106 may purchase creditable service for any period of employer approved leave of absence when in receipt of benefits under the North Carolina Workers' Compensation Act. The cost to purchase such creditable service shall be as determined above provided the amount due if not paid within six months from the beginning of the long-term disability period as determined in G.S. 135-106 shall be the amount due plus one percent (1%) per month penalty for each month or fraction thereof that the payment is made after the six-month period.

Whenever the creditable service purchased pursuant to this subsection is for a period that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 135-1(5) had the member not been on leave of absence without pay, then the compensation that the member would have received during the purchased period shall be included in calculating the member's average final compensation. In such cases, the compensation that the member would have received during the purchased period shall be based on the annual rate of compensation of the member immediately prior to the leave of absence.

(s) Credit at Full Cost for Temporary Employment. — In addition to the provisions of subsection (p) above, any member may purchase creditable service for State employment when classified as a temporary teacher or employee subject to the conditions that the:

(1) Member was employed by an employer as defined in G.S. 135-1(11) or G.S. 128-21(11);
(2) Member's temporary employment met all other requirements of G.S. 135-1(10) or (25), or G.S. 128-21(10);
(3) Member has completed five years or more of membership service;
(4) Member acquires from the employer such certifications of temporary employment as are required by the Board of Trustees; and
(5) Member makes a lump sum payment into the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary, plus an administrative expense fee to be determined by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

The provisions of this subsection shall also apply to the purchase of creditable service for State employment when classified as a permanent hourly employee in accordance with G.S. 126-5(c4).

(t) Credit at Full Cost for Local Government Employment. — Any member may purchase creditable service for any employment as an employee, as defined in G.S. 128-21(10), of a local government employer not creditable in the North Carolina Local Governmental Employees' Retirement System upon completion of five years of membership service by making a lump-sum payment into the Annuity Savings Fund. The payment by the member shall be equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary plus an administrative expense fee to be determined by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(u) Any member who was a wildlife protector who elected to become a member of the Law Enforcement Officers' Retirement System pursuant to Chapter 837 of the 1971 Session Laws by the transfer of accumulated contributions from this Retirement System to the Law Enforcement Officers' Retirement System and who has not subsequently applied for and received a return of accumulated contributions shall be entitled to creditable service for the service as a non-law enforcement officer forfeited as a result of the transfer pursuant to Chapter 837 of the 1971 Session Laws.

(v) Omitted Membership Service. — A member who had service as an employee as defined in G.S. 135-1(10) and G.S. 128-21(10) or as a teacher as defined in G.S. 135-1(25) and who was omitted from contributing membership through error may be allowed membership service, after submitting clear and convincing evidence of the error, as follows:

(1) Within 90 days of the omission, by the payment of employee and employer contributions that would have been paid; or

(2) After 90 days and prior to three years of the omission, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees; or

(3) After three years of the omission, by the payment of an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the system's liabilities, and shall take into account the additional retirement allowance arising on account of such additional service credit commencing at the earliest age at which a member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subdivision that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

Nothing contained in this subsection shall prevent an employer or member from paying all or a part of the cost of the omitted membership service; and to the extent paid by the employer, the cost paid by the employer shall be credited to the pension accumulation fund; and to the extent paid by the member, the cost paid by the members shall be credited to the member's annuity savings account; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the cost of the omitted membership service.

(w) Credit at Full Cost for Federal Employment. — Notwithstanding any other provisions of this Chapter, a member, upon the completion of five years of membership service, may purchase creditable service for periods of federal employment, provided that the member is not receiving any retirement benefits resulting from this federal employment, and provided that the member is not vested in the particular federal retirement system to which the member may have belonged while a federal employee. The member shall purchase this service by making a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities, and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

Members may also purchase creditable service for periods of employment with public community service entities within the State funded entirely with federal funds, other than the federal government, that are not covered by the provisions of G.S. 128-21(11) or G.S. 135-1(11), under the same terms and conditions that are applicable to the purchase of creditable service for periods of federal employment in accordance with this subsection. "Public community service entities" as used in this subsection shall mean community action, human relations, manpower development, and community development programs as defined in Articles 19 and 21 of Chapter 160A and Article 18 of Chapter 153A of the General Statutes and any other similar programs that the Board of Trustees may adopt.

(x) Repealed by Session Laws 2001-424, s. 32.32(c), effective July 1, 2001.

(y) A member who is a beneficiary of the Disability Income Plan provided for in Article 6 of this Chapter shall be granted creditable service for each month that the member is eligible for and for which a benefit is paid under the provisions of G.S. 135-105 and G.S. 135-106; provided, however, that in no instance shall a member be granted creditable service under this subsection if creditable service is earned or credited for the same month in this retirement system or any other retirement system administered by the State.

(z) Credit at Full Cost for Leave Due to Extended Illness. — Any member in service with five or more years of membership service standing to his credit may purchase creditable service for periods of interrupted service while on leave without pay status due to the member's illness or injury, excluding leave due to maternity, provided that any single such interrupted service shall have included such period of time during which the member failed to earn at least two months membership service, by making a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities; and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(aa) Credit at Full Cost for Maternity Leave. — Notwithstanding other provisions of this Chapter, any member in service with five or more years of credited membership service may purchase creditable service for periods of service which were interrupted due to parental leave, pregnancy or childbirth, or involuntary administrative furlough due to a lack of funds to support the position by making a lump sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities; and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Creditable service purchased under this subsection may not exceed six months per parental leave, pregnancy or childbirth, or involuntary administrative furlough due to a lack of funds to support the position. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed annual postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(bb) Credit at Full Cost for Probationary Local Government Employment. — Notwithstanding any other provision of this Chapter, a member may purchase creditable service, prior to retirement, for employment with any local employer as defined in G.S. 128-21(11) when considered to be in a probationary or employer-imposed waiting period status, between the date of employment and the date of membership service with the Local Governmental Employees' Retirement System, provided that the former employer of such a member has revoked this probationary employment or waiting period policy.

The member shall purchase this service by making a lump-sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the liabilities of the retirement system, and the calculation of the amount payable shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the provisions of this subsection that provide for the purchase of service credits, the term "full liability" includes assumed annual postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(cc) Credit for Employment in Charter School Operated by a Private Nonprofit Corporation. — Any member may purchase creditable service for any employment as an employee of a charter school operated by a private nonprofit corporation whose board of directors did not elect to participate in the Retirement System under G.S. 135-5.3 upon completion of five years of membership service after that charter school employment by making a lump-sum payment into the Annuity Savings Fund. The payment by the member shall be equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the actuary plus an administrative expense fee to be determined by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(dd) Purchase of Service Credits Through Rollover Contributions From Certain Other Plans. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 135-4, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through rollover contributions to the Annuity Savings Fund from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code, (ii) an eligible plan under Section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state, (iii) an individual retirement account or annuity described in Section 408(a) or 408(b) of the Internal Revenue Code that is eligible to be rolled over and would otherwise be includible in gross income, or (iv) a qualified plan described in Section 401(a) or 403(a) of the Internal Revenue Code. Notwithstanding the foregoing, the Retirement System shall not accept any amount as a rollover contribution unless such amount is eligible to be rolled over to a qualified trust in accordance with applicable law and the member provides evidence satisfactory to the Retirement System that such amount qualifies for rollover treatment. Unless received by the Retirement System in the form of a direct rollover, the rollover contribution must be paid to the Retirement System on or before the 60th day after the date it was received by the member.

Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 135-4, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code or (ii) an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

(ee) Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of G.S. 135-4, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) the Supplemental Retirement Income Plans A, B, or C of North Carolina or (ii) any other defined contribution plan qualified under Section 401(a) of the Internal Revenue Code which is maintained by the State of North Carolina, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

(ff) Retroactive Membership Service. — A member who is reinstated to service as an employee as defined in G.S. 135-1(10) or as a teacher as defined in G.S. 135-1(25) retroactively to the date of prior involuntary termination (with backpay and benefits) may be allowed membership service, after submitting clear and convincing evidence of the reinstatement, as follows:

(1) Within 90 days of the involuntary termination, by the payment of employee and employer contributions that would have been paid; or

(2) After 90 days of the involuntary termination, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees.

Nothing contained in this subsection shall prevent an employer or member from paying all or a part of the cost of the retroactive membership service; and to the extent paid by the employer, the cost paid by the employer shall be credited to the pension accumulation fund; and to the extent paid by the member, the cost paid by the member shall be credited to the member's annuity savings account; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the cost of the retroactive membership service.

In the event a member received a return of accumulated contributions subsequent to an involuntary termination as provided in G.S. 135-5(f), the member may redeposit, within 90 days of reinstatement retroactive to the date of prior involuntary termination, in the annuity savings fund by single payment an amount equal to the total amount he previously withdrew plus regular interest and restore the creditable service forfeited upon receiving his return of accumulated contributions.

(gg) If a member who is an elected government official and has not vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 135-18.10 for acts committed after July 1, 2007, then that member shall forfeit all benefits under this System. If a member who is an elected government official and has vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 135-18.10 for acts committed after July 1, 2007, then that member is not entitled to any creditable service that accrued after July 1, 2007. No member shall forfeit any benefit or creditable service earned from a position not as an elected government official.

(hh) Credit at Full Cost for Service With The University of North Carolina During Which a Member Participated in the Optional Retirement Program. — Notwithstanding any other provisions of this Chapter, a member upon the completion of five years of membership service may purchase creditable service for periods of employment with The University of North Carolina during which the member participated in the Optional Retirement Program as provided for in G.S. 135-5.1, provided that the member is not receiving, and is not entitled to receive, any retirement benefits resulting from this employment. The member shall purchase this service by making a lump-sum amount payable to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance, as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost," "full liability," and "full actuarial cost" include assumed annual postretirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance. (1941, c. 25,

s. 4; 1943, cc. 200, 783; 1945, c. 797; 1947, c. 575; 1949, c. 1056, ss. 2, 4; 1953, c. 1050, s. 3; 1959, c. 513, s. 11/2; 1961, c. 516, s. 3; c. 779, s. 2; 1963, c. 1262; 1965, c. 780, s. 1; c. 924; 1967, c. 720, s. 3; 1969, c. 1223, ss. 3, 4; 1971, c. 117, ss. 9, 10; c. 993; 1973, c. 241, s. 2; c. 242, s. 1; c. 667, s. 2; c. 737, s. 1; c. 816, s. 1; c. 1063; c. 1311, ss. 1-5; 1975, c. 205, s. 2; c. 875, s. 47; 1977, cc. 317, 790; 1979, c. 826; c. 866, s. 2; c. 867; c. 972, s. 3; 1981, c. 557, s. 3; c. 636, s. 1; c. 1116, s. 1; 1981 (Reg. Sess., 1982), c. 1396, s. 4; 1983, c. 533, s. 1; c. 725; 1983 (Reg. Sess., 1984), c. 1030; c. 1034, ss. 230, 231; c. 1045, ss. 1, 2; 1985, c. 401, ss. 1, 2; c. 407, s. 1; c. 479, s. 193; c. 512; c. 530; c. 649, ss. 1, 4; c. 749, s. 1; 1987, c. 533, s. 1; c. 717, s. 2; c. 738, s. 29(b); c. 809, s. 2; c. 821; c. 825; 1987 (Reg. Sess., 1988), c. 1088, ss. 1-4; c. 1103; c. 1110, s. 9; 1989, c. 255, ss. 11-20; c. 762, s. 3; 1991 (Reg. Sess., 1992), c. 1017, s. 2; c. 1029, s. 1; 1995, c. 507, s. 7.23D(b); 1998-71, ss. 3, 4; 1998-190, s. 1; 1998-212, s. 9.14A(c); 1998-214, s. 2; 1999-71, s. 1; 1999-158, s. 2; 2001-424, ss. 32.28(a), 32.32(a), 32.32(b), 32.32(c); 2002-71, s. 5; 2002-153, s. 4; 2002-174, s. 3; 2003-284, s. 30.18(b); 2003-358, s. 3; 2003-359, ss. 7, 8, 9, 12; 2005-91, s. 1; 2007-179, s. 3(b); 2007-233, s. 1; 2007-431, ss. 8, 11.)

Editor's Note. — Section 126-5(c4), referred to in subsection (s) of this section, was repealed by Session Laws 1993, c. 321, s. 145(b).

Session Laws 1981, c. 636, s. 1, effective July 1, 1981, deleted subdivision (f)(6), which concerned purchase of service credit for service in the armed forces of the United States, subsection (*l*), which concerned purchase of credit for service to governmental entities, subsection (n), which defined "out-of-state service", and subsection (o), which concerned purchase of credit for time spent as a court reporter prior to establishment of the Uniform Court System, but provided that any inchoate or accrued rights of any member on July 1, 1981, shall not be diminished.

Prior to this amendment, subdivision (f)(6) and subsections (*l*), (n) and (o) read:

"(f) (6) Notwithstanding any other provision of this Chapter, teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment to be determined by the Board of Trustees and assessed the member at the time of payment; provided that credit will be allowed only for the initial period of active duty in the armed forces of the United States up to the time the member was first eligible to be separated or released therefrom, and subsequent periods of such active duty as required by the armed forces of the United States up to the date of first eligibility for separation or release therefrom; and further provided that the member submit satisfactory evidence of the service claimed and that service credit be allowed only for that period of active service in the armed forces of the United States not creditable in any other retirement system, except the national guard or any reserve component of the armed forces of the United States. These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of a member is made.

"(*l*) Notwithstanding any other provision of this Chapter, any member may, upon completion of 10 years of current membership service, purchase credit for service previously rendered to any state, territory or other governmental subdivision of the United States other than this State at the rate of one year of out-of-state service for each two years of service in this State with a maximum allowable of 10 years of out-of-state service. Such service is limited to full-time service which would be allowable under the laws governing this System. Credit will be allowed only if no benefit is allowable in another public retirement system as a result of the service. Payment shall be permitted only on a total lump sum, an amount based on the compensation the member earned when he first entered membership and the employee contribution rate at that time and shall be equal to the full cost of providing credit for such service plus a fee to cover expense of handling which shall be determined by the Board of Trustees. These provisions shall apply equally to retired members who had attained 10 years of membership service prior to retirement. Cost as used in this subsection shall mean the amount of money required to provide additional retirement benefits based on service credit allowed at the time any adjustment to the service credit of an individual is made.

"Notwithstanding the foregoing provisions, any member may, upon completion of 10 years of current membership service, purchase Federal School, Overseas Dependent Schools, or Military Dependent Schools service, or, while on an approved leave of absence from employment with the State of North Carolina, foreign service in the International Cooperation Administration or the Agency for International Development upon the same terms as in the preceding paragraph for out-of-state service.

"(n) Wherever the terminology 'out-of-state service,' is used in this section, that terminology shall be interpreted to include the United States Public Health Service and time spent in the Merchant Marines while in the United States Naval Reserve.

"(o) Notwithstanding any other provision of this Chapter, a member who is presently a court reporter may buy in time spent serving as court reporter prior to the establishment of the Uniform Court System in 1968 by purchasing service credits, provided that the purchase payment equals the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities. Account shall be taken of the additional retirement allowance arising on account of the additional service credit commencing at the earliest date of which the member could retire or of a reduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary."

Session Laws 1991 (Reg. Sess., 1992), c. 1017, s. 2, which rewrote the first sentence of subsection (m), became effective on and after July 1, 1979.

Session Laws 2002-71, which added subsections (dd) and (ee) by s. 5, in s. 9, provides, in part, that s. 5 of the act becomes effective January 1, 2003, except that G.S. 135-4(ee), as enacted by s. 5, becomes effective the later of January 1, 2003, or the date upon which the Department of State Treasurer receives a ruling from the Internal Revenue Service approving the direct transfers provided for in that subsection. The Revisor of Statutes is informed that a favorable letter of determination has been received.

Effect of Amendments. — Session Laws 2007-179, s. 3(b), effective July 1, 2007, and applicable to offenses committed on or after that date, added subsection (gg).

Session Laws 2007-233, s. 1, effective July 1, 2007, rewrote subsection (g).

Session Laws 2007-431, ss. 8, 11, effective July 1, 2007, added subsection (hh); and added the second paragraph in subdivision (r)(3).

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

The 1992 Amendment. — In 1992, the General Assembly revised subsection (m) of this section, to make it clear that its intention was that credits for military service had to be purchased within three years of the date a member first becomes eligible to do so. Osborne v. Consolidated Judicial Retirement Sys., 333 N.C. 246, 424 S.E.2d 115 (1993).

Employee Held Not in Service for Death Benefit Purposes. — Where employee did not contribute to the Retirement System after being placed on leave without pay, the possible extension provided by this section for plan members who contribute while on leave of absence did not apply. Therefore, employee's death occurred more than 90 days after his last day of actual service, and he was not in service at the time of his death and thus, his beneficiary is not eligible for the death benefit. Garrett v. Teachers' & State Employees' Retirement Sys. ex rel. Board of Trustees, 91 N.C. App. 409, 371 S.E.2d 776, cert. denied, 323 N.C. 624, 374 S.E.2d 585 (1988).

Job Sharing Employee. — Petitioner remained an "employee" under G.S. 135-1(10) during the period of time when she participated in a job sharing program and was working full time and thus was entitled to credit for those years of service as reflected in her retirement records. Wiebenson v. Board of Trustees, 345 N.C. 734, 483 S.E.2d 153 (1997).

Cited in In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981); Stanley v. Retirement & Health Benefits Div., 55 N.C. App. 588, 286 S.E.2d 643 (1982); Worrell v. North Carolina Dep't of State Treas., 333 N.C. 528, 427 S.E.2d 871 (1993).

OPINIONS OF ATTORNEY GENERAL

Subsection (m) of This Section Was Not Repealed by Session Laws 1975, Chapter 875. — See opinion of Attorney General to Mr. W.H. Hambleton, Director, Retirement and Health Benefits Division, Department of the Treasurer, Nov. 8, 1977.

Employee Reentering State Employment After Retirement. — When an employee, age 62, retires on July 1, 1959, and receives retirement benefits until July 1, 1964, at which time he reenters State employment, when that employee subsequently retires on July 1, 1969, he is entitled to the resumption of payment of his retirement benefits suspended while he was reemployed, plus additional benefits based on a salary over the most recent 5 years' employment figured at the current formula rate. He is not entitled to benefits using the current formula and his total service recently plus that prior to his first retirement. See opinion of Attorney General to Mr. J.E. Miller, Director, Teachers' and State Employees' Retirement System, 40 N.C.A.G. 623 (1969).

Sick Leave Included in Creditable Service. — See opinion of Attorney General to Mr. J.E. Miller, Director, Teachers' and State Employees' Retirement System, 41 N.C.A.G. 101 (1970).

§ 135-4A: Recodified as G.S. 135-4.1 by Session Laws 2006-264, s. 14, effective August 27, 2006.

§ 135-4.1. Reciprocity of creditable service with other State-administered retirement systems.

(a) Only for the purpose of determining eligibility for benefits accruing under this Article, creditable service standing to the credit of a member of the Legislative Retirement System, Consolidated Judicial Retirement System, or the Local Governmental Employees' Retirement System shall be added to the creditable service standing to the credit of a member of this System; provided, that in the event a person is a retired member of any of the foregoing retirement systems, such creditable service standing to the credit of the retired member prior to retirement shall be likewise counted. In no instance shall service credits maintained in the aforementioned retirement systems be added to the creditable service in this System for application of this System's benefit accrual rate in computing a service retirement benefit unless specifically authorized by this Article.

(b) A person who was a former member of this System and who has forfeited his creditable service in this System by receiving a return of contributions and who has creditable service in the Legislative Retirement System, Consolidated Judicial Retirement System, or the Local Governmental Employees' Retirement System may count such creditable service for the purpose of restoring the creditable service forfeited in this System under the terms and conditions as set forth in this Article and reestablish membership in this System.

(c) Creditable service under this section shall not be counted twice for the same period of time whether earned as a member, purchased, or granted as prior service credits. (1989 (Reg. Sess., 1990), c. 1066, s. 35(c); 2006-264, s. 14.)

Editor's Note. — This section was formerly codified as G.S. 135-4A. It was recodified as G.S. 135-4.1 by Session Laws 2006-264, s. 14, effective August 27, 2006.

§ 135-5. Benefits.

(a) Service Retirement Benefits. —

(1) Any member may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 120 days subsequent to the execution of and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 60 years and have at least five years of membership service or shall have completed 30 years of creditable service.

(2) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1019, s. 1.

(3) Any member who was in service October 8, 1981, who had attained 60 years of age, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired.

(4) Any member who is a law-enforcement officer, and who attains age 50 and completes 15 or more years of creditable service in this capacity or who attains age 55 and completes five or more years of creditable service in this capacity, may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; Provided, also, any member who has met the conditions herein required but does not retire, and later becomes a teacher or an employee other than as a law-enforcement officer shall continue to have the right to commence retirement.

(5) Any member who is eligible for and is being paid a benefit under the Disability Income Plan as provided in G.S. 135-105 or G.S. 135-106 shall be deemed a member in service and may not retire under the provisions of this section. Any member who has made written application for long-term or extended short-term benefits under the Disability Income Plan as provided in G.S. 135-105 or G.S. 135-106, and who has been rejected by the Plan's Medical Board for a long-term or extended short-term benefit shall have 90 days from the date of notification of the rejection to convert his application to an early or service retirement application, provided that the member meets the eligibility requirements, effective the first day of the month following the month in which short-term disability benefits ended or the first day of the month following the month in which any salary continuation as may be provided in G.S. 135-104 ended, whichever is later.

(a1) Early Service Retirement Benefits. — Any member may retire and receive a reduced retirement allowance upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution of and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 50 years and have at least 20 years of creditable service.

(b) Service Retirement Allowances of Persons Retiring on or after July 1, 1959, but prior to July 1, 1963. — Upon retirement from service on or after July 1, 1959, but prior to July 1, 1963, a member shall receive a service retirement allowance which shall consist of:

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(2) A pension equal to the annuity allowable at the age of 65 years or at his retirement age, whichever is the earlier age, computed on the basis of contributions made prior to such earlier age; and

(3) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to the sum of:

  a. The annuity which would have been provided at his retirement age by the contributions which he would have made during such prior service had the System been in operation and had he contributed thereunder at the rate of six and twenty-five hundredths per centum (6.25%) of his compensation; and

  b. The pension which would have been provided on account of such contributions at age 65, or at his retirement age, whichever is the earlier age.

If the member has not less than 20 years of creditable service, he shall be entitled to a total retirement allowance of not less than seventy dollars ($70.00) per month; provided that the computation shall be made prior to any reduction resulting from the selection of an optional allowance as provided by subsection (g) of this section.

(b1) Service Retirement Allowances of Members Retiring on or after July 1, 1963, but prior to July 1, 1967. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1963, but prior to July 1, 1967, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to the sum of (i) one percent (1%) of the portion of his average final compensation not in excess of forty-eight hundred dollars ($4,800) plus one and one-half percent (1½%) of the portion of such compensation in excess of forty-eight hundred dollars ($4,800), multiplied by the number of years of his creditable service rendered prior to January 1, 1966, and (ii) one percent (1%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service rendered after January 1, 1966.

(2) If the member's service retirement date occurs before his sixty-fifth birthday, his service retirement allowance shall be computed as in (1) above, but shall be reduced by five twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b2) Service Retirement Allowance of Members Retiring on or after July 1, 1967, but prior to July 1, 1969. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1967, but prior to July 1, 1969, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs before his sixty-fifth birthday, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b3) Service Retirement Allowances of Members Retiring on or after July 1, 1969, but prior to July 1, 1973. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1969, but prior to July 1, 1973, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or on or

after his sixty-second birthday and the completion of 30 years of creditable service, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) If the member's service retirement date occurs before his sixty-second birthday but on or after his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-second birthday.

(4) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b4) Service Retirement Allowances of Members Retiring on or after July 1, 1973, but prior to July 1, 1975. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1973, but prior to July 1, 1975, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of five thousand six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of five thousand six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b5) Service Retirement Allowance of Members Retiring on or after July 1, 1975, but prior to July 1, 1977. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1975, but prior to July 1, 1977, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-half percent (1½%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable

service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b6) Service Retirement Allowance of Members Retiring on or after July 1, 1977, but prior to July 1, 1980. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1977, but prior to July 1, 1980, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-five one hundredths percent (1.55%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b7) Service Retirement Allowance of Members Retiring on or after July 1, 1980, but prior to July 1, 1985. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1980, but prior to July 1, 1985, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-seven hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2) above.

(4) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b8) Service Retirement Allowance of Law-Enforcement Officers Retiring on or after January 1, 1985 [on or after January 1, 1985, but prior to July 1, 1985]. — Upon retirement from service, in accordance with subsection (a) of this section, on or after January 1, 1985 [on or after January 1, 1985, but prior to July 1, 1985], a member who is a law-enforcement officer or an eligible former law-enforcement officer shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law-enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and fifty-seven one hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs after his 50th and before his 55th birthday with 15 or more years of creditable service as a law-enforcement officer and prior to his completion of 30 years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 55th birthday.

(b9) Service Retirement Allowance of Members Retiring on or after July 1, 1985, but before July 1, 1988. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1985, but before July 1, 1988, a member shall receive the following service retirement allowance:

(1) A member who is a law-enforcement officer or an eligible former law-enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law-enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and fifty-eight one hundredths percent (1.58%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs after his 50th and before his 55th birthday with 15 or more years of creditable service as a law-enforcement officer and prior to his completion of 30 years of creditable service, his retirement allowance shall be computed as in a. above, but shall be reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 55th birthday.

(2) A member who is not a law-enforcement officer or an eligible former law-enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, such allowance shall be equal to one and fifty-eight hundredths percent (1.58%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs after his 60th and before his 65th birthday and prior to his completion of 25 or more years of creditable service, his retirement allowance shall be computed as in a. above but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's service retirement date occurs before his 60th birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in b. above.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b10) Service Retirement Allowance of Members Retiring on or after July 1, 1988, but before July 1, 1989. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1988, but before July 1, 1989, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty hundredths percent (1.60%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(1)b.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, such allowance shall be equal to one and sixty hundredths percent (1.60%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(2)b, c and d.

(b11) Service Retirement Allowance of Members Retiring on or after July 1, 1989, but before July 1, 1990. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1989, but before July 1, 1990, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty-three hundredths percent (1.63%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(1)b.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and sixty-three hundredths percent (1.63%) of his average final compensation, multiplied by the number of years of creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(2)b, c and d.

(b12) Service Retirement Allowance of Members Retiring on or after July 1, 1990, but before July 1, 1992. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1990, but before July 1, 1992, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and sixty-four hundredths percent (1.64%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(1)b.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and sixty-four hundredths percent (1.64%) of his average final compensation, multiplied by the number of years of creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(2)b, c and d.

(b13) Service Retirement Allowance of Members Retiring on or after July 1, 1992, but before July 1, 1993. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1992, but before July 1, 1993, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy hundredths percent (1.70%) of his average final compensation, multiplied by the number of years of his creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(1)b.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy hundredths percent (1.70%) of his average final compensation, multiplied by the number of years of creditable service.

b. This allowance shall also be governed by the provisions of G.S. 135-5(b9)(2)b., c., and d.

(b14) Service Retirement Allowance of Members Retiring on or after July 1, 1993, but before July 1, 1994. — Upon retirement from service in accordance with subsection (a) above, on or after July 1, 1993, but before July 1, 1994, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-one hundredths percent (1.71%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs after his 50th and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, the allowance shall be computed as in G.S. 135-5(b14)(1)a., but shall be reduced by one-third of one percent (⅓ of 1%) thereof for each month by which the retirement date precedes the first day of the month coincident with or next following his 55th birthday.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-one hundredths percent (1.71%) of his average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to the completion of 25 years or more of creditable service, the retirement allowance shall be computed as in G.S. 135-5(b14)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's service retirement date occurs before his 60th birthday and prior to the completion of 30 or more years of creditable service, the service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 135-5(b14)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(b).

(b15) Service Retirement Allowance of Members Retiring on or after July 1, 1994, but before July 1, 1995. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1994, but before July 1, 1995, a member shall receive the following service retirement allowance:

- (1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  - a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-three hundredths percent (1.73%) of his average final compensation, multiplied by the number of years of his creditable service.
  - b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:
    - 1. The service retirement allowance payable under G.S. 135-5(b15)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or
    - 2. The service retirement allowance as computed under G.S. 135-5(b15)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.
- (2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  - a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-three hundredths percent (1.73%) of his average final compensation, multiplied by the number of years of creditable service.
  - b. If the member's service retirement date occurs after his 60th and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 135-5(b15)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.
  - c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:
    - 1. The service retirement allowance as computed under G.S. 135-5(b15)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th

birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 135-5(b15)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1994, the service retirement allowance provided by G.S. 135-5(b14)(2)c.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall not receive less than the benefit provided by G.S. 135-5(b).

(b16) Service Retirement Allowance of Members Retiring on or After July 1, 1995, but Before July 1, 1997. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1995, but before July 1, 1997, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and seventy-five hundredths percent (1.75%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 135-5(b16)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or
2. The service retirement allowance as computed under G.S. 135-5(b16)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of creditable service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and seventy-five hundredths percent (1.75%) of his average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 135-5(b16)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

  1. The service retirement allowance as computed under G.S. 135-5(b16)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or
  2. The service retirement allowance as computed under G.S. 135-5(b16)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
  3. If the member's creditable service commenced prior to July 1, 1994, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 135-5(b16)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall not receive less than the benefit provided by G.S. 135-5(b).

(b17) Service Retirement Allowance of Members Retiring on or After July 1, 1997, but Before July 1, 2000. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 1997, but before July 1, 2000, a member shall receive the following service retirement allowance.

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty hundredths percent (1.80%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

  1. The service retirement allowance payable under G.S. 135-5(b17)(1)a, reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or
  2. The service retirement allowance as computed under G.S. 135-5(b17)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of membership service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty hundredths percent (1.80%) of his average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 135-5(b17)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 135-5(b17)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 135-5(b17)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or

3. If the member's creditable service commenced prior to July 1, 1994, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 135-5(b17)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall not receive less than the benefit provided by G.S. 135-5(b).

(b18) Service Retirement Allowance of Members Retiring on or After July 1, 2000, but Before July 1, 2002. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2000, but before July 1, 2002, a member shall receive the following service retirement allowance.

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty-one hundredths percent (1.81%) of his average final compensation, multiplied by the number of years of his creditable service.

b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:

1. The service retirement allowance payable under G.S. 135-5(b18)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or
2. The service retirement allowance as computed under G.S. 135-5(b18)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:

a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of membership service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty-one hundredths percent (1.81%) of his average final compensation, multiplied by the number of years of creditable service.

b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 135-5(b18)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.

c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:

1. The service retirement allowance as computed under G.S. 135-5(b18)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or
2. The service retirement allowance as computed under G.S. 135-5(b18)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1994, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 135-5(b18)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall not receive less than the benefit provided by G.S. 135-5(b).

(b19) Service Retirement Allowance of Members Retiring on or After July 1, 2002. — Upon retirement from service in accordance with subsection (a) or (a1) above, on or after July 1, 2002, a member shall receive the following service retirement allowance:

(1) A member who is a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 55th birthday, and completion of five years of creditable service as a law enforcement officer, or after the completion of 30 years of creditable service, the allowance shall be equal to one and eighty-two hundredths percent (1.82%) of his average final compensation, multiplied by the number of years of his creditable service.
  b. If the member's service retirement date occurs on or after his 50th birthday and before his 55th birthday with 15 or more years of creditable service as a law enforcement officer and prior to the completion of 30 years of creditable service, his retirement allowance shall be equal to the greater of:
    1. The service retirement allowance payable under G.S. 135-5(b19)(1)a. reduced by one-third of one percent (⅓ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 55th birthday; or
    2. The service retirement allowance as computed under G.S. 135-5(b19)(1)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement.

(2) A member who is not a law enforcement officer or an eligible former law enforcement officer shall receive a service retirement allowance computed as follows:
  a. If the member's service retirement date occurs on or after his 65th birthday upon the completion of five years of membership service or after the completion of 30 years of creditable service or on or after his 60th birthday upon the completion of 25 years of creditable service, the allowance shall be equal to one and eighty-two hundredths percent (1.82%) of his average final compensation, multiplied by the number of years of creditable service.
  b. If the member's service retirement date occurs after his 60th birthday and before his 65th birthday and prior to his completion of 25 years or more of creditable service, his retirement allowance shall be computed as in G.S. 135-5(b19)(2)a. but shall be reduced by one-quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his 65th birthday.
  c. If the member's early service retirement date occurs on or after his 50th birthday and before his 60th birthday and after completion of 20 years of creditable service but prior to the completion of 30 years of creditable service, his early service retirement allowance shall be equal to the greater of:
    1. The service retirement allowance as computed under G.S. 135-5(b19)(2)a. but reduced by the sum of five-twelfths of one percent (5⁄12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following the month the member would have attained his 60th birthday, plus one-quarter of one

percent (¼ of 1%) thereof for each month by which his 60th birthday precedes the first day of the month coincident with or next following his 65th birthday; or

2. The service retirement allowance as computed under G.S. 135-5(b19)(2)a. reduced by five percent (5%) times the difference between 30 years and his creditable service at retirement; or
3. If the member's creditable service commenced prior to July 1, 1994, the service retirement allowance equal to the actuarial equivalent of the allowance payable at the age of 60 years as computed in G.S. 135-5(b19)(2)b.

d. Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall not receive less than the benefit provided by G.S. 135-5(b).

(c) Disability Retirement Benefits of Members Leaving Service Prior to January 1, 1988. — The provisions of this subsection shall not be applicable to members in service on or after January 1, 1988. Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than one day nor more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired; Provided further the medical board shall determine if the member is able to engage in gainful employment and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced as in subsection (e) below. Provided further, that the medical board shall not certify any member as disabled who:

(1) Applies for disability retirement based upon a mental or physical incapacity which existed when the member first established membership in the system; or
(2) Is in receipt of any payments on account of the same disability which existed when the member first established membership in the system.

The Board of Trustees shall require each employee upon enrolling in the retirement system to provide information on the membership application concerning any mental or physical incapacities existing at the time the member enrolls.

Supplemental disability benefits heretofore provided are hereby made a permanent part of disability benefits after age 65, and shall not be discontinued at age 65.

Notwithstanding the requirement of five or more years of creditable service to the contrary, a member who is a law-enforcement officer and who has had one year or more of creditable service and becomes incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty, and meets all other requirements for disability retirement benefits, may be retired by the Board of Trustees on a disability retirement allowance.

Notwithstanding the foregoing to the contrary, any beneficiary who commenced retirement with an early or service retirement benefit has the right, within three years of his retirement, to convert to an allowance with disability retirement benefits without modification of any election of optional allowance previously made; provided, the beneficiary presents clear and convincing evidence that the beneficiary would have met all applicable requirements for disability retirement benefits while still in service as a member. The allowance on account of disability retirement benefits to the beneficiary shall be retroactive to the effective date of early or service retirement.

Notwithstanding the foregoing, the surviving designated beneficiary of a deceased member who met all other requirements for disability retirement benefits, except whose death occurred before the first day of the calendar month in which the member's disability retirement allowance was to be due and payable, may elect to receive the reduced retirement allowance provided by a fifty percent (50%) joint and survivor payment option in lieu of a return of accumulated contributions, provided the following conditions apply:

(1) The member had designated as the principal beneficiary, to receive a return of accumulated contributions at the time of his death, one and only one person, and

(2) The member had not instructed the Board of Trustees in writing that he did not wish the provision of this subsection to apply.

(d) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1959, but prior to July 1, 1963. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1959, but prior to July 1, 1963, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall consist of:

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of retirement;

(2) A pension equal to seventy-five per centum (75%) of the pension that would have been payable upon service retirement at the age of 65 years had the member continued in service to the age of 65 years without further change in compensation.

If the member has not less than 20 years of creditable service, he shall be entitled to a total retirement allowance of not less than seventy dollars ($70.00) per month; provided, that the computation shall be made prior to any reduction resulting from an optional allowance as provided by subsection (g) of this section.

(d1) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1963, but prior to July 1, 1969. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1963, but prior to July 1, 1969, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation, to the age of 60 years, minus the actuarial equivalent to the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(d).

(d2) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1969, but prior to July 1, 1971. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1969, but prior to July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation to the age of 65 years, minus the actuarial equivalent of the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1963, shall receive not less than the benefit provided by G.S. 135-5(d).

(d3) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971, but prior to July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1971, but prior to July 1, 1982, a member shall receive a service retirement allowance if he has attained the age of 65 years; otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 135-5(d2);

b. The amount of disability allowance payable from the reserve funds of the Retirement System to any member retiring on or after July 1, 1974, who is eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements; and

c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements.

(d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982, Who Left Service prior to January 1, 1988. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member who left service prior to January 1, 1988 shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

(e) Reexamination of Beneficiaries Retired for Disability. — The provisions of this subsection shall be applicable to members retired on a disability retirement allowance and shall not be applicable to members in service on or after January 1, 1988. Once each year during the first five years following retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of 60 years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon, by a physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained the age of 60 years refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year all his rights in and to his pension may be revoked by the Board of Trustees.

(1) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months of service in the final 48 months prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. This difference shall be increased on January 1 each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of one percent (1/10th of 1%). Should the earning capacity of the disability beneficiary later change, the portion of his disability retirement allowance not provided by his contributions may be further modified. In lieu of the reductions on account of a disability beneficiary earning more than the aforesaid difference, he may elect to convert his disability retirement allowance to a service retirement allowance calculated on the basis of his average final compensation and creditable service at the time of disability and his age at the time of conversion to service retirement. This election is irrevocable. Provided, the provisions of this subdivision shall not apply to beneficiaries of the Law-Enforcement Officers' Retirement System transferred to this Retirement System who commenced retirement on and before July 1, 1981.

(2) Should a disability beneficiary under the age of 60 years be restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the same rate he paid prior to disability; provided that, on and after July 1, 1971, if a disability beneficiary under the age of 62 years is restored to active service at a compensation not less than his average final compensation, his retirement allowance shall cease, he shall again become a member of the Retirement System, and he shall contribute thereafter at the uniform contribution rate payable by all members. Any such prior service certificate on the basis of which his service was computed at the time of his retirement shall be restored to full force and effect, and, in addition, upon his subsequent retirement he shall be credited with all his service as a member, but should he be restored to active service on or after the attainment of the age of 50 years his pension upon subsequent retirement shall not exceed the sum of the pension which he was receiving immediately prior to his last restoration and the pension that he would have received on account of his service since his last restoration had he entered service at the time as a new entrant.

(3) Notwithstanding the foregoing, a member retired on a disability retirement allowance who is restored to service and subsequently retires on or after July 1, 1971, shall be entitled to an allowance not less than the allowance described in a. below reduced by the amount in b. below:

a. The allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service.

b. The actuarial equivalent of the retirement benefits he previously received.

(3a) Notwithstanding the foregoing, should a beneficiary who retired on a disability retirement allowance be restored to service as an employee or teacher, then the retirement allowance shall cease as of the first day of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members. Upon the subsequent retirement of the beneficiary, he shall be entitled to an allowance to which he would have been entitled if he were retiring for the first time, calculated on the basis of his total creditable service represented by the sum of his creditable service at the time of his first retirement and his creditable service after he was restored to service. Provided, however, any election of an optional allowance cannot be changed unless the member subsequently completes three years of membership service after being restored to service.

(4) As a condition to the receipt of the disability retirement allowance provided for in G.S. 135-5(d), (d1),(d2) and (d3) each member retired on a disability retirement allowance shall, on or before April 15 of each calendar year, provide the Board of Trustees with a statement of his or her income received as compensation for services, including fees, commissions or similar items, and income received from business, for the previous calendar year. Such statement shall be filed on a form as required by the Board of Trustees. The benefit payable to a beneficiary who does not or refuses to provide the information requested within 60 days after such request shall not be paid a benefit until the information so requested is provided, and should such refusal or failure to provide such information continue for 240 days after such request, the right of a beneficiary to a benefit under the Article may be terminated.

The Director of the State Retirement System shall contact any State or federal agency which can provide information to substantiate the statement required to be submitted by this subdivision and may enter into agreements for the exchange of information.

(5) Notwithstanding any other provisions of this Article to the contrary, a beneficiary who was a beneficiary retired on a disability retirement with the Law-Enforcement Officers' Retirement System at the time of the transfer of law-enforcement officers employed by a participating employer and beneficiaries last employed by a participating employer to this Retirement System and who also was a contributing member of this Retirement System at that time, shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership. Any beneficiary who retired on a disability retirement allowance as an employee of any participating employer under the Law-Enforcement Officers' Retirement System and becomes employed as an employee other than as a law-enforcement officer by an employer participating in the Retirement System after the aforementioned transfer shall continue to be paid his retirement allowance without restriction and may continue as a member of this Retirement System with all the rights and privileges appendant to membership until January 1, 1989, at which time his retirement allowance shall

cease and his subsequent retirement shall be determined in accordance with the preceding subdivision (3a) of this subsection. Any beneficiary as hereinbefore described who becomes employed as a law-enforcement officer by an employer participating in the Retirement System shall cease to be a beneficiary and shall immediately commence membership and his subsequent retirement shall be determined in accordance with subdivision (3a) of this subsection.

(6) Notwithstanding any other provision to the contrary, a beneficiary in receipt of a disability retirement allowance until the earliest date on which he would have qualified for an unreduced service retirement allowance shall thereafter (i) not be subject to further reexaminations as to disability, (ii) not be subject to any reduction in allowance on account of being engaged in a gainful occupation other than with an employer participating in the Retirement System, and (iii) be considered a beneficiary in receipt of a service retirement allowance. Provided, however, a beneficiary in receipt of a disability retirement allowance whose allowance is reduced on account of reexamination as to disability or to ability to engage in a gainful occupation prior to the date on which he would have qualified for an unreduced service retirement allowance shall have only the right to elect to convert to an early or service retirement allowance as permitted under subdivision (1) above.

(f) Return of Accumulated Contributions. — Should a member cease to be a teacher or State employee except by death or retirement under the provisions of this Chapter, he shall upon submission of an application be paid, not earlier than 60 days from the date of termination of service, his contributions, and if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service. Upon payment of such sum his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered except as provided in G.S. 135-4, and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder. Upon receipt of proof satisfactory to the Board of Trustees of the death, prior to retirement, of a member or former member there shall be paid to such person or persons as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the member's death, otherwise to the member's legal representatives, the amount of his accumulated contributions at the time of his death, unless the beneficiary elects to receive the alternate benefit under the provisions of (m) below. An extension service employee who made contributions to the Local Governmental Employees' Retirement System and the Teachers' and State Employees' Retirement System as a result of dual employment may not be paid his accumulated contributions unless he is eligible to be paid his accumulated contributions in both systems for the same period of service.

Pursuant to the provisions of G.S. 135-56.2, a member who is also a member of the Consolidated Judicial Retirement System may irrevocably elect to transfer any accumulated contributions to the Consolidated Judicial Retirement System or to the Supplemental Retirement Income Plan and forfeit any rights in or to any benefits otherwise payable hereunder.

A member who is a participant or beneficiary of the Disability Income Plan of North Carolina as is provided in Article 6 of this Chapter shall not be paid a return of accumulated contributions, notwithstanding the member's status as an employee or teacher. Notwithstanding any other provision of law to the contrary, a member who is a beneficiary of the Disability Income Plan of North

Carolina as provided in Article 6 of this Chapter and who is receiving disability benefits under the transition provisions as provided in G.S. 135-112, shall not be prohibited from receiving a return of accumulated contributions as provided in this subsection.

(f1) Expired.

(g) Election of Optional Allowance. — With the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance, including any special retirement allowance, in a reduced allowance payable throughout life under the provisions of one of the options set forth below. The election of Option 2 or Option 3 or nomination of the person thereunder shall be revoked if such person nominated dies prior to the date the first payment becomes normally due or until the first retirement check has been cashed. Such election may be revoked by the member prior to the date the first payment becomes normally due or until his first retirement check has been cashed. Provided, however, in the event a member has elected Option 2 or Option 3 and nominated his or her spouse to receive a retirement allowance upon the member's death, and the spouse predeceases the member after the first payment becomes normally due or the first retirement check has been cashed, if the member remarries he or she may request to nominate a new spouse to receive the retirement allowance under the previously elected option, within 90 days of the remarriage, and may nominate a new spouse to receive the retirement allowance under the previously elected option by written designation duly acknowledged and filed with the Board of Trustees within 120 days of the remarriage. The new nomination shall be effective on the first day of the month in which it is made and shall provide for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new nomination. Any member having elected Options 2, 3, or 6 and nominated his or her spouse to receive a retirement allowance upon the member's death may, after divorce from his or her spouse, revoke the nomination and elect a new option, effective on the first day of the month in which the new option is elected, providing for a retirement allowance computed to be the actuarial equivalent of the retirement allowance in effect immediately prior to the effective date of the new option.

Option 1.(a) In the Case of a Member Who Retires prior to July 1, 1963. — If he dies before he has received in annuity payments the present value of his annuity as it was at the time of his retirement, the balance shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees.

(b) In the Case of a Member Who Retires on or after July 1, 1963, but prior to July 1, 1993. — If he dies within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120 thereof for each month for which he has received a retirement allowance payment, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees; or

Option 2. Upon his death his reduced retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement, provided that if the person selected is other than his spouse the reduced retirement allowance payable to the member shall not be less than one half of the retirement allowance without optional modification which would otherwise be payable to him; or

Option 3. Upon his death, one half of his reduced retirement allowance shall be continued throughout the life of, and paid to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees at the time of his retirement; or

Option 4. Adjustment of Retirement Allowance for Social Security Benefits. — Until the first payment on account of any benefit becomes normally due, any member may elect to convert his benefit otherwise payable on his account after retirement into a retirement allowance of equivalent actuarial value of such amount that with his benefit under Title II of the Federal Social Security Act, he will receive, so far as possible, approximately the same amount per year before and after the earliest age at which he becomes eligible, upon application therefor, to receive a social security benefit.

Option 5. For Members Retiring Prior to July 1, 1993. — The member may elect to receive a reduced retirement allowance under the conditions of Option 2 or Option 3, as provided for above, with the modification that if both he and the person nominated die within 10 years from his retirement date, an amount equal to his accumulated contributions at retirement, less 1/120 thereof for each month for which a retirement allowance has been paid, shall be paid to his legal representatives or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Trustees.

Option 6. A member may elect either Option 2 or Option 3 with the added provision that in the event the designated beneficiary predeceases the member, the retirement allowance payable to the member after the designated beneficiary's death shall be equal to the retirement allowance which would have been payable had the member not elected the option.

(g1) In the event of the death of a retired member while in receipt of a retirement allowance under the provisions of this Article, there shall be paid to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the retiree's death, otherwise to the retiree's legal representatives, a death benefit equal to the excess, if any, of the accumulated contributions of the retiree at the date of retirement over the total of the retirement allowances paid prior to the death of the retiree. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event that a retirement allowance becomes payable to the designated survivor of a retired member under the provisions above and such retirement allowance to the survivor shall terminate upon the death of the survivor before the total of the retirement allowances paid to the retiree and the designated survivor combined equals the amount of the accumulated contributions of the retiree at the date of retirement, the excess, if any, of such accumulated contributions over the total of the retirement allowances paid to the retiree and the survivor combined shall be paid in a lump sum to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time such payment falls due, otherwise to the retiree's legal representative. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event that a retirement allowance becomes payable to the principal beneficiary designated to receive a return of accumulated contributions pursuant to subsection (m) of this section and that beneficiary dies before the total of the retirement allowances paid equals the amount of the accumulated contributions of the member at the date of the member's death, the excess of those accumulated contributions over the total of the retirement allowances paid to the beneficiary shall be paid in a lump sum to the person or persons the member has designated as the contingent beneficiary for return of accumulated contributions, if the person or persons are living at the time the payment falls due, otherwise to the principal beneficiary's legal representative. For purposes of this paragraph, the term "accumulated contributions" includes amounts of employee voluntary contributions that were transferred from the Supplemental Retirement Income Plan of North Carolina to this Retirement System at retirement by eligible law enforcement officers.

In the event a retiree purchases creditable service as provided in G.S. 135-4, there shall be paid to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time of the retiree's death, otherwise to the retiree's legal representatives, an additional death benefit equal to the excess, if any, of the cost of the creditable service purchased less the administrative fee, if any, over the total of the increase in the retirement allowance attributable to the additional creditable service, paid from the month following the month in which payment was received to the death of the retiree.

In the event that a retirement allowance becomes payable to the designated survivor of a retired member under the provisions above and such retirement allowance to the survivor shall terminate upon the death of the survivor before the total of the increase in the retirement allowance attributable to the additional creditable service paid to the retiree and the designated survivor combined equals the cost of the creditable service purchased less the administrative fee, the excess, if any, shall be paid in a lump sum to such person or persons as the retiree shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person or persons are living at the time such payment falls due, otherwise to the retiree's legal representative.

(h) Computation of Benefits Payable Prior or Subsequent to July 1, 1947. — Prior to July 1, 1947, all benefits payable as of February 22, 1945, shall be computed on the basis of the provisions of Chapter 135 as they existed at the time of the retirement of such beneficiaries. On and after July 1, 1947, all benefits payable to, or on account of, such beneficiaries shall be adjusted to take into account, under such rule as the Board of Trustees may adopt, the provisions of this Article as if they had been in effect at the date of retirement, and no further contributions on account of such adjustment shall be required of such beneficiaries. The Board of Trustees may authorize such transfers of reserve between the funds of the Retirement System as may be required by the provisions of this subsection.

(i) Restoration to Service of Certain Former Members. — If a former member who ceased to be a member prior to July 1, 1949, for any reason other than retirement, again becomes a member and prior to July 1, 1951, redeposits in the annuity savings fund by a single payment the amount, if any, he previously withdrew therefrom, he shall, anything in this Chapter to the contrary, be entitled to any membership service credits he had when his membership ceased, and any prior service certificate which became void at the time his membership ceased shall be restored to full force and effect: Provided, that, for the purpose of computing the amount of any retirement allowance which may become payable to or on account of such member under the Retirement System, any amount redeposited as provided herein shall be deemed to represent contributions made by the member after July 1, 1947.

(j) Notwithstanding anything herein to the contrary, effective July 1, 1959, the following provisions shall apply with respect to any retirement allowance payments due after such date to any retired member who was retired prior to July 1, 1959, on a service or disability retirement allowance:

(1) If such retired member has not made an election of an optional allowance in accordance with G.S. 135-5(g), the monthly retirement allowance payable to him from and after July 1, 1959, shall be equal to the allowance previously payable, increased by fifteen percent (15%) thereof, or by fifteen dollars ($15.00), whichever is the lesser; provided that, if such member had rendered not less than 20 years of creditable service, the retirement allowance payable to him from and after July 1, 1959, shall be not less than seventy dollars ($70.00) per month.

(2) If such retired member has made an effective election of an optional allowance, the allowance payable to him from and after July 1, 1959, shall be equal to the allowance previously payable under such election plus an increase which shall be computed in accordance with (1) above as if he had not made such an election; provided that such increase shall be payable only during the retired member's remaining life and no portion of such increase shall become payable to the beneficiary designated under the election.

(k) Increase in Benefits to Those Persons Who Were in Receipt of Benefits prior to July 1, 1967. — From and after July 1, 1967, the monthly benefits to or on account of persons who commenced receiving benefits from the System prior to July 1, 1967, shall be increased by a percentage thereof. Such percentage shall be determined in accordance with the following schedule:

Period in Which Benefits Commenced	Percentage
January 1, 1966, to June 30, 1967	5%
Year 1965	6%
Year 1964	7%
Year 1963	8%
and so on concluding with	
Year 1942	29%

The minimum increase pursuant to this subsection (k) shall be ten dollars ($10.00) per month; provided that, if an optional benefit has been elected, said minimum shall be reduced actuarially as determined by the Board and shall be applicable to the retired member, if surviving, otherwise to his designated beneficiary under the option elected.

(*l*) Death Benefit Plan. — There is hereby created a Group Life Insurance Plan (hereinafter called the "Plan") which is established as an employee welfare benefit plan that is separate and apart from the Retirement System and under which the members of the Retirement System shall participate and be eligible for group life insurance benefits. Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death, in service, of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit. Such death benefit shall be equal to the greater of:

(1) The compensation on which contributions were made by the member during the calendar year preceding the year in which his death occurs, or

(2) The greatest compensation on which contributions were made by the member during a 12-month period of service within the 24-month period of service ending on the last day of the month preceding the month in which his last day of actual service occurs;

(3), (4) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1049, s. 2.

subject to a minimum of twenty-five thousand dollars ($25,000) and to a maximum of fifty thousand dollars ($50,000). Such death benefit shall be payable apart and separate from the payment of the member's accumulated contributions under the System on his death pursuant to the provisions of subsection (f) of this section. For the purpose of the Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

The death benefit provided in this subsection (*l*) shall not be payable, notwithstanding the member's compliance with all the conditions set forth in the preceding paragraph, if his death occurs

(1) After December 31, 1968 and after he has attained age 70; or
(2) After December 31, 1969 and after he has attained age 69; or
(3) After December 31, 1970 and after he has attained age 68; or
(4) After December 31, 1971 and after he has attained age 67; or
(5) After December 31, 1972 and after he has attained age 66; or
(6) After December 31, 1973 and after he has attained age 65; or
(7) After December 31, 1978, but before January 1, 1987, and after he has attained age 70.

Notwithstanding the above provisions, the death benefit shall be payable on account of the death of any member who died or dies on or after January 1, 1974, but before January 1, 1979, after attaining age 65, if he or she had not yet attained age 65, if he or she had not yet attained age 66, was at the time of death completing the work year for those individuals under specific contract, or during the fiscal year for those individuals not under specific contract, in which he or she attained 65, and otherwise met all conditions for payment of the death benefit.

Notwithstanding the above provisions, the Board of Trustees may and is specifically authorized to provide the death benefit according to the terms and conditions otherwise appearing in this Plan in the form of group life insurance, either (i) by purchasing a contract or contracts of group life insurance with any life insurance company or companies licensed and authorized to transact business in this State for the purpose of insuring the lives of members in service, or (ii) by establishing a separate trust fund qualified under Section 501(c)(9) of the Internal Revenue Code of 1954, as amended, for such purpose. To that end the Board of Trustees is authorized, empowered and directed to investigate the desirability of utilizing group life insurance by either of the foregoing methods for the purpose of providing the death benefit. If a separate trust fund is established, it shall be operated in accordance with rules and regulations adopted by the Board of Trustees and all investment earnings on the trust fund shall be credited to such fund.

In administration of the death benefit the following shall apply:

(1) For the purpose of determining eligibility only, in this subsection "calendar year" shall mean any period of 12 consecutive months or, if less, the period covered by an annual contract of employment. For all other purposes in this subsection "calendar year" shall mean the 12 months beginning January 1 and ending December 31.
(2) Last day of actual service shall be:
    a. When employment has been terminated, the last day the member actually worked.
    b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire, unless he is on approved leave of absence and is in service under the provisions of G.S. 135-4(h).
(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 135-4(h).

(4) A member on leave of absence from his position as a teacher or State employee for the purpose of serving as a member or officer of the General Assembly shall be deemed to be in service during sessions of the General Assembly and thereby covered by the provisions of the death benefit. The amount of the death benefit for such member shall be the equivalent of the salary to which the member would have been entitled as a teacher or State employee during the 12-month period immediately prior to the month in which death occurred, not to be less than twenty-five thousand dollars ($25,000) nor to exceed fifty thousand dollars ($50,000).

The provisions of the Retirement System pertaining to Administration, G.S. 135-6, and management of funds, G.S. 135-7, are hereby made applicable to the Plan.

A member who is a beneficiary of the Disability Income Plan provided for in Article 6 of this Chapter, or a member who is in receipt of Workers' Compensation during the period for which he or she would have otherwise been eligible to receive short-term benefits as provided in G.S. 135-105 and dies on or after 181 days from the last day of his or her actual service but prior to the date the benefits as provided in G.S. 135-105 would have ended, shall be eligible for group life insurance benefits as provided in this subsection, notwithstanding that the member is no longer an employee or teacher or that the member's death occurs after the eligibility period after active service. The basis of the death benefit payable hereunder shall be the higher of the death benefit computed as above or a death benefit based on compensation used in computing the benefit payable under G.S. 135-105 and G.S. 135-106, as may be adjusted for percentage post-disability increases, all subject to the maximum dollar limitation as provided above. A member in receipt of benefits from the Disability Income Plan under the provisions of G.S. 135-112 whose right to a benefit accrued under the former Disability Salary Continuation Plan shall not be covered under the provisions of this paragraph.

Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 1988, but before January 1, 1999, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of five thousand dollars ($5,000) upon the completion of twenty-four months of contributions required under this subsection. Should death occur before the completion of twenty-four months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after January 1, 1999, but before July 1, 2004, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of six thousand dollars ($6,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 2004, but before July 1, 2007, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of nine thousand dollars ($9,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

Upon receipt of proof, satisfactory to the Board of Trustees in its capacity under this subsection, of the death of a retired member of the Retirement System on or after July 1, 2007, there shall be paid a death benefit to the surviving spouse of the deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of ten thousand dollars ($10,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(*l*1) Reciprocity of Death Benefit Plan. — Only for the purpose of determining eligibility for the death benefit provided for in subsection (*l*) of this section, membership service standing to the credit of a member of the Legislative Retirement System or the Consolidated Judicial Retirement System shall be added to the membership service standing to the credit of a member of the Teachers' and State Employees' Retirement System. However, in the event that a participant or beneficiary is a retired member of the Legislative Retirement System or the Consolidated Judicial Retirement System whose retirement benefit was suspended upon entrance into membership in the Teachers' and State Employees' Retirement System, such membership service standing to the credit of the retired member prior to retirement shall be likewise counted. Membership service under this section shall not be counted twice for the same period of time. In no event shall a death benefit provided for in G.S. 135-5(*l*) be paid if a death benefit is paid under G.S. 135-63.

(m) Survivor's Alternate Benefit. — Upon the death of a member in service, the principal beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the reduced retirement allowance provided by Option 2 of subsection (g) above computed by assuming that the member had retired on the first day of the month following the date of his death, provided that the following conditions apply:

(1) a. The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance,
  b. The member had obtained 20 years of creditable service in which case the retirement allowance shall be computed in accordance with G.S. 135-5(b19)(1)b. or G.S. 135-5(b19)(2)c., notwithstanding the requirement of obtaining age 50, or
  c. The member had not commenced to receive a retirement allowance as provided under this Chapter.

(2) The member had designated as the principal beneficiary to receive a return of his accumulated contributions one and only one person who was living at the time of his death.

(3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection to apply.

For the purpose of this benefit, a member is considered to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service. The last day of actual service shall be determined as provided in subsection (*l*) of this section. Upon the death of a member in service, the surviving spouse may make all purchases for creditable service as provided for under this Chapter for which the member had made application in writing prior to the date of death, provided that the date of death occurred prior to or within 60 days after notification of the cost to make the purchase. The term "in service" as used in this subsection includes a member in receipt of a benefit under the Disability Income Plan as provided in Article 6 of this Chapter.

Notwithstanding the foregoing, a member who is in receipt of Workers' Compensation during the period for which the member would have otherwise been eligible to receive short-term benefits, as provided in G.S. 135-105, and who dies on or after 181 days from the last day of the member's actual service but on or before the date the benefits as provided in G.S. 135-105 would have ended, shall be considered in service at the time of the member's death for the purpose of this benefit.

(m1) Special Retirement Allowance for Law Enforcement Officers — Upon retirement, a member who is a law enforcement officer may elect to transfer his eligible accumulated contributions, not including any Roth after-tax contributions and the earnings thereon, from the Supplemental Retirement Income Plan of North Carolina to this Retirement System and receive, in addition to his basic service, early or disability retirement allowance, a special retirement allowance which shall be based upon his eligible accumulated account balance at the date of the transfer of the assets to this System. For the purpose of determining the special retirement allowance, the Board of Trustees shall adopt straight life annuity factors on the basis of mortality tables, such other tables as may be necessary and the interest assumption rate recommended by the actuary based upon actual experience including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees shall modify such factors every five years, as shall be deemed necessary, based upon the five year experience study as required by G.S. 135-6(n). Provided, however, a member, who transfers his eligible accumulated contributions from the Supplemental Retirement Income Plan of North Carolina, shall be taxed for North Carolina State Income tax purposes on the special retirement allowance the same as if that special retirement allowance had been paid directly by the Supplemental Retirement Income Plan of North Carolina. The Teachers' and State Employees' Retirement System shall be responsible to determine the taxable amount, if any, and report accordingly.

(n) No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

(o) Post-Retirement Increases in Allowances. — As of December 31, 1969, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase that equals or exceeds three per centum (3%), each beneficiary receiving a retirement allowance as of December 31, 1968, shall be entitled to have his allowance increased three per centum (3%) effective July 1, 1970.

As of December 31, 1970, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase of at least one per centum (1%), each beneficiary on the retirement rolls as of July 1, 1970, shall be entitled to have his allowance increased effective July 1, 1971 as follows:

Increase In Index	*Increase In Allowance*
1.00 to 1.49%	1%
1.50 to 2.49%	2%
2.50 to 3.49%	3%
3.50% or more	4%

As of December 31, 1971, an increase in retirement allowances shall be calculated and made effective July 1, 1972, in the manner described in the preceding paragraph. As of December 31 of each year after 1971, the ratio (R) of the Consumer Price Index to such index one year earlier shall be determined, and each beneficiary on the retirement rolls as of July 1 of the year of determination shall be entitled to have his allowance increased effective on July 1 of the year following the year of determination by the same percentage of increase indicated by the ratio (R) calculated to the nearest tenth of one per centum, but not more than four per centum (4%); provided that any such increase in allowances shall become effective only if the additional liabilities on account of such increase do not require an increase in the total employer rate of contributions.

The allowance of a surviving annuitant of a beneficiary whose allowance is increased under this subsection shall, when and if payable, be increased by the same per centum.

Any increase in allowance granted hereunder shall be permanent, irrespective of any subsequent decrease in the Consumer Price Index, and shall be included in determining any subsequent increase.

For purposes of this subsection, Consumer Price Index shall mean the Consumer Price Index (all items — United States city average), as published by the United States Department of Labor, Bureau of Labor Statistics.

Notwithstanding the above paragraphs, retired members and beneficiaries may receive cost-of-living increases in retirement allowances if active members of the system receive across-the-board cost-of-living salary increases. Such increases in post-retirement allowances shall be comparable to cost-of-living salary increases for active members in light of the differences between the statutory payroll deductions for State retirement contributions, Social Security taxes, State income withholding taxes, and federal income withholding taxes required of each group. The increases for retired members shall include the cost-of-living increases provided in this section. The cost-of-living increases allowed retired and active members of the system shall be comparable when each group receives an increase that has the same relative impact upon the net disposable income of each group.

(p) Increases in Benefits Paid in Respect to Members Retired prior to July 1, 1967. — From and after July 1, 1971, the monthly benefits to or on account of persons who commenced receiving benefits prior to July 1, 1963, shall be increased by twenty percent (20%) thereof; the monthly benefits to or on account of persons who commenced receiving benefits after June 30, 1963 and before July 1, 1967, shall be increased by five percent (5%) thereof. These increases shall be calculated after monthly retirement allowances as of July 1, 1971, have been increased to the extent provided for in the preceding subsection (o).

(q) Increases in Benefits to Those Persons Who Were Retired prior to January 1, 1970. — From and after July 1, 1973, the monthly benefits to or on account of persons who commenced receiving benefits from the System prior to January 1, 1970, shall be increased by a percentage thereof. Such percentage shall be determined in accordance with the following schedule:

Year(s) in Which Benefits Commenced	*Percentage*
1969	1
1968	4
1967	6
1965 through 1966	9
1964	12
1963	14
1959 through 1962	17
1942 through 1958	22

These increases shall be calculated after monthly retirement allowances as of July 1, 1973, have been increased to the extent provided for in the preceding subsection (o).

(r) Notwithstanding anything herein to the contrary, effective July 1, 1973, any member who retired after attaining the age of 60 with 15 or more years of creditable service shall receive a monthly benefit of no less than seventy-five dollars ($75.00) prior to the application of any optional benefit.

(s) Increases in Benefits to Those Persons on Disability Retirement Who Were Retired prior to July 1, 1971. — From and after July 1, 1974, the monthly benefits to members who commenced receiving disability benefits prior to July 1, 1963, shall be increased by one percent (1%) thereof for each year by which the member retired prior to the age of 65 years; the monthly benefits to members who commenced receiving disability benefits after June 30, 1963, and before July 1, 1971, shall be increased by five percent (5%) thereof. These increases shall be calculated before monthly retirement allowances as of June 30, 1974, have been increased to the extent provided for in the preceding subsection (o).

(t) Notwithstanding any of the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1973, which shall become effective on July 1, 1974, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional two percent (2%) to a total of six percent (6%) for the year 1974 only. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(u) Repealed by Session Laws 1975, c. 875, s. 47.

(v) Notwithstanding any of the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1974, which shall become payable on July 1, 1975, and to each beneficiary on the retirement rolls as of July 1, 1975, which shall become payable on July 1, 1976, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional four percent (4%) to a total of eight percent (8%) for the years 1975 and 1976 only, provided that the increases do not exceed the actual percentage increase in the Consumer Price Index as determined in G.S. 135-5(o). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(w) Notwithstanding any other provision of this section, the increase in the allowance to each beneficiary on the retirement rolls as otherwise provided in G.S. 135-5(o) shall be the current maximum of four per centum (4%) plus an additional four per centum (4%) to a total of eight per centum (8%) on July 1, 1975, and July 1, 1976, provided the increases do not exceed the actual percentage increase in the cost of living as determined in G.S. 135-5(o). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary. The cost of these increases shall be borne from the funds of the Retirement System unless the 1975 Session of the General Assembly provides an appropriation to fund this provision.

(x) Increases in Benefits to Those Persons on Disability Retirement Who Were Retired prior to July 1, 1971. — From and after July 1, 1975, the monthly benefits to members who commenced receiving disability benefits prior to July 1, 1963, shall be increased one percent (1%) thereof for each year by which the member retired prior to age 65 years; the monthly benefits to members who commenced receiving disability benefits after June 30, 1963, and before July 1, 1971, shall be increased by five percent (5%) thereof. These increases shall be calculated before monthly retirement allowances as of June 30, 1975, have been increased to the extent provided in the preceding provisions of this Chapter.

(y) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1976, which shall become payable on July 1, 1977, and to each beneficiary on the retirement rolls as of July 1, 1977, which shall become payable on July 1, 1978, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional two and one-half percent (2½%) for the years beginning July 1, 1977, and July 1, 1978. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(z) Increases in Benefits Paid in Respect to Members Retired prior to July 1, 1975. — From and after July 1, 1977, the monthly benefits to or on account of persons who commenced receiving benefits prior to July 1, 1975, shall be increased by seven percent (7%) thereof. This increase shall be calculated before monthly retirement allowances as of July 1, 1977, have been increased to the extent provided for in the preceding subsection (o). The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(aa) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1978, which shall become payable on July 1, 1979, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional one percent (1%) for the year beginning July 1, 1979. Provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(bb) Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1979, which shall become payable on July 1, 1980, as otherwise provided in G.S. 135-5(o), shall be the current maximum four percent (4%) plus an additional three percent (3%) computed on the retirement allowance prior to any increase authorized by paragraph (cc) of this section. Provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(cc) Increases in Benefits to Those Persons Who Were Retired Prior to July 1, 1977. — From and after July 1, 1980, the monthly benefits to or on account of persons who commenced receiving benefits from the system prior to July 1, 1977, shall be increased by a percentage in accordance with the following schedule:

Period in Which Benefits Commenced	*Percentage*
On or before June 30, 1963	10%
July 1, 1963, to June 30, 1968	7%
July 1, 1968, to June 30, 1977	2%

This increase shall be calculated before monthly retirement allowances, as of July 1, 1980, have been increased for all cost-of-living increases allowed for the same period.

(dd) From and after July 1, 1981, the retirement allowance to or on account of the beneficiaries whose retirement commenced prior to July 1, 1980, shall be increased by three percent (3%). These increases shall be calculated on the basis of the allowance payable and in effect on June 30, 1980, so as not to compound on the increases otherwise payable under paragraphs (bb), (cc) and (ee) of this section.

(ee) Adjustment in Allowances Paid Beneficiaries Whose Retirement Commenced Prior to July 1, 1980. — From and after July 1, 1981, the retirement allowance to or on account of beneficiaries whose retirement commenced prior to July 1, 1980, shall be adjusted by an increase of one and three-tenths percent (1.3%). This adjustment shall be calculated on the basis of the allowance payable and in effect on June 30, 1980, so as not to compound on the increases otherwise payable under paragraphs (bb), (cc) and (dd) of this section.

(ff) From and after July 1, 1982, the retirement allowance to or on account of beneficiaries on the retirement rolls as of July 1, 1981, shall be increased by one-tenth of one percent (0.1%) of the allowance payable on July 1, 1981.

(gg) From and after July 1, 1983, the retirement allowance to or on account of beneficiaries on the retirement rolls as of July 1, 1982, shall be increased by two and one-half percent (2.5%) of the allowance payable on July 1, 1982, provided the increase in retirement allowances shall be payable in accordance with all requirements, stipulations and conditions set forth in subsection (o) of this section, plus an additional one and one-half percent (1.5%) of the allowance payable on July 1, 1982, in order to supplement the increase payable in accordance with subsection (o) of this section.

(hh) Notwithstanding any other provision of this Chapter, from and after July 1, 1983, the retirement allowance payable to each teacher and State employee, who retired prior to July 1, 1973, and who is in receipt of a reduced retirement allowance based upon 30 or more years of contributing membership service, shall be increased by the elimination of the reduction factors applicable at the time of their retirement under G.S. 135-3(8) or G.S. 135-5(b3). The provisions of this subsection shall apply equally to the allowance of a surviving annuitant of a beneficiary.

(ii) From and after July 1, 1984, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1983, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1983, in accordance with G.S. 135-5(o), plus an additional four and two-tenths percent (4.2%) of the allowance payable on July 1, 1983.

(jj) Increase in Allowance Where Retirement Commenced on or before July 1, 1984, or after that Date, but before June 30, 1985. — From and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1984, shall be increased by four percent (4%) of the allowance payable on July 1, 1984, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1984, but before June 30, 1985, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1984, and June 30, 1985.

(kk) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1985. — From and after July 1, 1985, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1985, shall be increased by six-tenths percent (0.6%) of the allowance payable on June 1, 1985. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1985, so as not to be compounded on any other increases payable under subsection (o) of this section or otherwise granted by act of the 1985 Session of the General Assembly.

(*ll*) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985, and June 30, 1986.

(mm) From and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1986, shall be increased by four percent (4.0%) of the allowance payable on July 1, 1986, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1986, but before June 30, 1987, shall be increased by a prorated amount of four percent (4.0%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1986, and June 30, 1987.

(nn) From and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1987, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on July 1, 1987, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1987, but before June 30, 1988, shall be increased by a prorated amount of three and six-tenths percent (3.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1987, and June 30, 1988.

(oo) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1988. — From and after July 1, 1988, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1988, shall be increased by one and two-tenths percent (1.2%) of the allowance payable on June 1, 1988. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1988, so as not to be compounded on any other increase payable under subsection (o) of this section or otherwise granted by act of the 1987 Session of the General Assembly.

(pp) From and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1988, shall be increased by three and one-half percent (3.5%) of the allowance payable on July 1, 1988, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1988, but before June 30, 1989, shall be increased by a prorated amount of three and one-half percent (3.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1988, and June 30, 1989.

(qq) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1989. — From and after July 1, 1989, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1989, shall be increased by one and nine-tenths percent (1.9%) of the allowance payable on June 1, 1989. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1989, so as not to be compounded on any other increase payable under subsection (o) of this section or otherwise granted by act of the 1989 Session of the General Assembly.

(rr) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1990. From and after July 1, 1990, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1990, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 1990. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1990, so as not to be compounded on any other increase granted by act of the 1989 Session of the General Assembly (1990 Regular Session).

(ss) From and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1989, shall be increased by six and one-tenth percent (6.1%) of the allowance payable on July 1, 1989, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1989, but before June 30, 1990, shall be increased by a prorated amount of six and one-tenth percent (6.1%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1989, and June 30, 1990.

(tt) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1992. — From and after July 1, 1992, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1992, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on June 1, 1992. This allowance shall be calculated on the allowance payable and in effect on June 30, 1992, so as not to be compounded on any other increase granted by act of the 1991 Session of the General Assembly, 1992 Regular Session.

(uu) From and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1991, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1991, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1991, but before June 30, 1992, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1991 and June 30, 1992.

(vv) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1993. — From and after July 1, 1993, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1993, shall be increased by six-tenths of one percent (.6%) of the allowance payable on June 1, 1993. This allowance shall be calculated on the allowance payable and in effect on June 30, 1993, so as not to be compounded on any other increase granted by act of the 1993 General Assembly.

(ww) From and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1992, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1992, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1992, but before June 30, 1993, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1992, and June 30, 1993.

(xx) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1994. — From and after July 1, 1994, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1994, shall be increased by one and two-tenths of one percent (1.2%) of the allowance payable on June 1, 1994. This allowance shall be calculated on the allowance payable and in effect on June 30, 1994, so as not to be compounded on any other increase granted by act of the 1993 General Assembly, 1994 Regular Session.

(yy) From and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1993, shall be increased by three and one-half percent (3.5%) of the allowance payable on July 1, 1993, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1993, but before June 30, 1994, shall be increased by a prorated amount of three and one-half percent (3.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1993, and June 30, 1994.

(zz) From and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1994, shall be increased by two percent (2%) of the allowance payable on July 1, 1994, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1994, but before June 30, 1995, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1994, and June 30, 1995.

(aaa) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1995. — From and after July 1, 1995, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1995, shall be increased by one and two-tenths of one percent (1.2%) of the allowance payable on June 1, 1995. This allowance shall be calculated on the allowance payable and in effect on June 30, 1995, so as not to be compounded on any other increase granted by act of the 1995 General Assembly.

(bbb) From and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1995, shall be increased by four and four-tenths percent (4.4%) of the allowance payable on July 1, 1995, in accordance with G.S. 135-5(o). Furthermore, from and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1995, but before June 30, 1996, shall be increased by a prorated amount of four and four-tenths percent (4.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1995, and June 30, 1996.

(ccc) From and after July 1, 1997, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1996, shall be increased by four percent (4%) of the allowance payable on June 1, 1997, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1977, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1996, but before June 30, 1997, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1996, and June 30, 1997.

(ddd) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1997. — From and after July 1, 1997, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1997, shall be increased by two and two-tenths percent (2.2%) of the allowance payable on June 1, 1997. This allowance shall be calculated on the allowance payable and in effect on June 30, 1997, so as not to be compounded on any other increase granted by act of the 1997 General Assembly.

(eee) From and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1997, shall be increased by two and one-half percent (2.5%) of the allowance payable on June 1, 1998, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1997, but before June 30, 1998, shall be increased by a prorated amount of two and one-half percent (2.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1997, and June 30, 1998.

(fff) From and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1998, shall be increased by two and three-tenths percent (2.3%) of the allowance payable on June 1, 1999, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1998, but before June 30, 1999, shall be increased by a prorated amount of two and three-tenths percent (2.3%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1998, and June 30, 1999.

(ggg) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2000. — From and after July 1, 2000, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2000, shall be increased by six-tenths percent (0.6%) of the allowance payable on June 1, 2000. This allowance shall be calculated on the allowance payable and in effect on June 30, 2000, so as not to be compounded on any other increase granted by act of the 1999 General Assembly, 2000 Regular Session.

(hhh) From and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1999, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on June 1, 2000, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1999, but before June 30, 2000, shall be increased by a prorated amount of three and six-tenths percent (3.6%)

of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1999, and June 30, 2000.

(iii) From and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2000, shall be increased by two percent (2%) of the allowance payable on June 1, 2001, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2000, but before June 30, 2001, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2000, and June 30, 2001.

(jjj) From and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2001, shall be increased by one and four-tenths percent (1.4%) of the allowance payable on June 1, 2002, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2001, but before June 30, 2002, shall be increased by a prorated amount of one and four-tenths percent (1.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2001, and June 30, 2002.

(kkk) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 2002. — From and after July 1, 2002, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 2002, shall be increased by six-tenths of one percent (0.6%) of the allowance payable on June 1, 2002. This allowance shall be calculated on the allowance payable and in effect on June 30, 2002, so as not to be compounded on any other increase granted by act of the 2002 Regular Session of the 2001 General Assembly.

(*lll*) From and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2002, shall be increased by one and twenty-eight hundredths percent (1.28%) of the allowance payable on June 1, 2003, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2002, but before June 30, 2003, shall be increased by a prorated amount of one and twenty-eight hundredths percent (1.28%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2002, and June 30, 2003.

(mmm) From and after July 1, 2004, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2003, shall be increased by one and seven-tenths percent (1.7%) of the allowance payable on June 1, 2004, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2004, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2003, but before June 30, 2004, shall be increased by a prorated amount of one and seven-tenths percent (1.7%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2003, and June 30, 2004.

(nnn) From and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2004, shall be increased by two percent (2%) of the allowance payable on June 1, 2005, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2004, but before June 30, 2005, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2004, and June 30, 2005.

(ooo) From and after July 1, 2006, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2005, shall be increased by three percent (3%) of the allowance payable on June 1, 2006, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2006, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2005, but before June 30, 2006, shall be increased by a prorated amount of three percent (3%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2005, and June 30, 2006.

(ppp) Repealed by Session Laws 2007-431, s. 7, effective July 1, 2007.

(qqq) From and after July 1, 2007, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2006, shall be increased by two and two-tenths percent (2.2%) of the allowance payable on June 1, 2007, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2007, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2006, but before June 30, 2007, shall be increased by a prorated amount of two and two-tenths percent (2.2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2006, and June 30, 2007. (1941, c. 25, s. 5; 1945, c. 218; 1947, c. 458, ss. 3, 4, 7, 8a; 1949, c. 1056, ss. 3, 5; 1955, c. 1155, ss. 1, 2; 1957, c. 855, ss. 5-8; 1959, c. 490; c. 513, ss. 2, 3; c. 620, ss. 1-3; c. 624; 1961, c. 516, s. 4; c. 779, s. 1; 1963, c. 687, s. 3; 1965, c. 780, s. 1; 1967, c. 720, ss. 4-10; c. 1223; 1969, c. 1223, ss. 2, 5-12; 1971, c. 117, ss. 11-15; c. 118, ss. 3-7; 1973, c. 241, ss. 3-7; c. 242, ss. 2-4; c. 737, s. 2; c. 816, s. 2; c. 994, ss. 1, 3; c. 1312, ss. 1-3; 1975, c. 457, ss. 2-4; c. 511, ss. 1, 2; c. 634, ss. 1, 2; c. 875, s. 47; 1977, c. 561; c. 802, ss. 50.65-50.70; 1979, c. 838, s. 99; c. 862, ss. 1, 4, 5; c. 972, s. 4; c. 975, s. 1; 1979, 2nd Sess., c. 1137, ss. 63, 64, 66; c. 1196, s. 1; c. 1216; 1981, c. 672, s. 1; c. 689, s. 2; c. 859, ss. 42, 42.1, 44; c. 940, s. 1; c. 975, s. 3; c. 978, ss. 1, 2; c. 980, ss. 3, 4; 1981 (Reg. Sess., 1982), c. 1282, s. 11; 1983, c. 467; c. 761, ss. 218, 219, 228, 229; c. 902, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1034, ss. 222, 232-235, 237; c. 1049, ss. 1-3; 1985, c. 348, s. 2; c. 479, ss. 189(a), 190, 191, 192(a), 194; c. 520, s. 2; c. 649, ss. 8, 10; 1985 (Reg. Sess., 1986), c. 1014, s. 49(a); 1987, c. 181, s. 1; c. 513, s. 1; c. 738, ss. 27(a), 29(c)-(j), 37(a); c. 824, s. 3; 1987 (Reg. Sess., 1988), c. 1061, s. 1; c. 1086, s. 22(a); c. 1108, s. 1; c. 1110, ss. 1-3; 1989, c. 717, ss. 1-6; c. 731, s. 1; c. 752, s. 41(a); c. 770, s. 31; c. 792, ss. 3.1-3.3; 1989 (Reg. Sess., 1990), c. 1077, ss. 2-5; 1991 (Reg. Sess., 1992), c. 766, s. 2; c. 900, ss. 52(a)-(c), 53(b); 1993, c. 321, ss. 74(c)-(e), 74.1(e), (f), 74.2(a); c. 531, s. 5; 1993 (Reg. Sess., 1994), c. 769, ss. 7.30(g)-(j), (m), (r); 1995, c. 507, ss. 7.22(a), 7.23(a), (b), 7.23A(a), (b); c. 509, ss. 74, 75; 1996, 2nd Ex. Sess., c. 18, s. 28.21(a); 1997-443, s. 33.22(a)-(d); 1998-153, s. 21(a); 1998-212, ss. 28.26(c), 28.27(a); 1999-237, s. 28.23(a); 2000-67, ss. 26.20(a)-(d); 2001-424, s. 32.22(a); 2002-126, ss. 28.8(a), 28.9(a)-(d); 2003-284, s. 30.17(a); 2003-359, ss. 3-6, 11; 2004-124, s. 31.17(a); 2004-147, s. 1; 2005-91, ss. 2, 3; 2005-276, s. 29.25(a); 2006-66, s. 22.18(a); 2006-172, s. 1; 2007-323, s. 28.20(a); 2007-384, ss. 10.3, 10.4; 2007-431, ss. 1, 5, 7, 12, 13; 2007-496, s. 1.)

Cross References. — As to repayment of contributions withdrawn pursuant to subsection (f) of this section, see G.S. 135-4, subsection (k).

Study Commission on State Disability Income Plan, Death Benefit Plan, and Separate Insurance Benefits Plan for Law Enforcement Officers. — Session Laws 2003-284, ss. 30.20(a) to (i), as amended by Session Laws 2004-78, s. 5, provides: "(a) There is established a Study Commission on the State Disability Income Plan, the State Death Benefit Plan, and the Separate Insurance Benefits Plan for Law Enforcement Officers.

"(b) The Commission shall be comprised of 13 members as follows:

"(1) Four persons appointed by the President Pro Tempore of the Senate, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, and one of whom shall be familiar with workers' compensation issues relating to State employees or school employees.

"(2) Four persons appointed by the Speaker of the House of Representatives, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, and one of whom shall be familiar with workers' compensation issues relating to State employees or school employees.

"(3) The State Treasurer, or the Treasurer's designee.

"(4) The Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan.

"(5) The Chair of the North Carolina Industrial Commission, or the Chair's designee.

"(6) One person appointed by the President of The University of North Carolina who is familiar with disability issues relating to university employees.

"(7) One person appointed by the President of the North Carolina Community Colleges System who is familiar with disability issues relating to community college employees.

"Any vacancy shall be filled by the officer who made the original appointment.

"(c) The Commission shall study the plan design, funding, and administration of the Disability Income Plan of North Carolina established pursuant to Article 6 of Chapter 135 of the General Statutes, the Death Benefit Plan established pursuant to G.S. 135-5(*l*), and the Separate Insurance Benefits Plan for State and Local Governmental Law Enforcement Officers established pursuant to G.S. 143-166.60 to determine what changes, if any, should be made to those Plans. The Commission shall consider what changes could be made to the Plans that would enhance the efficiency of and reduce the cost of the Plans to the State and its employees.

"(d) The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall designate cochairs of the Commission from among their respective appointees. The Commission shall meet upon the call of the cochairs. Members of the Commission shall receive per diem, subsistence, and travel allowance in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. The Commission, while in the discharge of official duties, may exercise all powers provided for under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission shall terminate the earlier of the delivery of its final report or December 31, 2004.

"(e) The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. Subject to the approval of the Legislative Services Commission, the Commission may meet in the Legislative Building or the Legislative Office Building.

"(f) The Commission shall employ an actuary with expertise in the areas of disability income insurance and group life insurance to assist the Commission in its work pursuant to the procedure set forth in G.S. 120-32.02. This actuary shall not be a State employee or a person currently under contract with the State to provide services. If necessary, the Commission may hire other employees as provided in G.S. 120-32.02.

"(g) The Commission may meet during a regular or extra session of the General Assembly, subject to approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

"(h) The Commission shall submit a report of the results of its study, including any legislative recommendations, to the General Assembly not later than January 1, 2005.

"(i) Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds to implement the provisions of subsections (a) through (i) of this section."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Editor's Note — The amendment by Session Laws 1985, c. 479, s. 190, to subsection (b8) directed that "on or after January 1, 1985, but prior to July 1, 1985" be substituted for "on or after July 1, 1985" in the catchline and first sentence of subsection (b8). The language to be inserted by this amendment has been inserted in brackets, since the language of subsection (b8) prior to the amendment read "on or after January 1, 1985," not "on or after July 1, 1985."

Subsection (f1) of this section, which provided for refund of contributions not withdrawn with refund, expired June 30, 1993, pursuant to Session Laws 1987 (Reg. Sess., 1988), c. 1061, s. 1.

Session Laws 2006-172, s. 1, added subsection (ooo), which was redesignated as subsection (ppp) at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-384, s. 11(b), provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

Effect of Amendments. — Session Laws 2006-66, s. 22.18(a), effective July 1, 2006, added new subsection (ooo).

Session Laws 2006-172, s. 1, effective August 1, 2006, added subsection (ooo) (See Editor's note).

Session Laws 2007-323, s. 28.20(a), effective July 1, 2007, added subsection (qqq).

Session Laws 2007-384, ss. 10.3 and 10.4, substituted "allowance, including any special retirement allowance" for "allowance" following "actuarial equivalent of such retirement" in the first sentence of subsection (g); and added subsection (m1). For effective date, see Editor's note.

Session Laws 2007-431, ss. 1, 5, 7, 12, 13, effective July 1, 2007, substituted "120 days" for "90 days" in subdivision (a)(1); added the last sentence in each of the first three paragraphs of subsection (g1); deleted former subsection (ppp), which read: "Credit at Full Cost for Service with The University of North Carolina During Which a Member Participated in the Optional Retirement Program"; inserted the language beginning with "or a member who is in receipt of Workers' Compensation..." and ending with "...G.S. 135-105 would have ended" near the beginning of the seventh paragraph of subsection (*l*); and added the last paragraph of subsection (m).

Session Laws 2007-496, s. 1, effective July 1, 2007, and applicable to eligible retirees who die on or after that date, in subsection (*l*), inserted "but before July 1, 2007" near the beginning of the next-to-last paragraph, and added the last paragraph.

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Constitutionality. — Subsection (*l*) of this section, as in effect in 1974, was constitutional on its face. Stanley v. Retirement & Health Benefits Div., 55 N.C. App. 588, 286 S.E.2d 643, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Grant of Disability Retirement Benefits Terminated Status as "Career Teacher". — The granting of a career teacher's application for disability retirement benefits under the Teachers' and State Employees' Retirement System operated as an acceptance of her resignation by implication and terminated her status as a "career teacher" under former G.S. 115-142, since a finding that her disability was "likely to be permanent" was implicit in the granting of her application for disability retirement benefits and this finding rendered her status as a disabled retiree wholly inconsistent with her former status as a "career teacher". Meachan v. Montgomery County Bd. of Educ., 47 N.C. App. 271, 267 S.E.2d 349 (1980).

Widow of a prison guard was not entitled to death benefits where the guard's last day of service was ruled to be the date his sick and annual leave expired, and not the date his position was vacated, and thus his death, which occurred more than 90 days after his last day of service, did not occur while "in service" within the meaning of the benefits provision. Garrett v. Teachers' & State Employees' Retirement Sys. ex rel. Board of Trustees, 91 N.C. App. 409, 371 S.E.2d 776, cert. denied, 323 N.C. 624, 374 S.E.2d 585 (1988).

Applied in Bennett v. Hertford County Bd. of Educ., 69 N.C. App. 615, 317 S.E.2d 912 (1984).

Cited in Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637

(1984); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997); Liptrap v. City of High Point, 128 N.C. App. 353, 496 S.E.2d 817 (1998), cert. denied, 348 N.C. 73, 505 S.E.2d 873 (1998).

§ 135-5.1. Optional retirement program for The University of North Carolina.

(a) An Optional Retirement Program provided for in this section is authorized and established and shall be implemented by the Board of Governors of The University of North Carolina. The Optional Retirement Program shall be underwritten by the purchase of annuity contracts, which may be both fixed and variable contracts or a combination thereof, or financed through the establishment of a trust, for the benefit of participants in the Program. Participation in the Optional Retirement Program shall be limited to University personnel who are eligible for membership in the Teachers' and State Employees' Retirement Program and who are:

(1) Administrators and faculty of The University of North Carolina with the rank of instructor or above;

(2) The President and employees of The University of North Carolina who are appointed by the Board of Governors on recommendation of the President pursuant to G.S. 116-11(4), 116-11(5), and 116-14 or who are appointed by the Board of Trustees of a constituent institution of The University of North Carolina upon the recommendation of the Chancellor pursuant to G.S. 116-40.22(b);

(3) Nonfaculty instructional and research staff who are exempt from the State Personnel Act, as defined by the provisions of G.S. 126-5(c1)(8), and the faculty of the North Carolina School of Science and Mathematics; and

(4) Field faculty of the Cooperative Agriculture Extension Service, and tenure track faculty in North Carolina State University agriculture research programs who are exempt from the State Personnel Act and who are eligible for membership in the Teachers' and State Employees' Retirement System pursuant to G.S. 135-3(1), who in any of the cases described in this subsection (i) had been members of the Optional Retirement Program under the provisions of Chapter 338, Session Laws of 1971, immediately prior to July 1, 1985, or (ii) have sought membership as required in subsection (b), below. Under the Optional Retirement Program, the State and the participant shall contribute, to the extent authorized or required, toward the purchase of such contracts or deposited in such trust on the participant's behalf.

(b) Participation in the Optional Retirement Program shall be governed as follows:

(1) Those participating in the Optional Retirement Program immediately prior to July 1, 1985, under the provisions of Chapter 338, Session Laws of 1971, are deemed automatically enrolled in the Program as established by this section.

(2) Eligible employees initially appointed on or after July 1, 1985, shall at the same time of entering upon eligible employment elect (i) to join the Retirement System in accordance with the provisions of law applicable thereto or (ii) to participate in the Optional Retirement Program. This election shall be in writing and filed with the Retirement System and with the employing institution and shall be effective as of the date of entry into eligible service.

(3) An election to participate in the Optional Retirement Program shall be irrevocable. An eligible employee failing to elect to participate in the

Optional Retirement Program at the time of entry into eligible service shall automatically be enrolled as a member of the Retirement System.

(4) No election by an eligible employee of the Optional Retirement Program shall be effective unless it is accompanied by an appropriate application for the issuance of a contract or contracts or trust participation under the Program.

(5) If any participant having less than five years coverage under the Optional Retirement Program leaves the employ of The University of North Carolina and either retires or commences employment with an employer not having a retirement program with the same company underwriting the participant's annuity contract, regardless of whether the annuity contract is held by the participant, a trust, or the Retirement System, the participant's interest in the Optional Retirement Program attributable to contributions of The University of North Carolina shall be forfeited and shall either (i) be refunded to The University of North Carolina and forthwith paid by it to the Retirement System and credited to the pension accumulation fund or (ii) be paid directly to the Retirement System and credited to the pension accumulation fund.

(c) Each employing institution shall contribute on behalf of each participant in the Optional Retirement Program an amount equal to a percentage of the participant's compensation as established from time to time by the General Assembly. Each participant shall contribute the amount which he or she would be required to contribute if a member of the Retirement System. Contributions authorized or required by the provisions of this subsection on behalf of each participant shall be made, consistent with Section 414(h) of the Internal Revenue Code, by salary reduction according to rules and regulations established by The University of North Carolina. Additional personal contributions may also be made by a participant by payroll deduction or salary reduction to an annuity or retirement income plan established pursuant to G.S. 116-17. Payment of contributions shall be made by the employing institution to the designated company or companies underwriting the annuities or the trustees for the benefit of each participant, and this employer contribution shall not be subject to any State tax if made under the Optional Retirement Program or, otherwise, by salary reduction.

(d) The Board of Governors of The University of North Carolina shall designate the company or companies from which contracts are to be purchased or the trustee responsible for the investment of contributions under the Optional Retirement Program, and shall approve the form and contents of such contracts or trust agreement. In making this designation and giving such approval, the Board shall give due consideration to the following:

(1) The nature and extent of the rights and benefits to be provided by these contracts or trust agreement for participants and their beneficiaries;

(2) The relation of these rights and benefits to the amount of contributions to be made;

(3) The suitability of these rights and benefits to the needs of the participants and the interest of the institutions of The University of North Carolina in recruiting and retaining faculty in a national market; and

(4) The ability of the designated company or companies underwriting the annuity contracts or trust agreement to provide these suitable rights and benefits under such contracts or trust agreement for these purposes.

Notwithstanding the provisions of this subsection, no contractual relationship established under the Optional Retirement Program pursuant to the authority granted by Chapter 338, Session Laws of 1971, is deemed terminated by the provisions of this section.

(e) The Board of Governors of The University of North Carolina may provide for the administration of the Optional Retirement Program and may perform or authorize the performance of all functions necessary for its administration.

(f) Any eligible employee electing to participate in the Optional Retirement Program is ineligible for membership in the Retirement System so long as he or she remains employed in any eligible position within The University of North Carolina, and, in this event, he or she shall continue to participate in the Optional Retirement Program.

(g) No retirement benefit, death benefit, or other benefit under the Optional Retirement Program shall be paid by the State of North Carolina, or The University of North Carolina, or the Board of Trustees of the Teachers' and State Employees' Retirement System with respect to any employee selecting and participating in the Optional Retirement Program or with respect to any beneficiary of that employee. Benefits shall be payable to participants or their beneficiaries only by the designated company in accordance with the terms of the contracts or trust agreement. (1971, c. 338, s. 2; c. 916; 1973, c. 1425; 1977, c. 1070; 1985, c. 309; 1987 (Reg. Sess., 1988), c. 1086, s. 28; 2001-424, s. 32.27; 2003-356, s. 1; 2006-172, ss. 2, 3.)

Cross References. — As to the pick up of certain employee contributions by the employer, see G.S. 135-8.

Editor's Note. — Session Laws 2006-172, s. 4, provides: "Sections 2 and 3 of this act become effective July 1, 2007, and Section 3 of this act applies only to eligible persons who are employees as of July 1, 2007, or who are employed thereafter. The remainder of this act is effective when it becomes law."

Effect of Amendments. — Session Laws 2006-172, ss. 2 and 3, effective July 1, 2007, substituted "The University of North Carolina" for "State institutions of higher education" in the section catchline; and, in subsection (a), substituted "University" for "university" near the end of the second sentence, and added "and the faculty of the North Carolina School of Science and Mathematics" at the end of subdivision (a)(3). For applicability, see Editor's Note.

CASE NOTES

Cited in Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

OPINIONS OF ATTORNEY GENERAL

The Legislative Intent Expressed in This Section Is Ambiguous. — In light of that ambiguity and the Board of Governors' obligations to implement and administer the Optional Retirement Program (ORP), the policies and rules that the Board of Governors has adopted to clarify the description of persons eligible to participate in the ORP are reasonable. See opinion of Attorney General to Mr. Roy A. Carroll, Senior Vice President and Vice President for Academic Affairs, The University of North Carolina General Administration, 1999 N.C.A.G. 1 (2/4/99).

§ 135-5.2. Chapel Hill utilities and telephone employees.

Notwithstanding any other provision to the contrary, all persons employed by Chapel Hill Telephone Company or University Service Plants at the time the Chapel Hill telephone services and utilities services are sold to the Southern Bell Company and Duke Power Company respectively, shall be entitled to retire upon early retirement after 30 years of combined service with the Teachers' and State Employees' Retirement System and either Southern Bell or Duke Power Company. An employee must have had at least five years' service with the Teachers' and State Employees' Retirement System and at least five years with either Southern Bell or Duke Power Company in order to be eligible for benefits under this provision. This provision is in addition to any other retirement benefits or privileges the employee may have under the Teachers' and State Employees' Retirement System. (1977, c. 1007.)

§ 135-5.3. Optional participation for charter schools operated by private nonprofit corporations.

(a) The board of directors of each charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Retirement System in accordance with this Article. This election shall be in writing, shall be made no later than 30 days after this section becomes law, and shall be filed with the Retirement System and with the State Board of Education. For each charter school employee who is employed on or before the date the board makes the election to participate, membership in the System is effective as of the date the board makes the election to participate. For each charter school employee who is employed after the date the board makes the election, membership in the System is effective as of the date of that employee's entry into eligible service. This subsection applies only to charter schools that received State Board of Education approval under G.S. 115C-238.29D in 1997 or 1998.

(b) No later than 30 days after both parties have signed the written charter under G.S. 115C-238.29E, the board of directors of a charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Retirement System in accordance with this Article. This election shall be in writing and filed with the Retirement System and with the State Board of Education and is effective for each charter school employee as of the date of that employee's entry into eligible service. This subsection applies to charter schools that receive State Board of Education approval under G.S. 115C-238.29D after 1998.

(c) A board's election to become a participating employer in the Retirement System under this section is irrevocable and shall require all eligible employees of the charter school to participate.

(d) No retirement benefit, death benefit, or other benefit payable under the Retirement System shall be paid by the State of North Carolina or the Board of Trustees of the Teachers' and State Employees' Retirement System on account of employment with a charter school with respect to any employee, or with respect to any beneficiary of an employee, of a charter school whose board of directors does not elect to become a participating employer in the Retirement System under this section.

(e) The board of directors of each charter school shall notify each of its employees as to whether the board elected to become a participating employer in the Retirement System under this section. This notification shall be in writing and shall be provided within 30 days of the board's election or at the time an initial offer for employment is made, whichever occurs last. If the board did not elect to join the Retirement System, the notice shall include a statement that the employee shall have no legal recourse against the board or the State for any possible credit or reimbursement under the Retirement System. The employee shall provide written acknowledgment of the employee's receipt of the notification under this subsection. (1998-212, s. 9.14A(b).)

Editor's Note. — Session Laws 2001-462, s. 2, provides: "Notwithstanding the time limitation contained in G.S. 135-5.3(b), the board of directors of any charter school that received State Board of Education approval under G.S. 115C-238.29D on or after January 1, 2001, may elect to become a participating employer in the Teachers' and State Employees' Retirement

System in accordance with Article 1 of Chapter 135 of the General Statutes. The election authorized by this section [s. 2 of Session Laws 2001-462] must be made no later than 30 days after the effective date [November 16, 2001], of this act [Session Laws 2001-462] and in accordance with all other requirements of G.S. 135-5.3."

Session Laws 2003-69, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3(b) and G.S. 135-40.3A(b), the board of directors of any charter school that received State Board of Education approval under G.S. 115C-238.29D on or after January 1, 2002, and the board of directors of River Mill Academy in Alamance County may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2004-164, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of (i) New Century High School in Saxapahaw; (ii) Lake Norman Charter School in Huntersville; (iii) Exploris Middle School in Raleigh, a charter school division of Exploris; (iv) Magellan Charter School in Raleigh; (v) American Renaissance Charter School in Statesville; and (vi) Healthy Start Academy in Durham may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2005-315, s. 1, provides: "Notwithstanding the time limitation contained in G.S. 135-5.3, the Board of Directors of Evergreen Charter School, a charter school located in Asheville, may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes. The election authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3."

Session Laws 2005-317, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of Success Institute, a charter school in Statesville, and Piedmont Community Charter School in Gastonia may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2007-464, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the Board of Directors of Orange Charter School, a charter school located in Hillsborough, may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. Notwithstanding the time limitations contained in G.S. 135-40.3A, the Board of Directors of Bethany Community Middle School, a charter school in Rockingham County, may elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. Notwithstanding the time limitations contained in G.S. 135-40.3A, the board of directors of Tiller School, a charter school, may elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. The election authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-40.3A and, as applicable, with G.S. 135-5.3."

§ 135-5.4. Optional retirement program for State-funded community colleges.

(a) An Optional Retirement Program provided for in this section is authorized and established and shall be implemented by the North Carolina Community Colleges System, ("System"). The Optional Retirement Program shall be underwritten by the purchase of annuity contracts, which may be both fixed and variable contracts or a combination thereof, or financed through the establishment of a trust, for the benefit of the presidents of the community colleges all of whom are appointed after the implementation of the Program and who elect membership as required by subsection (b) of this section. Under the Optional Retirement Program, the State and the participant shall contribute, to the extent authorized or required, toward the purchase of such contracts or deposited in such trust on the participant's behalf.

(b) Participation in the Optional Retirement Program shall be governed as follows:

(1) Employees initially appointed on or after the implementation of the Optional Retirement Program shall at the same time of entering upon eligible employment elect (i) to join the Retirement System in accordance with the provisions of law applicable thereto or (ii) to participate in the Optional Retirement Program. This election shall be in writing and filed with the Retirement System and with the employing institution and shall be effective as of the date of entry into eligible service.

(2) An election to participate in the Optional Retirement Program shall be irrevocable. An eligible employee failing to elect to participate in the Optional Retirement Program at the time of entry into eligible service shall automatically be enrolled as a member of the Retirement System.

(3) No election by an eligible employee of the Optional Retirement Program shall be effective unless it is accompanied by an appropriate application for the issuance of a contract or contracts or trust participation under the Program.

(4) If any participant having less than five years coverage under the Optional Retirement Program leaves the employ of the System and either retires or commences employment with an employer not having a retirement program with the same company underwriting the participant's annuity contract, regardless of whether the annuity contract is held by the participant, a trust, or the Retirement System, the participant's interest in the Optional Retirement Program attributable to contributions of the employing institution shall be forfeited and shall either (i) be refunded to the employing institution and forthwith paid by it to the Retirement System and credited to the pension accumulation fund or (ii) be paid directly to the Retirement System and credited to the pension accumulation fund.

(c) Each employing institution shall contribute on behalf of each participant in the Optional Retirement Program an amount equal to a percentage of the participant's compensation as established from time to time by the General Assembly. Each participant shall contribute the amount that he or she would be required to contribute if a member of the Retirement System. Contributions authorized or required by the provisions of this subsection on behalf of each participant shall be made, consistent with section 414(h) of the Internal Revenue Code, by salary reduction according to rules and regulations established by the employing institution. Additional personal contributions may also be made by a participant by payroll deduction or salary reduction to an annuity or retirement income plan established pursuant to G.S. 115D-25.

Payment of contributions shall be made by the employing institution to the designated company or companies underwriting the annuities or the trustees for the benefit of each participant, and this employer contribution shall not be subject to any State tax if made under the Optional Retirement Program or, otherwise, by salary reduction.

(d) The System shall designate the company or companies from which contracts are to be purchased or the trustee responsible for the investment of contributions under the Optional Retirement Program and shall approve the form and contents of such contracts or trust agreement. In making this designation and giving such approval, the Board shall give due consideration to the following:

(1) The nature and extent of the rights and benefits to be provided by these contracts or trust agreement for participants and their beneficiaries;
(2) The relation of these rights and benefits to the amount of contributions to be made;
(3) The suitability of these rights and benefits to the needs of the participants and the interest of the institutions of the System in recruiting and retaining faculty in a national and market;
(4) The ability of the designated company or companies underwriting the annuity contracts or trust agreement to provide these suitable rights and benefits under such contracts or trust agreement for these purposes.

In lieu of such designation and in order to provide a more efficient, cost-effective, and flexible Program, the System may designate the company or companies designated for the Optional Retirement Program for State institutions of higher education as prescribed in G.S. 135-5.1(d).

Notwithstanding the provisions of this subsection, no contractual relationship established under the Optional Retirement Program pursuant to the authority granted by Chapter 338, Session Laws of 1971, is deemed terminated by the provisions of this section.

(e) The System or employing institution may provide for the administration of the Optional Retirement Program and may perform or authorize the performance of all functions necessary for its administration.

(f) Any eligible employee electing to participate in the Optional Retirement Program is ineligible for membership in the Retirement System so long as he or she remains employed in any eligible position within the System, and, in this event, he or she shall continue to participate in the Optional Retirement Program.

(g) No retirement benefit, death benefit, or other benefit under the Optional Retirement Program shall be paid by the State of North Carolina, or the System, or the Board of Trustees of the Teachers' and State Employees' Retirement System with respect to any employee selecting and participating in the Optional Retirement Program or with respect to any beneficiary of that employee. Benefits shall be payable to participants or their beneficiaries only by the designated company in accordance with the terms of the contracts or trust agreement. (2001-424, s. 32.24(a); 2001-513, s. 24.)

§ 135-6. Administration.

(a) Administration by Board of Trustees; Corporate Name; Rights and Powers; Tax Exemption. — The general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of the Chapter are hereby vested in a Board of Trustees which shall be organized immediately after a majority of the trustees provided for in this section shall have qualified and taken the oath of office.

The Board of Trustees shall be a body politic and corporate under the name "Board of Trustees Teachers' and State Employees' Retirement System"; and as a body politic and corporate shall have the right to sue and be sued, shall have perpetual succession and a common seal, and in said corporate name shall be able and capable in law to take, demand, receive and possess all kinds of real and personal property necessary and proper for its corporate purposes, and to bargain, sell, grant, alien, or dispose of all such real and personal property as it may lawfully acquire. All such property owned or acquired by said body politic and corporate shall be exempt from all taxes imposed by the State or any political subdivision thereof, and shall not be subject to income taxes.

(b) Membership of Board; Terms. — The Board shall consist of 14 members, as follows:

(1) The State Treasurer, ex officio;

(2) The Superintendent of Public Instruction, ex officio;

(3) Ten members to be appointed by the Governor and confirmed by the Senate of North Carolina. One of the appointive members shall be a member of the teaching profession of the State; one of the appointive members shall be an employee of the Board of Transportation, who shall be appointed by the Governor for a term of four years commencing April 1, 1947, and quadrennially thereafter; one of the appointive members shall be a representative of higher education appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one of the appointive members shall be a retired teacher who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1969, and quadrennially thereafter; one shall be a retired State employee who is drawing a retirement allowance, appointed by the Governor for a term of four years commencing July 1, 1977, and quadrennially thereafter; one to be a general State employee, and three who are not members of the teaching profession or State employees; two to be appointed for a term of two years, two for a term of three years and one for a term of four years; one appointive member shall be a law-enforcement officer employed by the State, appointed by the Governor, for a term of four years commencing April 1, 1985. At the expiration of these terms of office the appointment shall be for a term of four years;

(4) Two members appointed by the General Assembly, one appointed upon the recommendation of the Speaker of the House of Representatives, and one appointed upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. Neither of these members may be an active or retired teacher or State employee or an employee of a unit of local government. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(c) Compensation of Trustees. — The trustees shall be paid during sessions of the Board at the prevailing rate established for members of State boards and commissions, and they shall be reimbursed for all necessary expenses that they incur through service on the Board.

(d) Oath. — Each trustee other than the ex officio members shall, within 10 days after his appointment, take an oath of office, that, so far as it devolves upon him, he will diligently and honestly administer the affairs of the said Board, and that he will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to the Retirement System. Such oath shall be subscribed to by the member making it, and certified by the officer before whom it is taken, and immediately filed in the office of the Secretary of State.

(e) Voting Rights. — Each trustee shall be entitled to one vote in the Board. Four affirmative votes shall be necessary for a decision by the trustees at any meeting of said Board.

(f) Rules and Regulations. — Subject to the limitations of this Chapter, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created by this Chapter and for the transaction of its business. The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

(g) Officers and Other Employees; Salaries and Expenses. — The State Treasurer shall be ex officio chairman of the Board of Trustees. The Board of Trustees shall, by a majority vote of all the members, appoint a director, who may be, but need not be, one of its members. The salary of the director of the Retirement System is subject to the provisions of Chapter 126 of the General Statutes of North Carolina. The Board of Trustees shall engage such actuarial and other service as shall be required to transact the business of the Retirement System. The compensation of all persons, other than the director, engaged by the Board of Trustees, and all other expenses of the Board necessary for the operation of the Retirement System, shall be paid at such rates and in such amounts as the Board of Trustees shall approve, subject to the approval of the Director of the Budget.

(h) Actuarial Data. — The Board of Trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System.

(i) Record of Proceedings; Annual Report. — The Board of Trustees shall keep a record of all of its proceedings which shall be open to public inspection. It shall publish annually a report showing the fiscal transactions of the Retirement System for the preceding year, the amount of the accumulated cash and securities of the System, and the last balance sheet showing the financial condition of the System by means of an actuarial valuation of the assets and liabilities of the Retirement System.

(j) Legal Adviser. — The Attorney General shall be the legal adviser of the Board of Trustees.

(k) Medical Board. — The Board of Trustees shall designate a medical board to be composed of not less than three nor more than five physicians not eligible to participate in the Retirement System. If required, other physicians may be employed to report on special cases. The medical board shall arrange for and pass upon all medical examinations required under the provisions of this Chapter, and shall investigate all essential statements and certificates by or on behalf of a member in connection with an application for disability retirement, and shall report in writing to the Board of Trustees its conclusion and recommendations upon all the matters referred to it.

(*l*) Duties of Actuary. — The Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this Chapter and shall perform such other duties as are required in connection therewith.

(m) Immediately after the establishment of the Retirement System the actuary shall make such investigation of the mortality, service and compensation experience of the members of the System as he shall recommend and the Board of Trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Trustees such tables and such rates as are required in subsection (n), subdivisions (1) and (2), of this section. The Board of Trustees shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates of the assets and liabilities of the funds created by this Chapter.

(n) In 1943, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the Retirement System, and shall make a valuation of the assets and liabilities of the funds of the System, and taking into account the result of such investigation and valuation, the Board of Trustees shall:

(1) Adopt for the Retirement System such mortality, service and other tables as shall be deemed necessary; and

(2) Certify the rates of contributions payable by the State of North Carolina on account of new entrants at various ages.

(o) On the basis of such tables and interest assumption rate as the Board of Trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the System created by this Chapter.

(p) Notwithstanding any law, rule, regulation or policy to the contrary, any board, agency, department, institution or subdivision of the State maintaining lists of names and addresses in the administration of their programs may upon request provide to the Retirement System information limited to social security numbers, current name and addresses of persons identified by the System as members, beneficiaries, and beneficiaries of members of the System. The System shall use such information for the sole purpose of notifying members, beneficiaries, and beneficiaries of members of their rights to and accruals of benefits in the Retirement System. Any social security number, current name and address so obtained and any information concluded therefrom and the source thereof shall be treated as confidential and shall not be divulged by any employee of the Retirement System or of the Department of State Treasurer except as may be necessary to notify the member, beneficiary, or beneficiary of the member of their rights to and accruals of benefits in the Retirement System. Any person, officer, employee or former employee violating this provision shall be guilty of a Class 1 misdemeanor; and if such offending person be a public official or employee, he shall be dismissed from office or employment and shall not hold any public office or employment in this State for a period of five years thereafter. (1941, c. 25, s. 6; 1943, c. 719; 1947, c. 259; 1957, c. 541, s. 15; 1965, c. 780, s. 1; 1969, c. 805; c. 1223, s. 17; 1973, c. 241, s. 8; c. 507, s. 5; c. 1114; 1977, c. 564; 1979, c. 376; 1981 (Reg. Sess., 1982), c. 1191, s. 11; 1983 (Reg. Sess., 1984), c. 1034, s. 238; 1987, c. 539, s. 1; 1993, c. 539, s. 972; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 490, s. 57.)

CASE NOTES

Board Without Power to Waive Statutory Deadlines. — The Board of Trustees of the Retirement System does not have discretionary power to extend or waive statutory deadlines for the reinstatement of a withdrawn account or for purchase of out-of-state service, since a waiver would not be a rule or regulation to prevent injustice and inequality across the board but simply a waiver in a specific instance. In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

Cited in Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993).

§ 135-7. Management of funds.

(a) Vested in Board of Trustees. — The Board of Trustees shall be the trustee of the several funds created by this Chapter as provided in this section and in G.S. 135-8.

(b) Regular Interest Allowance. — The Board of Trustees annually shall allow regular interest on the mean amount for the preceding year in each of the funds with the exception of the expense fund. The amounts so allowed shall be due and payable to said funds, and shall be annually credited thereto by the

Board of Trustees from interest and other earnings on the moneys of the Retirement System. Any additional amount required to meet the interest on the funds of the Retirement System shall be paid from the pension accumulation fund, and any excess of earnings over such amount required shall be paid to the pension accumulation fund. Regular interest shall mean such per centum rate to be compounded annually as shall be determined by the Board of Trustees on the basis of the interest earnings of the System for the preceding year and of the probable earnings to be made, in the judgment of the Board, during the immediate future, such rate to be limited to a minimum of three per centum (3%) and a maximum of four per centum (4%), with the latter rate applicable during the first year of operation of the Retirement System.

(c) Custodian of Funds; Disbursements; Bond of Director. — The State Treasurer shall be the custodian of the several funds and shall invest their assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3.

(d) Deposits to Meet Disbursements. — For the purpose of meeting disbursements for pensions, annuities and other payments there may be kept available cash, not exceeding ten per centum (10%) of the total amount in the several funds of the Retirement System, on deposit with the State Treasurer of North Carolina.

(e) Personal Profit or Acting as Surety Prohibited. — Except as otherwise herein provided, no trustee and no employee of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees, nor as such receive any pay or emolument for his service. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use the same, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned or borrowed from the Board of Trustees.

(f) Retiree Health Benefit Fund. — The Retiree Health Benefit Fund is established as a fund in which accumulated contributions from employers and any earnings on those contributions shall be used to provide health benefits to retired and disabled employees and their applicable beneficiaries as provided by this Chapter. The Retiree Health Benefit Fund shall be administered in accordance with the provisions of subsection (a) of this section. Employer contributions to the Fund are irrevocable. The assets of the Fund are dedicated to providing health benefits to retired and disabled employees and their applicable beneficiaries as provided by this Chapter and are not subject to the claims of creditors of the employers making contributions to the Fund. However, Fund assets may be used for reasonable expenses to administer the Fund, including costs to conduct required actuarial valuations of State-supported retired employees' health benefits under other post-employment benefit accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. (1941, c. 25, s. 7; 1957, c. 846, s. 2; 1959, c. 1181, s. 2; 1961, c. 397; 1965, c. 780, s. 1; 1967, c. 720, s. 11; c. 1205; 1971, c. 386, s. 4; 1973, c. 241, s. 9; 1979, c. 467, ss. 14, 15; 2004-124, s. 31.20(a); 2007-323, s. 28.23.)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.23, effective July 1, 2007, added the last sentence in subsection (f).

CASE NOTES

Applied in Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984).

Cited in Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993).

OPINIONS OF ATTORNEY GENERAL

Investment by Teachers' and State Employees' Retirement System in Government National Mortgage Association Mortgages. — See opinion of Attorney General to Mr. R. Moore, Assistant Treasurer, State of North Carolina, 40 N.C.A.G. 752 (1970).

§§ 135-7.1, 135-7.2: Repealed by Session Laws 1979, c. 467, ss. 16, 17.

§ 135-8. Method of financing.

(a) Funds to Which Assets of Retirement System Credited. — All of the assets of the Retirement System shall be credited according to the purpose for which they are held to one of four funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, and the pension reserve fund.

(b) Annuity Savings Fund. — The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to any payments from the annuity savings fund shall be made as follows:

(1) Prior to the first day of July, 1947, each employer shall cause to be deducted from the salary of each member on each and every payroll of such employer for each and every payroll period four per centum (4%) of his actual compensation; and the employer also shall deduct four per centum (4%) of any compensation received by any member for teaching in public schools, or in any of the institutions, agencies or departments of the State, from salaries other than the appropriations from the State of North Carolina. On and after such date the rate so deducted shall be five per centum (5%) of actual compensation except that, with respect to each member who is eligible for coverage under the Social Security Act in accordance with the agreement entered into during 1955 in accordance with the provisions of Article 2 of Chapter 135 of Volume 17 of the General Statutes, as amended, and with respect to members covered under G.S. 135-27, with such coverage retroactive to January 1, 1955, such deduction shall, commencing with the first day of the period of service with respect to which such agreement is effective, be at the rate of three per centum (3%) of the part of his actual compensation not in excess of the amount taxable to him under the Federal Insurance Contributions Act as from time to time in effect plus five per centum (5%) of the part of his earnable compensation not so taxable; provided that in the case of any member so eligible and receiving compensation from two or more employers such deductions may be adjusted under such rules as the Board of Trustees may establish so as to be as nearly equivalent as practicable to the deductions which would have been made had the member received all of such compensation from one employer. Notwithstanding the foregoing, the Board of Trustees may in its discretion cause such portion as it may determine of deductions made between January 1, 1955, and December 1, 1955, to be transferred into the contribution fund established under G.S. 135-24; such amounts so transferred shall in that event be deemed to be taxes contributed by

employees as required under Article 2, Chapter 135 of Volume 17 of the General Statutes as amended, and shall be in lieu of contributions otherwise payable in the same amount as so required.

Notwithstanding the foregoing, effective July 1, 1963, with respect to the period of service commencing on July 1, 1963, and ending December 31, 1965, the rates of such deduction shall be four per centum (4%) of the portion of compensation not in excess of forty-eight hundred dollars ($4,800) and six per centum (6%) of the portion of compensation in excess of forty-eight hundred dollars ($4,800); and with respect to the period of service commencing January 1, 1966, and ending June 30, 1967, the rate of such deductions shall be four per centum (4%) of the portion of compensation not in excess of fifty-six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars ($5,600); and with respect to the period of service commencing July 1, 1967, and ending June 30, 1975, the rate of such deductions shall be five per centum (5%) of the portion of compensation not in excess of fifty-six hundred dollars ($5,600) and six per centum (6%) of the portion of compensation in excess of fifty-six hundred dollars ($5,600). Such rates shall apply uniformly to all members of the Retirement System, without regard to their coverage under the Social Security Act.

Notwithstanding the foregoing, effective July 1, 1975, with respect to the period of service commencing on July 1, 1975, the rate of such deductions shall be six per centum (6%) of the compensation received by any member. Such rates shall apply uniformly to all members of the Retirement System, without regard to their coverage under the Social Security Act.

(2) The deductions provided for herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Chapter. The employer shall certify to the Board of Trustees on each and every payroll or in such other manner as the Board of Trustees may prescribe, the amounts to be deducted; and each of said amounts shall be deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon, to the individual account of the member from whose compensation said deduction was made.

(3) Each board of education of each county and each board of education of each city, and the employer in any department, agency or institution of the State, in which any teacher receives compensation from sources other than appropriations of the State of North Carolina shall deduct from the salaries of these teachers paid from sources other than State appropriations an amount equal to that deducted from the salaries of the teachers whose salaries are paid from State funds, and remit this amount to the State Retirement System. City boards of education and county boards of education in each and every county and city which has employees compensated from other than the State appropriation shall pay to the State Retirement System the same per centum of the compensation that the State of North Carolina pays and shall transmit same to the State Retirement System monthly: Provided, that for

the purpose of enabling the boards of education to make such payment, the tax-levying authorities are hereby authorized, empowered and directed to provide the necessary funds therefor. In case the salary is paid in part from State funds and in part from local funds, the local authorities shall not be relieved of providing and remitting the same per centum of the salary paid from local funds as is paid from State funds. In case the entire salary of any teacher, as defined in this Chapter, is paid from county or local funds, the county or city paying such salary shall provide and remit to the Retirement System the same per centum that would be required if the salary were provided by the State of North Carolina.

(4) In addition to contributions deducted from compensation as hereinbefore provided, subject to the approval of the Board of Trustees, any member may redeposit in the annuity savings fund by a single payment an amount equal to the total amount which he previously withdrew therefrom, as provided in this Chapter. Such amounts so redeposited shall become a part of his accumulated contributions as if such amounts had initially been contributed within the calendar year of such redeposit. In no event, however, shall any member be permitted to redeposit any amount withdrawn after July 1, 1959, except as provided for in G.S. 135-4(e).

(5) The Board of Trustees may approve the purchase of creditable service by any member for leaves of absence or for interrupted service to an employer for the sole purpose of acquiring knowledge, talents, or abilities and to increase the efficiency of service to the employer. This approval shall be made prior to the purchase of the creditable service, is limited to a career total of six years for each member, and may be obtained in the following manner:

a. Approved leave of absence. — Where the employer grants an approved leave of absence, a member may make monthly contributions to the annuity savings fund on the basis of compensation the member was earning immediately prior to such leave of absence. The employer shall make monthly contributions equal to the normal and accrued liability contribution on such compensation or, in lieu thereof, the member may pay into the annuity savings fund monthly an amount equal to the employer's normal and accrued liability contribution when the policy of the employer is not to make such payment.

b. No educational leave policy. — Where the employer has a policy of not granting educational leaves of absence or the member has unsuccessfully petitioned for leave of absence and the member has interrupted service for educational purposes, the member may make monthly contributions into the annuity savings fund in an amount equal to the employee contribution plus the employer normal and accrued liability contribution on the basis of the compensation the member was earning immediately prior to the interrupted service.

c. Educational program prior to July 1, 1981. — Creditable service for leaves of absence or interrupted service for educational purposes prior to July 1, 1981, may be purchased by a member, before or after retirement, who returned as a contributing employee or teacher within 12 months after completing the educational program and completed 10 years of subsequent membership service, by making a lump sum payment into the annuity savings fund equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities and shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus a fee to be determined by the Board of Trustees.

d. Employment in a charter school. — Notwithstanding subparagraph a. of this subdivision, where the employer grants an approved leave of absence for the member to be employed in a charter school or where the member's service is interrupted by employment in a charter school, authorized under Part 6A of Article 16 of Chapter 115C of the General Statutes, the member may make monthly contributions into the annuity savings fund in an amount equal to the employee contribution plus the employer normal and accrued liability contribution on the basis of the compensation the member was earning immediately prior to the interrupted service.

Payments required to be made by the member, the employer, or both under subparagraphs a or b are due by the 15th of the month following the month for which the service credit is allowed and payments made after the due date shall be assessed a penalty, in lieu of interest, of one percent (1%) per month or fraction thereof the payment is made beyond the due date; provided, that these payments shall be made prior to retirement and provided further, that if the member did not become a contributing member within 12 months after completing the educational program and failed to complete three years of subsequent membership service, except in the event of death or disability, any payment made by the member including penalty shall be refunded with regular interest thereon and the service credits cancelled prior to or at retirement.

(6) The contributions of a member, and such interest as may be allowed thereon, paid upon his death or withdrawn by him as provided in this Chapter, shall be paid from the annuity savings fund, and any balance of the accumulated contributions of such a member shall be transferred to the pension accumulation fund.

(b1) Pick Up of Employee Contributions. — Anything within this section to the contrary notwithstanding, effective July 1, 1982, an employer, pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended, shall pick up and pay the contributions which would be payable by the employees as members under subsection (b) of this section with respect to the service of employees after June 30, 1982.

The members' contributions picked up by an employer shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the annuity savings fund and accumulated within the fund in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Member contributions picked up by an employer shall be payable from the same source of funds used for the payment of compensation to a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by his employer. This deduction, however, shall not reduce his compensation as defined in subdivision (7a) of G.S. 135-1. Picked up contributions shall be transmitted to the System monthly for the preceding month by means of a warrant drawn by the employer and payable to the Teachers' and State Employees' Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed. In the case of a failure to fulfill these conditions, the provisions of subsection (f)(3) of this section shall apply.

The pick up of employee contributions by an employer as provided for hereunder shall be equally applicable to participant contributions required under the optional retirement program as specified in G.S. 135-5.1(c).

(b2) Retroactive Adjustment in Compensation or an Underreporting of Compensation. — A member who is awarded backpay in cases of a denied promotional opportunity in which the aggrieved member is granted a promotion retroactively, or in cases in which an employer errs in the reporting of compensation, including the employee and employer contributions, the member and employer may make employee and employer contributions on the retroactive or additional compensation, after submitting clear and convincing evidence of the retroactive promotion or underreporting of compensation, as follows:

(1) Within 90 days of the denial of the promotion or the error in reporting, by the payment of employee and employer contributions that would have been paid; or

(2) After 90 days of the denial of the promotion or the error in reporting, by the payment of the employee and employer contributions that would have been paid plus interest compounded annually at a rate equal to the greater of the average yield on the pension accumulation fund for the preceding calendar year or the actuarial investment rate-of-return assumption, as adopted by the Board of Trustees.

For members electing to make the employee contributions on the retroactive adjustment in compensation or on the underreported compensation, the member's employer, which granted the retroactive promotion or erred in underreporting compensation and contributions, shall make the required employer contributions. Nothing contained in this subsection shall prevent an employer from paying all or a part of the interest assessed on the employee contributions; and to the extent paid by the employer, the interest paid by the employer shall be credited to the pension accumulation fund; provided, however, an employer does not discriminate against any member or group of members in his employ in paying all or any part of the interest assessed on the employee contributions due.

In the event the retroactive adjustment in compensation or the underreported compensation is for a period that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 135-1(5) the compensation the member would have received during the period shall be included in calculating the member's average final compensation only in the event the appropriate employee and employer contributions are paid on such compensation.

An employer error in underreporting compensation shall not include a retroactive increase in compensation that occurs during the four consecutive calendar years that would have produced the highest average annual compensation pursuant to G.S. 135-1(5) for reasons other than a wrongfully denied promotional opportunity where the member is promoted retroactively.

(c) Annuity Reserve Fund. — The annuity reserve fund shall be the fund in which shall be held the reserves on all annuities in force and from which shall be paid all annuities and all benefits in lieu of annuities, payable as provided in this Chapter. Should a beneficiary retired on account of disability be restored to active service with a compensation not less than his average final compensation at the time of his last retirement his annuity reserve shall be transferred from the annuity reserve fund to the annuity savings fund and credited to his individual account therein.

(d) Pension Accumulation Fund. — The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contribution made by employers and from which shall be paid all pensions and other benefits on account of members with prior service credit. Contributions to and payments from the pension accumulation fund shall be made as follows:

(1) On account of each member there shall be paid in the pension accumulation fund by employers an amount equal to a certain percentage of the actual compensation of each member to be known as the "normal contribution," and an additional amount equal to a percentage of his actual compensation to be known as the "accrued liability contribution." The rate per centum of such contributions shall be fixed on the basis of the liabilities of the Retirement System as shown by actuarial valuation. Until the first valuation the normal contribution shall be two and fifty-seven one-hundredths percent (2.57%) for teachers, and one and fifty-seven one-hundredths percent (1.57%) for State employees, and the accrued liability contribution shall be two and ninety-four one-hundredths percent (2.94%) for teachers and one and fifty-nine one-hundredths percent (1.59%) of the salary of other State employees.

(2) On the basis of regular interest and of such mortality and other tables as shall be adopted by the Board of Trustees, the actuary engaged by the Board to make each valuation required by this Chapter during the period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the earnable compensation of the average new entrant throughout his entire period of active service which would be sufficient to provide for the payment of any pension payable on his account. The rate per centum so determined shall be known as the "normal contribution" rate. After the accrued liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable salary of all members obtained by deducting from the total liabilities of the pension accumulation fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed on the basis of the mortality and service tables adopted by the Board of Trustees and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation.

(3) Immediately succeeding the first valuation the actuary engaged by the Board of Trustees shall compute the rate per centum of the total annual compensation of all members which is equivalent to four percent (4%) of the amount of the total pension liability on account of all members and beneficiaries which is not dischargeable by the aforesaid normal contribution made on account of such members during the remainder of their active service. The rate per centum originally so determined shall be known as the "accrued liability contribution" rate. Such rate shall be increased on the basis of subsequent valuations if benefits are increased over those included in the valuation on the basis of which the original accrued liability contribution rate was determined. Upon certification by the actuary engaged by the Board of Trustees that the accrued liability contribution rate may be reduced without impairing the Retirement System, the Board of Trustees may cause the accrued liability contribution rate to be reduced.

(4) The total amount payable in each year to the pension accumulation fund shall not be less than the sum of the rate per centum known as the normal contribution rate and the accrued liability contribution

rate of the total actual compensation of all members during the preceding year: Provided, however, that, subject to the provisions of subdivision (3) of this subsection the amount of each annual accrued liability contribution shall be at least three percent (3%) greater than the preceding annual accrued liability payment, and that the aggregate payment by employers shall be sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the year then current.

(5) The accrued liability contribution shall be discontinued as soon as the accumulated reserve in the pension accumulation fund shall equal the present value as actuarially computed and approved by the Board of Trustees, of the total liability of such fund less the present value, computed on the basis of the normal contribution rate then in force, of the prospective normal contributions to be received on account of all persons who are at the time members.

(6) All pensions, and benefits in lieu thereof, with the exception of those payable on account of members who received no prior service allowance, payable from contributions of employer shall be paid from the pension accumulation fund.

(7) Upon the retirement of a member not entitled to credit for prior service, an amount equal to his pension reserve shall be transferred from the pension accumulation fund to the pension reserve fund.

(e) Pension Reserve Fund. — The pension reserve fund shall be the fund in which shall be held the reserves on all pensions granted to members not entitled to credit for prior service and from which such pensions and benefits in lieu thereof shall be paid. Should such a beneficiary retired on account of disability be restored to active service with a compensation not less than his average final compensation at the time of his last retirement, the pension thereon shall be transferred from the pension reserve fund to the pension accumulation fund. Should the pension of such disability beneficiary be reduced as a result of an increase in his earning capacity, the amount of the annual reduction in his pension shall be paid annually into the pension accumulation fund during the period of such reduction.

(f) Collection of Contributions. —

(1) The collection of members' contributions shall be as follows:

a. Each employer shall cause to be deducted on each and every payroll of a member for each and every payroll subsequent to the date of establishment of the Retirement System the contributions payable by such member as provided in this Chapter, and the employer shall draw his warrant for the amount so deducted, payable to the Teachers' and State Employees' Retirement System of North Carolina, and shall transmit the same, together with schedule of the contributions, on such forms as prescribed.

(2) The collection of employers' contributions shall be made as follows:

a. Upon the basis of each actuarial valuation provided herein there shall be prepared biennially and certified to the Department of Administration a statement of the total amount necessary for the ensuing biennium to the pension accumulation and expense funds, as provided under subsections (d) and (f) of this section, and these funds shall be handled and disbursed in accordance with the State Budget Act, Chapter 143C of the General Statutes.

b. Until the first valuation has been made and the rates computed as provided in subsection (d) of this section, the amount payable by employers on account of the normal and accrued liability contributions shall be five and fifty-one one-hundredths percent (5.51%) of the payroll of all teachers and three and sixteen one-hundredths percent (3.16%) for other State employees.

c. Repealed by Session Laws 1993, c. 257, s. 13.

d. Each board of education in each county and each board of education in each city in which teachers or other employees of the schools receive compensation for services in the public schools from sources other than the appropriation of the State of North Carolina shall pay the Board of Trustees of the State Retirement System such rate of their respective salaries as are paid those of other employees.

e. Each employer shall transmit monthly to the State Retirement System on account of each employee, who is a member of this System, an amount sufficient to cover the normal contribution and the accrued liability contribution of each member employed by such employer for the preceding month.

(3) In the event the employee or employer contributions required under this section are not received by the date set by the Board of Trustees, the Board shall assess the employer with a penalty of 1% per month with a minimum penalty of twenty-five dollars ($25.00). If within 90 days after request therefor by the Board any employer shall not have provided the System with the records and other information required hereunder or if the full accrued amount of the contributions provided for under this section due from members employed by an employer or from an employer other than the State shall not have been received by the System from the chief fiscal officer of such employer within 30 days after the last due date as herein provided, then, notwithstanding anything herein or in the provisions of any other law to the contrary, upon notification by the Board to the State Treasurer as to the default of such employer as herein provided, any distributions which might otherwise be made to such employer from any funds of the State shall be withheld from such employer until notice from the Board to the State Treasurer that such employer is no longer in default.

(g) Merger of Annuity Reserve Fund and Pension Reserve Fund into Pension Accumulation Fund. — Notwithstanding the foregoing, effective at such date not later than December 31, 1959, as the Board of Trustees may determine, the annuity reserve fund and the pension reserve fund shall be merged into and become a part of the pension accumulation fund, provided that such merger shall in no way adversely affect the rights of any members or retired members of the System and further provided the Board of Trustees shall be and hereby is authorized to make such changes in the accounting methods and procedures of the System from time to time as, in its opinion, are in the interest of sound and proper administration of the System.

(h) Repealed by Session Laws 1965, c. 780, s. 1. (1941, c. 25, s. 8; c. 143; 1943, c. 207; 1947, c. 458, ss. 1, 2, 8; 1955, c. 1155, ss. 3-5; 1959, c. 513, s. 4; 1963, c. 687, ss. 4, 5; 1965, c. 780, s. 1; 1967, c. 720, ss. 12, 13; 1969, c. 1223, s. 13; 1971, c. 117, ss. 2, 10; 1975, c. 457, s. 5; c. 879, s. 46; 1977, c. 909; 1981, c. 636, s. 1; c. 1000, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 8; 1985, c. 539, ss. 1, 2; 1991, c. 585, s. 3; c. 718, s. 1; 1993, c. 257, s. 13; 1997-430, s. 11; 2003-359, s. 10; 2006-203, s. 73.)

Editor's Note. — This section, as amended by Session Laws 1993, c. 257, s. 13 does not contain a subdivision (f)(1)b.

Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-203, s. 73, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "the State Budget Act, Chapter 143C of the General Statutes" for "Chapter 100, Public Laws of 1929, and amendments thereto (G.S. 143-1 et seq.), known as the Executive Budget Act" in subdivision (f)(2)a.

CASE NOTES

Funding. — Teachers' and State Employees' Retirement System of North Carolina, Consolidated Judicial Retirement System of North Carolina, and Legislative Retirement System are funded by both employee and State, or employer, contributions under G.S. 135-8, 135-68, 135-69, 120-4.19, and 120-4.20; these systems provide for a systematic method of funding of the respective retirement system with employee contributions computed as a set percentage of the employees' salaries, and with systematic employer contributions in accordance with formulas mandated by the retirement statutes, which include calculations by an actuary based on the actuarial valuation of liabilities of the retirement systems. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

Local Unit Contribution. — Where a local unit assumes the burden of supplementing State support for the schools, the provision of subsection (b)(3) of this section that the local unit make its contribution and the taxing authority provide the necessary funds is mandatory. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942), holding no vote necessary to tax to meet deficiency in previously authorized tax.

Applied in Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984).

Cited in Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213 (1968); Stanley v. Retirement & Health Benefits Div., 55 N.C. App. 588, 286 S.E.2d 643 (1982).

§ 135-9. Exemption from garnishment, attachment, etc.

Except for the applications of the provisions of G.S. 110-136, and G.S. 110-136.3 et seq., and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a person to a pension, or annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Chapter, and the moneys in the various funds created by this Chapter, are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Chapter specifically otherwise provided. Notwithstanding any provisions to the contrary, any overpayment of benefits to a member in a State-administered retirement system or the former Disability Salary Continuation Plan or the Disability Income Plan of North Carolina may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person, the person's estate, or designated beneficiary. (1941, c. 25, s. 9; 1985, c. 402, s. 1; c. 649, s. 5; 1987, c. 738, s. 29(k); 1989, c. 665, s. 1; c. 792, s. 2.5.)

Legal Periodicals. — For comment on this enactment, see 19 N.C.L. Rev. 519 (1941).

CASE NOTES

The language of this section is clear and unequivocal. A person's rights to state employee retirement benefits are not assignable. Reynolds v. North Carolina State Employees Credit Union, 31 Bankr. 296 (Bankr. E.D.N.C. 1983).

This section and G.S. 50-20(b)(3) do not require entry of a Qualified Domestic Relations Order to assign a retirement plan; therefore, the plain language of a property settlement agreement incorporated into a consent order served to secure ex-wife's twenty percent interest in her ex-husband's state university retirement plan. Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

G.S. 1C-1601(c) does not preclude the use of this section by a bankruptcy debtor to claim an exemption in state employee retirement benefits. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

The designation of "retirement" as "other collateral" on loan document was clearly misleading, since the "retirement" account of a state employee is unassignable, and therefore not available as a source of security to a creditor. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Credit union deceived borrower by purporting to have enforceable security interest in retirement accounts. Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at the time of making his first loan, which authorized the sending of employee's retirement checks to the credit union and depositing therein and the filing away of these forms and applying them to all loans made thereafter violated public policy of protecting the retirement accounts of teachers and other state employees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Cited in Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

§ 135-10. Protection against fraud.

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this Retirement System in any attempt to defraud such System as a result of such act shall be guilty of a Class 1 misdemeanor. Should any change or error in the records result in any member or beneficiary receiving from the Retirement System more or less than he would have been entitled to receive had the records been correct, the Board of Trustees shall correct such error, and as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid. (1941, c. 25, s. 10; 1993, c. 539, s. 973; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Legislative Intent. — This section shows the intent of the General Assembly to allow the courts to require that compensation paid for underpayment of a pension compensation be paid at the actuarial value. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Calculation of Additional Benefit. — The re-calculation of additional benefits owed to retirees did not mandate the use of a mortality factor, where the right to payments was not forfeited upon the death of a retiree but was passed to the retiree's survivors. Faulkenbury v. Teachers' & State Employees' Ret. Sys., 132 N.C. App. 137, 510 S.E.2d 675, 1999 N.C. App. LEXIS 89 (1999), cert. denied, 350 N.C. 379, 536 S.E.2d 620 (1999).

§ 135-10.1. Failure to respond.

If a member fails to respond in any way within 90 days after preliminary option figures and Form 6-E, Election of Benefits, are mailed, the Form 6, Application for Service, Early or Disability Retirement, shall be null and void; the retirement system shall not be liable for any benefits due on account of the voided application, and a new application must be filed establishing a subsequent effective date of retirement. If an applicant for disability retirement fails to furnish requested additional medical information within 90 days following such request, the application shall be declared null and void under the same conditions outlined above, unless the applicant is eligible for early or service retirement in which case the application shall be processed accordingly, using the same effective date as would have been used had the application for disability retirement been approved. (2005-91, s. 4.)

§ 135-11. Application of other pension laws.

Subject to the provisions of Article 2, Chapter 135 of the General Statutes, Volume 17, as amended, no other provisions of law in any other statute which provides wholly or partly at the expense of the State of North Carolina for pensions or retirement benefits for teachers or State employees of the said State, their widows, or other dependents shall apply to members or beneficiaries of the Retirement System established by this Chapter, their widows or other dependents. (1941, c. 25, s. 11; 1955, c. 1155, s. 6.)

§ 135-12. Obligation of maintaining reserves and paying benefits.

The maintenance of annuity reserves and pension reserves as provided for and regular interest creditable to the various funds as provided in G.S. 135-8, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Chapter, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived from deposits and investments authorized by this Chapter shall be used for the payment of the said obligations of the said fund. (1941, c. 25, s. 12.)

§ 135-13. Certain laws not repealed; suspension of payments and compulsory retirement.

Nothing in this Chapter shall be construed to repeal or invalidate any of the provisions of Chapter 483 of the Public-Local Laws of 1919, or Chapter 385 of the Public-Local Laws of 1921, as amended, relating to pensions for school teachers in New Hanover County. No payment on account of any benefit granted under the provisions of G.S. 135-5, subsections (a) and (d) inclusive, shall become effective or begin to accrue until the end of one year following the date the System is established nor shall any compulsory retirement be made during such period. (1941, c. 25, s. 13.)

§ 135-14. Pensions of certain former teachers and State employees.

On and after July 1, 1983, special pensions and allowances of certain former teachers and State employees shall be paid out of the Pension Accumulation Fund of the Retirement System, as follows:

(1) Any person who was a teacher or employee, as defined in G.S. 135-1(10) and (25), for 20 or more years, whose separation from service was prior to April 1, 1956, was not due to any dishonorable cause, and who had attained age 65 prior to July 1, 1960, shall upon application be paid an allowance of one hundred seventy-three dollars and twenty-five cents ($173.25) per month.

(2) Any beneficiary who did not qualify for Social Security benefits and had 20 or more years of creditable service and qualified for a minimum eighty-five dollars ($85.00) per month under the provisions of Chapter 1140 of the 1965 Session Laws, shall be paid the allowance in effect on June 30, 1983.

(3) Any beneficiary who did not qualify for Social Security benefits and who had 15 years but less than 20 years of creditable service and qualified for a benefit of four dollars ($4.00) per month for each year of creditable service under the provisions of Chapter 1199 of the 1965 Session Laws shall be paid the allowance in effect on June 30, 1983.

(4) All the allowances in subsections (1) through (3) of this section may be adjusted by any cost-of-living increases in retirement allowances provided by the General Assembly or by the Board of Trustees. (1943, c. 785; 1953, c. 1132, s. 1; 1955, c. 1199, ss. 1, 2; 1957, cc. 852, 1408, 1412; 1959, c. 538, s. 1; 1979, c. 1057, ss. 1, 2; 1983, c. 761, s. 223.)

§ 135-14.1. Certain school superintendents and assistant superintendents.

Any person who has been a superintendent or assistant superintendent in the public schools of North Carolina for a total of 20 years or more and who was not a superintendent or assistant superintendent in the public schools of this State at the time of the enactment of the Teachers' and State Employees' Retirement System Act, the same being this Chapter, and whose cessation of employment as a superintendent or assistant superintendent was not due to any dishonorable cause shall be entitled to receive benefits under said Retirement Act for such services in the same manner and to the same extent as such 20 years of prior service would have entitled such superintendent or assistant superintendent had he or she been a superintendent or assistant superintendent in the public schools at the time said Retirement Act became effective, and had chosen to become a member of the Retirement System, provided that such former superintendent or assistant superintendent has returned to State service and been employed for at least five years and has reached the age of 65 before July 1, 1957; provided, further, the monthly benefit to such former superintendent or assistant superintendent shall be equal to the minimum provided with respect to teachers under the provisions of G.S. 135-14, as amended. (1957, c. 1431.)

§ 135-15: Repealed by Session Laws 1949, c. 1056, s. 9.

§ 135-16. Employees transferred to North Carolina State Employment Service by act of Congress.

Notwithstanding any provision contained in this Chapter, any employee of the United States Employment Service who was transferred to and became employed by the State of North Carolina, or any of its agencies, on November 16, 1946, by virtue of Public Laws 549, 79th Congress, Chapter 672, 2nd Session, and who was employed by the War Manpower Commission or the United States Employment Service between January 1, 1942, and November 15, 1946, shall be deemed to have been engaged in membership service as defined by this Chapter for any payroll period or periods between such dates: Provided, that any such employee or member on or before January 1, 1948, pays to the Board of Trustees for the benefit of the proper fund or account an amount equal to the accumulated contributions, with interest thereon, that such employee or member would have made during such period if he had been a member of the Retirement System with earnable compensation based on the salary received for such period and as limited by this Chapter: Provided, further that funds are made available by the United States Employment Service, or other federal agency, to the Employment Security Commission for the payment of and the Employment Security Commission pays to the Board of Trustees for the benefit of the proper fund a sum equal to the employer's contributions that would have been paid for such period for members or employees who pay the accumulated contributions provided in this section.

The Board of Trustees is authorized to adopt and issue all necessary rules and regulations for the purpose of administering and enforcing the provisions of this section. (1947, c. 464, s. 1; c. 598, s. 1.)

§ 135-16.1. Blind or visually impaired employees.

(a) On July 1, 1971, all blind or visually impaired employees employed by the Department of Health and Human Services shall be enrolled as members of the Teachers' and State Employees' Retirement System. All such employees shall be given full credit for all service theretofore as employees of the Department of Health and Human Services. All retired employees drawing or receiving benefits from and under the private retirement plan purportedly created on December 6, 1966, by the Bureau of Employment for the Blind Division pursuant to a trust agreement purportedly entered into with a private banking institution as trustee shall continue to be paid by the Teachers' and State Employees' Retirement System benefits in the same amount which they purportedly were entitled to under the private retirement plan and trust agreement, except that such retired persons shall be eligible for such annual cost-of-living increases as may be provided for retirement members of the Teachers' and State Employees' Retirement System under the provisions of this Article.

(b) Upon the enrollment of the employees in the Teachers' and State Employees' Retirement System, the purported private retirement plan and trust agreement hereinabove referred to shall be dissolved and terminated.

(c) Notwithstanding the foregoing, blind persons licensed by the State and operating vending facilities under contract with the Department of Health and Human Services, Division of Services for the Blind and its successors, hereinafter referred to as licensed vendors, so licensed on and after October 1, 1983, shall not be members of the Retirement System. All licensed vendors in service or who are members of the Retirement System before October 1, 1983, shall make an irrevocable election to do one of the following:

(1) Continue contributing membership service as if an employee under the same conditions and requirements as are otherwise provided, and have the rights of a member to all benefits and a retirement allowance;

(2) Receive a return of accumulated contributions with cessation of contributing membership service, under G.S. 135-5(f), and in any event with regular interest regardless of membership service; or

(3) Terminate contributing membership service and be entitled alternatively to the benefits and allowances provided under G.S. 135-3(8) or 135-5(a). (1971, c. 1025, s. 3; 1973, c. 476, s. 143; 1983, c. 867, s. 3; 1997-443, s. 11A.118(a); 2000-121, s. 28.)

§ 135-17. Facility of payment.

In the event of the death of a member or beneficiary not survived by a person designated to receive any return of accumulated contributions or balance thereof, or in the event that the Board of Trustees shall find that a beneficiary is unable to care for his affairs because of illness or accident, any benefit payments due may, unless claim shall have been made therefor by a duly appointed guardian, committee or other legal representative, be paid to the spouse, a child, a parent or other blood relative, or to any person deemed by the Board of Trustees to have incurred expense for such beneficiary or deceased member, and any such payments so made shall be a complete discharge of the liabilities of this Retirement System therefor. (1949, c. 1056, s. 6.)

§ 135-18: Repealed by Session Laws 1969, c. 1223, s. 14.

§ 135-18.1. Transfer of credits from the North Carolina Local Governmental Employees' Retirement System.

(a) Any person who is a member of the Teachers' and State Employees' Retirement System of North Carolina on July 1, 1951, and who was previously a member of the North Carolina Governmental Employees' Retirement System, hereafter in this section referred to as the local system, shall be entitled to transfer to this Retirement System his credits for membership and prior service in the local system as of the date of termination of membership in the local system, notwithstanding that his membership in the local system may have been terminated prior to July 1, 1951: Provided, such member shall deposit in this Retirement System prior to January 1, 1952, the full amount of any accumulated contributions standing to his credit in, or previously withdrawn from, the local system and shall apply to the Board of Trustees of this Retirement System for a transfer of credit from the local system. Any person who becomes a member of this Retirement System on or after July 1, 1951, shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the local system: Provided, the actual transfer of employment is made while his account in the local system is active and such person shall request the local system to transfer his accumulated contributions, interest, and service credits to this Retirement System; provided further, with respect to any person who becomes a member of this Retirement System after July 1, 1969, the local system agrees to transfer to this Retirement System the amount of reserve held in the local system as a result of previous contributions of the employer on behalf of the transferring employee.

(b) The accumulated contributions withdrawn from the local system and deposited in this Retirement System shall be credited to such member's account in the annuity savings fund of this Retirement System and shall be deemed, for the purpose of computing any benefits subsequently payable from the annuity savings fund, to be regular contributions made on the date of such deposit.

(c) Upon the deposit in this Retirement System of the accumulated contributions previously withdrawn from the local system the Board of Trustees of this Retirement System shall request the Board of Trustees of the local system to certify to the period of membership service credit and the regular accumulated contributions attributable thereto and to the period of prior service credit, if any, and the contributions with interest allowable as a basis for prior service benefits in the local system, as of the date of termination of membership in the local system. Credit shall be allowed in this System for the service so certified in determining the member's credited service and, upon his retirement he shall be entitled, in addition to the regular benefits allowable on account of his participation in this Retirement System, to the pension which shall be the actuarial equivalent at age 65 or at retirement, if prior thereto, of the amount of the credit with interest thereon representing contributions attributable to his service credits in the local system.

(d) The Board of Trustees of the Retirement System shall effect such rules as it may deem necessary to prevent any duplication of service, interest or other credits which might otherwise occur. (1951, c. 797; 1961, c. 516, s. 7; 1965, c. 780, s. 1; 1969, c. 1223, s. 15; 1971, c. 117, ss. 16, 17; 1973, c. 241, s. 11.)

CASE NOTES

Transfer of Local Creditable Service to State System. — In determining the date of eligibility of state employee petitioner to purchase retirement credits under Teachers' and State Employees' Retirement System for time spent in the military service, petitioner could not include service in the Local Governmental Employees' Retirement System. Worrell v. North Carolina Dep't of State Treas., 333 N.C. 528, 427 S.E.2d 871 (1993).

§ 135-18.2: Repealed by Session Laws 1959, c. 538, s. 3.

§ 135-18.3. Conditions under which amendments void.

If for any reason the federal-state agreement provided in Article 2 of Chapter 135 of the General Statutes, Volume 17 [now Volume 15], as amended, is not entered upon, or the referendum authorized therein with respect to positions covered by the Teachers' and State Employees' Retirement System of North Carolina is not held, or the conditions specified in section 218 (d)(3) of this Social Security Act with respect to such referendum if held are not met, this act shall be null and void. (1955, c. 1155, s. 7.)

Editor's Note. — The words "this act" in this section refer to Session Laws 1955, c. 1155, which amended the following: G.S. 135-1, 135-3, 135-5, 135-8 and 135-11.

§ 135-18.4. Reservation of power to change.

The General Assembly reserves the right at any time and from time to time, and if deemed necessary or appropriate by said General Assembly in order to coordinate with any changes, in the benefit and other provisions of the Social Security Act made after January 1, 1955, to modify or amend in whole or in part any or all of the provisions of the Teachers' and State Employees' Retirement System of North Carolina. (1955, c. 1155, s. 8.)

CASE NOTES

Cited in Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

§ 135-18.5. Provision for emergency expenses of integration of System.

For the purpose of meeting the expenses involved in administering the provisions of this Article to June 30, 1959, and in holding the referendum described herein with respect to positions covered under the Teachers' and State Employees' Retirement System of North Carolina as established by Article 1 of Chapter 135 of the General Statutes, Volume 17, as amended, any funds not otherwise provided for such purpose by action of the General Assembly during the session of 1955 or 1957 may be borrowed from the pension accumulation fund of such System; provided, however, that the amount so borrowed and the expenditure thereof shall be subject to the approval of the Board of Trustees of such System and the assistant director of the budget, and that such amounts so borrowed shall be repaid as soon as practicable. (1955, c. 1155, s. 9; 1957, c. 855, s. 9.)

§ 135-18.6. Termination or partial termination; discontinuance of contributions.

In the event of the termination or partial termination of the Retirement System or in the event of complete discontinuance of contributions under the Retirement System, the rights of all affected members to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the members' accounts, shall be nonforfeitable and fully vested. (1987, c. 177, s. 1(a), (b).)

Editor's Note. — Session Laws 1987, c. 177, s. 1(c), made this section effective upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling from the Internal Revenue Service, United States Department of Treasury, that the Retirement Systems were qualified trusts under Section 401(a) of the Internal Revenue Code of 1954 as amended. A favorable letter was received prior to the enactment of c. 177.

§ 135-18.7. Internal Revenue Code compliance.

(a) Notwithstanding any other provisions of law to the contrary, compensation for any calendar year after 1988 in which employee or employer contributions are made and for which annual compensation is used for computing any benefit under this Article shall not exceed the higher of two hundred thousand dollars ($200,000) or the amount determined by the Commissioner of Internal Revenue as the limitation for calendar years after 1989; provided the imposition of the limitation shall not reduce a member's benefit below the amount determined as of December 31, 1988.

Effective January 1, 1996, the annual compensation of a member taken into account for determining all benefits provided under this Article shall not exceed one hundred fifty thousand dollars ($150,000), as adjusted pursuant to section 401(a)(17)(B) of the Internal Revenue Code and any regulations issued under the Code. However, with respect to a person who became a member of the Retirement System prior to January 1, 1996, the imposition of this limitation on compensation shall not reduce the amount of compensation which may be taken into account for determining the benefits of that member under this Article below the amount of compensation which would have been recognized under the provisions of this Article in effect on July 1, 1993.

Effective January 1, 2002, the annual compensation of a person, who became a member of the Retirement System on or after January 1, 1996, taken into account for determining all benefits accruing under this Article for any plan year after December 31, 2001, shall not exceed two hundred thousand dollars ($200,000) or the amount otherwise set by the Internal Revenue Code or determined by the Commissioner of Internal Revenue as the limitation for calendar years after 2002.

(b) Notwithstanding any other provisions of law to the contrary, the annual benefit payable on behalf of a member shall, if necessary, be reduced to the extent required by Section 415(b) and with respect to calendar years commencing prior to January 1, 2000, Section 415(e) of the Internal Revenue Code, as adjusted by the Secretary of the Treasury or his delegate pursuant to Section 415(d) of the Code. If a member is a participant under any qualified defined contributions plan that is required to be taken into account for the purposes of the limitation contained in Section 415 of the Internal Revenue Code, the annual benefit payable under this Article shall be reduced to the extent required by Section 415(e) prior to making any reduction under the defined contribution plan provided by the employer. However, with respect to a member who has benefits accrued under this Article but whose benefit had not commenced as of December 31, 1999, the combined plan limitation contained in Section 415(e) of the Internal Revenue Code shall not be applied to such member for calendar years commencing on or after January 1, 2000.

(c) On and after January 1, 1989, the retirement allowance of a member who has terminated employment shall begin no later than the later of April 1 of the calendar year following the calendar year that the member attains 70 ½ years of age or April 1 of the calendar year following the calendar year in which the member terminates employment.

(d) This subsection applies to distributions made on or after January 1, 1993. Notwithstanding any other provision of the Plan to the contrary that would otherwise limit a distributee's election under this Article, a distributee may elect, at the time and in the manner prescribed by the Plan administrator, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover. Provided, an eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more; any distribution to the extent such distribution is required under section 401(a)(9) of the Code; and the portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net realized appreciation with respect to employer securities). Effective as of January 1, 2002, and notwithstanding the preceding sentence, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Section 408(a) or (b) of the Code, or to a qualified defined contribution plan described in Section 401(a) or 403(a) of the Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible. Provided, an eligible retirement plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, an annuity plan described in section 403(a) of the Code, or a qualified trust described in section 401(a) of the Code, that accepts the distributee's eligible rollover distribution. Effective on and after January 1, 2002, an eligible retirement plan shall also mean an annuity contract described in Section 403(b) of the Code and an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. The definition of eligible retirement plan shall also apply in the case of a distribution to surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code, or a court-ordered equitable distribution of marital property, as provided under G.S. 50-30. Provided, a distributee includes an employee or former employee. Provided further, a direct rollover is a payment by the Plan to the eligible retirement plan specified by the distributee. (1989, c. 276, s. 3; 1993, c. 531, s. 6; 1995, c. 361, s. 1; 2002-71, s. 6.)

§ 135-18.8. Deduction for payments to certain employees' or retirees' associations allowed.

Any beneficiary who is a member of a domiciled employees' or retirees' association that has at least 2,000 members, the majority of whom are active or retired employees of the State or public school employees, may authorize, in writing, the periodic deduction from the beneficiary's retirement benefits a designated lump sum to be paid to the employees' or retirees' association. The authorization shall remain in effect until revoked by the beneficiary. A plan of deductions pursuant to this section shall become void if the employees' or retirees' association engages in collective bargaining with the State, any political subdivision of the State, or any local school administrative unit. (1998-212, s. 9.24(a); 1999-237, s. 23; 2002-126, s. 6.4(c).)

§ 135-18.9. Transfer of members from the Legislative Retirement System or the Consolidated Judicial Retirement System.

(a) The accumulated contributions, creditable service, and reserves, if any, of a member of the Legislative Retirement System, as provided for in Article 1A of G.S. 120, or the Consolidated Judicial Retirement System, as provided for in Article 4 of G.S. 135, who later becomes a member of the Teachers' and State Employees' Retirement System for a period of five or more years may, upon application of the member, be transferred from the Legislative Retirement System or the Consolidated Judicial Retirement System. The accumulated contributions, creditable service, and reserves of any member whose service as a member of the Legislative Retirement System or the Consolidated Judicial Retirement System is terminated other than by retirement or death and who later becomes a member of the Teachers' and State Employees' Retirement System may, upon application of the member, be transferred from the Legislative Retirement System or the Consolidated Judicial Retirement System to the Teachers' and State Employees' Retirement System. In order to effect the transfer of a member's creditable service from the Legislative Retirement System or the Consolidated Judicial Retirement System to the Teachers' and State Employees' Retirement System, the accumulated contributions of each member credited in the annuity savings fund in the Legislative Retirement System or the Consolidated Judicial Retirement System shall be transferred and credited to the annuity savings fund in the Teachers' and State Employees' Retirement System.

(b) The Board of Trustees shall effect such rules as it may deem necessary to administer subsection (a) of this section and to prevent any duplication of service credits or benefits that might otherwise occur. (2003-284, s. 30.18(c).)

§ 135-18.10. Forfeiture of retirement benefits for certain felonies.

(a) Except as provided in G.S. 135-4(gg), the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony under the federal laws listed in subsection (b) of this section or the laws of this State listed in subsection (c) of this section if all of the following apply:

(1) The federal or State offense is committed while serving as an elected government official.

(2) The conduct on which the federal or State offense is based is directly related to the member's service as an elected government official.

(b) The federal offenses covered by this section are as follows:

(1) A felony violation of 18 U.S.C. § 201 (Bribery of public officials and witnesses), 18 U.S.C. § 286 (Conspiracy to defraud the Government with respect to claims), 18 U.S.C. § 287 (False, fictitious or fraudulent claims), 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States), 18 U.S.C. § 597 (Expenditures to influence voting), 18 U.S.C. § 599 (Promise of appointment by candidate), 18 U.S.C. § 606 (Intimidation to secure political contributions), 18 U.S.C. § 641 (Public money, property, or records), 18 U.S.C. § 666 (Embezzlement and theft), 18 U.S.C. § 1001 (Statements or entries generally), 18 U.S.C. § 1341 (Frauds and swindles), 18 U.S.C. § 1343 (Fraud by wire, radio, or television), 18 U.S.C. § 1503 (Influencing or injuring officer or juror generally), 18 U.S.C. § 1951 (Interference with commerce by threats or violence), 18 U.S.C. § 1952 (Interstate and foreign travel or transportation in aid of racketeering enterprises), 18

U.S.C. § 1956 (Laundering of monetary instruments), 18 U.S.C. § 1962 (Prohibited activities), or section 7201 of the Internal Revenue Code (Attempt to evade or defeat tax).

(2) Reserved for future codification purposes.

(c) The offenses under the laws of this State covered by this section are as follows:

(1) A felony violation of Article 29, 30, or 30A of Chapter 14 of the General Statutes (Relating to bribery, obstructing justice, and secret listening) or G.S. 14-228 (Buying and selling offices), or Part 1 of Article 14 of Chapter 120 of the General Statutes (Code of Legislative Ethics), Article 20 or 22 of Chapter 163 of the General Statutes (Relating to absentee ballots, corrupt practices and other offenses against the elective franchise, and regulating of contributions and expenditures in political campaigns).

(2) Perjury or false information as follows:

a. Perjury committed under G.S. 14-209 in falsely denying the commission of an act that constitutes an offense within the purview of an offense listed in subdivision (1) of subsection (c) of this section.

b. Subornation of perjury committed under G.S. 14-210 in connection with the false denial of another as specified by subdivision (2) of this subsection.

c. Perjury under Article 22A of Chapter 163 of the General Statutes.

(d) All monies forfeited under this section shall be remitted to the Civil Penalty and Forfeiture Fund. (2007-179, s. 3(a).)

Editor's Note. — Session Laws 2007-179, s. 5, made this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2007-179, s. 3(a), enacted this section with a subdivision (b)(1), but no subdivision (b)(2). Subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

Article 2.

Coverage of Governmental Employees under Title II of the Social Security Act.

§ 135-19. Declaration of policy.

In order to extend to employees of the State and its political subdivisions and of the instrumentalities of either, and to the dependents and survivors of such employees, the basic protection accorded to others by the Old Age and Survivors Insurance System embodied in the Social Security Act, it is hereby declared to be the policy of the legislature, subject to the limitation of this Article, that such steps be taken as to provide such protection to employees of the State and local governments on as broad a basis as is permitted under applicable federal law.

It is also the policy of the legislature that the protection afforded employees in positions covered by a retirement system on the date an agreement under this Article is made applicable to service performed in such positions, or receiving periodic benefits under such retirement system at such time, will not be impaired as a result of making the agreement so applicable or as a result of legislative enactment in anticipation thereof. (1951, c. 562, s. 3; 1955, c. 1154, s. 1.)

Cross References. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see G.S. 143-34.1.

§ 135-20. Definitions.

For the purposes of this Article:

(1) The term "employee" includes an officer of the State, or one of its political subdivisions or instrumentalities.

(2) The term "employment" means any service performed by an employee in the employ of the State, or any political subdivision thereof, for such employer, except

a. Service which in the absence of an agreement entered into under this Article would constitute "employment" as defined in the Social Security Act; or

b. Service which under the Social Security Act may not be included in an agreement between the State and the Secretary of Health, Education and Welfare entered into under this Article.

Service which under the Social Security Act may be included in an agreement only upon certification by the Governor in accordance with section 218(d)(3) of that act shall be included in the term "employment" if and when the Governor issues, with respect to such service, a certificate to the Secretary of Health, Education and Welfare pursuant to G.S. 135-29.

(3) The term "Federal Insurance Contributions Act" means Subchapter A of Chapter 9 of the Federal Internal Revenue Code of 1939 and Subchapters A and B of Chapter 21 of the Federal Internal Revenue Code of 1954, as such Codes have been and may from time to time be amended; and the term "employee tax" means the tax imposed by section 1400 of such Code of 1939 and section 3101 of such Code of 1954.

(4) The term "political subdivision" includes an instrumentality of a state, of one or more of its political subdivisions, or of a state and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision.

(5) The term "Secretary of Health, Education and Welfare" includes any individual to whom the Secretary of Health, Education and Welfare has delegated any of his functions under the Social Security Act with respect to coverage under such act of employees of states and their political subdivisions, and with respect to any action taken prior to April 11, 1953, includes the Federal Security Administrator and any individual to whom such Administrator has delegated any such function.

(6) The term "Social Security Act" means the act of Congress approved August 14, 1935, Chapter 531, 49 Stat. 620, officially cited as the "Social Security Act," (including regulations and requirements issued pursuant thereto), as such act has been and may from time to time be amended.

(7) The term "State agency" means the director of the Teachers' and State Employees' Retirement System.

(8) The term "wages" means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were paid for "employ-

ment" within the meaning of the Federal Insurance Contributions Act, would not constitute "wages" within the meaning of that act. (1951, c. 562, s. 3; 1955, c. 1154, ss. 2-4, 12; 1959, c. 1020; 1965, c. 780, s. 1; 1973, c. 108, s. 84.)

Local Modification. — Village of Pinehurst: 1977, c. 245.

State Government Reorganization. — The Public Employees' Social Security Agency was transferred to the Department of State Treasurer by G.S. 143A-36, enacted by Session Laws 1971, c. 864.

OPINIONS OF ATTORNEY GENERAL

The Piedmont Triad Council of Governments is a separate political entity and its employees are eligible for social security coverage through the State agency and are eligible for participation in the Local Governmental Employees' Retirement System. Opinion of Attorney General to Mr. J.E. Miller, Director, Local Governmental Employees' Retirement System, 40 N.C.A.G. 620 (1969).

§ 135-21. Federal-State agreement; interstate instrumentalities.

(a) The State agency, with the approval of the Governor, is hereby authorized to enter on behalf of the State into an agreement with the Secretary of Health, Education and Welfare, consistent with the terms and provisions of this Article, for the purpose of extending the benefits of the Federal Old Age and Survivors Insurance System to employees of the State or any political subdivision thereof with respect to services specified in such agreement which constitute "employment" as defined in G.S. 135-20. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the State agency and Secretary of Health, Education and Welfare shall agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that —

(1) Benefits will be provided for employees whose services are covered by the agreement (and their dependents and survivors) on the same basis as though such services constituted employment within the meaning of Title II of the Social Security Act.

(2) The State will pay to the Secretary of the Treasury, at such time or times as may be prescribed under the Social Security Act, contributions with respect to wages (as defined in G.S. 135-20), equal to the sum of the taxes which would be imposed by the Federal Insurance Contributions Act if the services covered by the agreement constituted employment within the meaning of that act.

(3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein but shall in no event cover any such services performed prior to January 1, 1951.

(4) All services which constitute employment as defined in G.S. 135-20 and are performed in the employ of the State by employees of the State, shall be covered by the agreement.

(5) All services which constitute employment as defined in G.S. 135-20, are performed in the employ of a political subdivision of the State, and are covered by a plan which is in conformity with the terms of the agreement and has been approved by the State agency under G.S. 135-23, shall be covered by the agreement.

(6) As modified, the agreement shall include all services described in either subdivision (4) or subdivision (5) of this subsection and performed by individuals to whom section 218(c)(3)(C) of the Social Security Act is applicable and shall provide that the service of any such individual shall continue to be covered by the agreement in case he thereafter becomes eligible to be a member of a retirement system; and

(7) As modified, the agreement shall include all services described in either subdivision (4) or subdivision (5) of this subsection and performed by individuals in positions covered by a retirement system with respect to which the Governor has issued a certificate to the Secretary of Health, Education and Welfare pursuant to G.S. 135-29.

(b) Any instrumentality jointly created by this State and any other state or states is hereby authorized, upon the granting of like authority by such other state or states,

(1) To enter into an agreement with the Secretary of Health, Education and Welfare whereby the benefits of the Federal Old Age and Survivors Insurance System shall be extended to employees of such instrumentality,

(2) To require its employees to pay (and for that purpose to deduct from their wages) contributions equal to the amounts which they would be required to pay under G.S. 135-22(a) if they were covered by an agreement made pursuant to subsection (a) of this section, and

(3) To make payments to the Secretary of the Treasury in accordance with such agreement, including payments from its own funds, and otherwise to comply with such agreements.

Such agreement shall, to the extent practicable, be consistent with the terms and provisions of subsection (a) and other provisions of this Article.

(c) Pursuant to section 218(d)(6) of the Social Security Act, the Teachers' and State Employees' Retirement System of North Carolina as established by Article 1 of Chapter 135 of the General Statutes, Volume 17, as amended and as the same may be hereafter amended, shall for the purposes of this Article, be deemed to constitute a single retirement system; and, the North Carolina Local Governmental Employees' Retirement System as established by Article 3 of Chapter 128 of the General Statutes, Volume 16, as amended and as the same may be hereafter amended, shall be deemed to constitute a single retirement system with respect to each political subdivision having positions covered thereby. (1951, c. 562, s. 3; 1953, c. 52; 1955, c. 1154, ss. 5-7, 12.)

§ 135-22. Contributions by State employees.

(a) Every employee of the State whose services are covered by an agreement entered into under G.S. 135-21 shall be required to pay for the period of such coverage, into the contribution fund established by G.S. 135-24, contributions, with respect to wages (as defined in G.S. 135-20), equal to the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act if such services constituted employment within the meaning of that act. Such liability shall arise in consideration of the employee's retention in the service of the State, or his entry upon such service, after the enactment of this Article.

(b) The contribution imposed by this section shall be collected by deducting the amount of the contribution from wages as and when paid, but failure to make such deduction shall not relieve the employee from liability for such contribution.

(c) If more or less than the correct amount of the contribution imposed by this section is paid or deducted with respect to any remuneration, proper adjustments, or refund if adjustment is impracticable, shall be made, without interest, in such manner and at such times as the State agency shall prescribe. (1951, c. 562, s. 3; 1955, c. 1154, s. 8.)

§ 135-23. Plans for coverage of employees of political subdivisions.

(a) Each political subdivision of the State is hereby authorized to submit for approval by the State agency a plan for extending the benefits of Title II of the Social Security Act, in conformity with applicable provisions of such act, to employees of such political subdivisions. Each such plan and any amendment thereof shall be approved by the State agency if it finds that such plan or such plan as amended, is in conformity with such requirements as are provided in regulations of the State agency, except that no such plan shall be approved unless —

(1) It is in conformity with the requirements of the Social Security Act and with the agreement entered into under G.S. 135-21.

(2) It provides that all services which constitute employment as defined in G.S. 135-20 and are performed in the employ of the political subdivision by employees thereof, shall be covered by the plan, except that it may exclude services performed by individuals to whom section 218(c)(3)(C) of the Social Security Act is applicable.

(3) It specifies the source or sources from which the funds necessary to make the payments required by subdivision (1) of subsection (c) and by subsection (d) are expected to be derived and contains reasonable assurance that such sources will be adequate for such purpose.

(4) It provides for such methods of administration of the plan by the political subdivision as are found by the State agency to be necessary for the proper and efficient administration of the plan.

(5) It provides that the political subdivision will make such reports, in such form and containing such information, as the State agency may from time to time require, and comply with such provisions as the State agency or the Secretary of Health, Education and Welfare may from time to time find necessary to assure the correctness and verification of such reports.

(6) It authorizes the State agency to terminate the plan in its entirety, in the discretion of the State agency, if it finds that there has been a failure to comply substantially with any provision contained in such plan, such termination to take effect at the expiration of such notice and on such conditions as may be provided by regulations of the State agency and may be consistent with the provisions of the Social Security Act.

(b) The State agency shall not finally refuse to approve a plan submitted by a political subdivision under subsection (a), and shall not terminate an approved plan, without reasonable notice and opportunity for hearing to the political subdivision affected thereby.

(c)(1) Each political subdivision as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages (as defined in G.S. 135-20), at such time or times as the State agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the State agency under G.S. 135-21.

(2) Each political subdivision required to make payments under subdivision (1) of this subsection is authorized, in consideration of the employee's retention in, or entry upon, employment after enactment of this Article, to impose upon each of its employees, as to services

which are covered by an approved plan, a contribution with respect to his wages (as defined in G.S. 135-20), not exceeding the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act if such services constituted employment within the meaning of that act, and to deduct the amount of such contribution from his wages as and when paid. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of such political subdivision or instrumentality under subdivision (1) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor.

(d) Delinquent payments due under subdivision (1) of subsection (c), may, with interest at the rate of six per centum (6%) per annum, be recovered by action in the Superior Court of Wake County against the political subdivision liable therefor or may, at the request of the State agency, be deducted from any other moneys payable to such subdivision by any department or agency of the State. (1951, c. 562, s. 3; 1955, c. 1154, ss. 9, 10, 12.)

Local Modification. — Rowan (as to subdivision (c)(2)): 1957, c. 408; city of Raleigh (as to subsection (c)(2)): 1957, c. 4.

§ 135-24. Contribution fund.

(a) There is hereby established a special fund to be known as the contribution fund. Such fund shall consist of and there shall be deposited in such fund:

(1) All contributions, interest, and penalties collected under G.S. 135-22 and 135-23;

(2) All moneys appropriated thereto under this Article;

(3) Any property or securities and earnings thereof acquired through the use of moneys belonging to the fund;

(4) Interest earned upon any moneys in the fund; and

(5) All sums recovered upon the bond of the custodian or otherwise for losses sustained by the fund and all other moneys received for the fund from any other source.

All moneys in the fund shall be mingled and undivided. Subject to the provisions of this Article, the State agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts whether or not specifically designated, which are necessary to the administration thereof and are consistent with the provisions of this Article.

(b) The contribution fund shall be established and held separate and apart from any other funds or moneys of the State and shall be used and administered exclusively for the purpose of this Article. Withdrawals from such fund shall be made for, and solely for

(1) Payment of amounts required to be paid to the Secretary of the Treasury pursuant to an agreement entered into under G.S. 135-21;

(2) Payment of refunds provided for in G.S. 135-22(c); and

(3) Refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality.

(c) From the contribution fund the custodian of the fund shall pay to the Secretary of the Treasury such amounts and at such time or times as may be directed by the State agency in accordance with any agreement entered into under G.S. 135-21 and the Social Security Act.

(d) The Treasurer of the State shall be ex officio treasurer and custodian of the contribution fund and shall administer such fund in accordance with the provisions of this Article and the directions of the State agency and shall pay all warrants drawn upon it in accordance with the provisions of this section and with such regulations as the State agency may prescribe pursuant thereto.

(e)(1) There are hereby authorized to be appropriated biennially to the contribution fund, in addition to the contributions collected and paid into the contribution fund under G.S. 135-22 and 135-23, to be available for the purposes of G.S. 135-24(b) and (c) until expended, such additional sums as are found to be necessary in order to make the payments to the Secretary of the Treasury which the State is obligated to make pursuant to an agreement entered into under G.S. 135-21.

(2) The State agency shall submit to each regular session of the State legislature, at least 90 days in advance of the beginning of such session, an estimate of the amounts authorized to be appropriated to the contribution fund by subdivision (1) of this subsection for the next appropriation period.

(f) The State agency shall have the authority to promulgate rules and regulations under which the State agency may make a reasonable charge or assessment against any political subdivision whose employees shall be included in any coverage agreement under any plan of coverage of employees as provided by the provisions of this Article. Such charge or assessment shall be determined by the State agency and shall be apportioned among the various political subdivisions of government in a ratable or fair manner, and the funds derived from such charge or assessment shall be used exclusively by the State agency to defray the cost and expense of administering the provisions of this Article. In case of refusal to pay such charge or assessment on the part of any political subdivision as defined in this Article, or in case such charge or assessment remains unpaid for a period of 30 days, the State agency may maintain a suit in the Superior Court of Wake County for the recovery of such charge or assessment. The Superior Court of Wake County is hereby vested with jurisdiction over all such suits or actions. Only such amount shall be assessed against such political subdivision as is necessary to pay its share of the expense of providing supplies, necessary employees and clerks, records and other proper expenses necessary for the administration of this Article by the State agency, including compensation of the State agency for the agency's services. The funds accumulated and derived from such assessments and charges shall be deposited by the State agency in some safe and reliable depository chosen by the State agency, and the State agency shall issue such checks or vouchers as may be necessary to defray the above-mentioned expenses of administration with the right of the representative of any political subdivision to inspect the books and records and inquire into the amounts necessary for such administration. (1951, c. 562, s. 3; 1963, c. 687, s. 6.)

§ 135-25. Rules and regulations.

The State agency shall make and publish such rules and regulations, not inconsistent with the provisions of this Article, as it finds necessary or appropriate to the efficient administration of the functions with which it is charged under this Article. (1951, c. 562, s. 3.)

§ 135-26. Studies and reports.

The State agency shall make studies concerning the problem of old age and survivors insurance protection for employees of the State and local governments and their instrumentalities and concerning the operation of agreements made and plans approved under this Article and shall submit a report to the legislature at the beginning of each regular session, covering the administration and operation of this Article during the preceding biennium, including such recommendations for amendments to this Article as it considers proper. (1951, c. 562, s. 3.)

§ 135-27. Transfers from State to certain association service.

(a) Any member whose service as a teacher or State employee is terminated because of acceptance of a position prior to July 1, 1983, with the North Carolina Education Association, the North Carolina State Employees' Association, North Carolina State Firemen's Association, the North Carolina State Highway Employees Association, North Carolina Teachers' Association and the State Employees' Credit Union, alumni associations of state-supported universities and colleges, local professional associations of teachers and State employees as defined by the Board of Trustees, and North Carolina State School Boards Association may elect to leave his total accumulated contributions in this Retirement System during the period he is in such association employment, by filing with the Board of Trustees at the time of such termination the form provided by it for that purpose.

(b) Any member who files such an election shall remain a member of the Retirement System during the time he is in such association employment and does not withdraw his contributions. Such a member shall be entitled to all the rights and benefits of the Retirement System as though remaining in State service on the basis of the funds accumulated for his credit at the time of such transfer plus any additional accruals on account of future contributions made as hereinafter provided. Such former State employee may restore any such account and pay into the annuity savings fund before July 1, 1960, such amounts as would have been paid after transfer to such service, provided that the association makes contributions to the Retirement System on behalf of such former members in accordance with subsection (c) of this section.

(c) Under such rules as the Board of Trustees shall adopt, the association to which the member has been transferred may agree to contribute to the Retirement System on behalf of such member such current service contributions as would have been made by his employer had he remained in State service with actual compensation equal to the remuneration received from such association; provided the member continues to contribute to the Retirement System. Any period of such association employment on account of which contributions are made by both the association and the member as herein provided shall be credited as membership service under the Retirement System.

(d) The governing board of any association or organization listed in subsection (a), in its discretion, may elect on or before July 1, 1983, by an appropriate resolution of said board, to cause the employees of such association or organization so employed prior to July 1, 1983, to become members of the Teachers' and State Employees' Retirement System. Such Retirement System coverage shall be conditioned on such association's or organization's paying all of the employer's contributions or matching funds from funds of the association or organization and on such board's collecting from its employees the employees' contributions at such rates as may be fixed by law and by the regulations of the Board of Trustees of the Retirement System, all of such funds to be paid to the Retirement System and placed in the appropriate funds. Retroactive coverage of the employees of any such association or organization may also be effected to the extent that such board requests; provided, the association or organization shall pay all of the employer's contributions or matching funds necessary for such purposes; and, provided further, such association or organization shall collect from its employees all employees' contributions necessary for such purpose, computed at such rates and in such amount as the Board of Trustees of the Retirement System shall determine, all of such funds to be paid to the Retirement System, together with such interest as may be due, and placed in the appropriate funds. The provisions of this subsection shall be fully applicable to the North Carolina Symphony Society, Inc. and the North Carolina Art Society, Inc.

(e) Notwithstanding the foregoing, employees of the State Employees' Credit Union who are in service and members of the Retirement System on June 30, 1983, shall, on or before October 1, 1983, make an irrevocable election to do one of the following:

(1) Continue contributing membership service under the same conditions and requirements as are otherwise provided, and have the rights of a member to all benefits and a retirement allowance; or

(2) Receive a return of accumulated contributions with cessation of contributing membership service, under G.S. 135-5(f) and in any event with regular interest regardless of membership service; or

(3) Terminate contributing membership service and be entitled alternatively to the benefits and allowances provided under G.S. 135-3(8) or G.S. 135-5(a).

(f) Notwithstanding the foregoing, employees of the State Employees Association of North Carolina, the employees of the North Carolina Association of Educators, and the employees of the North Carolina School Boards Association who are in service and members of the Retirement System on June 30, 1985, shall, on or before October 1, 1985, make an irrevocable election to exercise one of the three options provided in G.S. 135-27(e). (1953, c. 1050, s. 1; 1959, c. 513, s. 5; 1961, c. 516, s. 5; 1967, c. 720, s. 14; 1969, cc. 540, 847, 1227; 1983, c. 412, ss. 4-6; c. 782; 1985, c. 757, s. 200.)

§ 135-28. Transfer of members to employment covered by the North Carolina Local Governmental Employees' Retirement System.

(a) Any member whose services as a teacher or State employee are terminated for any reason other than retirement or death, who, while his account remains active, becomes employed by an employer participating in the North Carolina Local Governmental Employees' Retirement System or an employer which brings its employees into participation in said System while his account is active, may elect to leave his total accumulated contributions in the Teachers' and State Employees' Retirement System during the period he is in the employment of such employer, or his account remains active in the local system. This subsection shall be effective retroactively as well as prospectively.

(b) Any such member shall retain all the rights, credits and benefits obtaining to him under this Retirement System at the time of such transfer while he is a member of the local system and does not withdraw his contributions hereunder and in addition, he shall be granted membership service credits under this Retirement System on account of the period of his membership in the local system for the purpose of increasing his years of creditable service hereunder in order to meet any service requirements of any retirement benefit under this Retirement System and, if he is a member in service under the local system, he shall be deemed to be a member in service under this Retirement System if so required by such benefit: Provided, however, that in lieu of transfer of funds from one retirement system to another, such member who is eligible for retirement benefits shall file application therefor with each retirement system to the end that each retirement system shall pay appropriate benefits without transfer of funds between the systems.

(c) Any member who became or becomes employed by an employer of the North Carolina Local Governmental Employees' Retirement System as provided in (a) above shall be entitled to waive the provisions of (b) above and to transfer to the local system his credits for membership and prior service in this System provided such member shall request this System to transfer his accumulated contributions, interest and service credits to the local system. If such request is made, in addition to the member's accumulated contributions, interest and service credits, there shall be transferred to the local system the amount of reserve held in this System as a result of previous employer contributions on behalf of the transferring employee. (1953, c. 1050, s. 2; 1961, c. 516, s. 6; 1965, c. 780, s. 1; 1971, c. 117, ss. 16, 18; 1973, c. 241, s. 12.)

§ 135-28.1. Transfer of members to employment covered by the Uniform Judicial Retirement System.

(a) Any member whose service as a teacher or State employee is terminated other than by retirement or death and, who, while still a member of this Retirement System, becomes a judge participating in the Uniform Judicial Retirement System, may elect to retain his membership in this Retirement System by not withdrawing his accumulated contributions hereunder. Any such member shall retain all the rights, credits and benefits obtaining to him under this Retirement System at the time of such termination of service hereunder while he is a member of the other system and does not withdraw his contributions hereunder.

(b) The provisions of the preceding subsection to the contrary notwithstanding, with respect to each judge or former judge of the district court division of the General Court of Justice who was a member of this Retirement System immediately prior to January 1, 1974, and who becomes a member of the Uniform Judicial Retirement System on or after January 1, 1974, upon his commencement of membership in the other system there shall be paid in a lump sum to his account in the annuity savings fund of the other system the amount of his accumulated contributions under this System that are attributable to contributions made by him hereunder while a judge of said district court division. Upon such payment, the member's accumulated contributions hereunder shall be reduced by the amount of such payment and his period of creditable membership service shall be reduced by the period of service during which such repaid contributions were originally made.

Any member for whom the payment of his accumulated contributions as herein provided reduces the balance of his account in the annuity savings fund to zero and cancels his entire period of creditable service shall no longer be a member of this Retirement System.

In the case of any member who retains his membership in this Retirement System after the payment hereinabove provided and who subsequently becomes eligible for retirement benefits under this Retirement System or whose death results in benefit payments to another beneficiary, the average final compensation used in the computation of the amount of any such benefits shall be computed as of the date of commencement of his membership in the other system on the same basis as if his retirement or death had occurred as of such date of commencement. Moreover, for the sole purpose of increasing his creditable service hereunder in order to meet any applicable service requirements for benefits hereunder, any such member shall be granted membership service credits under this Retirement System on account of (i) the period of membership service cancelled under the first paragraph of this subsection and (ii) the period of his membership in the other system so long as he remains a member hereunder and, if he is a member in service under the other system, he shall be deemed to be a member in service under this Retirement System if so required for any benefit hereunder.

(c) Any member who becomes eligible for benefits under both this Retirement System and the Uniform Judicial Retirement System may file application therefor with each retirement system to the end that each retirement system shall pay appropriate benefits without transfer of funds between the systems except as otherwise provided in subsection (b) above.

(d) The Board of Trustees shall effect such rules as it may deem necessary to administer the provisions of the preceding subsections of this section and to prevent any duplication of service credits or benefits that might otherwise occur.

(e) When any judge of a district court division of the General Court of Justice shall have made application for disability retirement prior to January 1, 1974, while a member of this Retirement System to become effective after January 1, 1974, and such judge died before January 1, 1974, and there was filed with the application for disability retirement a statement by a physician that such judge was permanently and totally disabled, such person shall be deemed to have complied with all provisions of this Retirement System as of the date of application for disability retirement and no action of the medical board shall be necessary. He shall be presumed to have chosen Option 2 as to retirement benefits and survivor's benefits shall commence immediately and shall also be paid retroactively to the first day of the calendar month following such judge's death.

(f) Notwithstanding the provisions of subsections (a), (b), (c), (d), and (e) of this section, the accumulated contributions and creditable service of any member whose service as a teacher or employee has been or is terminated other than by retirement or death and who, while still a member of this Retirement System, became or becomes a member, as defined in G.S. 135-53(11), of the Consolidated Judicial Retirement System for a period of five or more years may, upon application of the member, be transferred from this Retirement System to the Consolidated Judicial Retirement System. In order to effect the transfer of a member's creditable service from the Teachers' and State Employees' Retirement System to the Consolidated Judicial Retirement System, there shall be transferred from the Teachers' and State Employees' Retirement System to the Consolidated Judicial Retirement System the sum of (i) the accumulated contributions of the member credited in the annuity savings fund and (ii) the amount of reserve held in the Teachers' and State Employees' Retirement System as a result of previous contributions by the employer on behalf of the transferring member. (1973, c. 640, s. 2; c. 1221; 1999-237, s. 28.24(b).)

Legal Periodicals. — For note, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

§ 135-29. Referenda and certification.

(a) With respect to employees of the State and any other individuals covered by Article 1 of Chapter 135 of the General Statutes, Volume 17, as amended and as may be hereafter amended, the Governor is empowered to authorize a referendum, and with respect to the employees of any political subdivision he shall authorize a referendum upon request of the governing body of such vision covered by Article 3 of Chapter 128 of the General Statutes, Volume 16, as amended and as the same may be hereafter amended, or by some other retirement system established either by the State or by the political subdivision; and in either case the referendum shall be conducted, and the Governor shall designate an agency or individual to supervise its conduct, in accordance with the requirements of section 218(d)(3) of the Social Security Act, on the question of whether service in positions covered by a retirement system established by the State or by a political subdivision thereof should be excluded from or included under an agreement under this Article. The notice of referendum required by section 218(d)(3)(C) of the Social Security Act to be given to employees shall contain or shall be accompanied by a statement, in such form and such detail as the agency or the individual designated to supervise the referendum shall deem necessary and sufficient, to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject, if their services are included under an agreement under this Article.

(b) Upon receiving evidence satisfactory to him that with respect to any such referendum the conditions specified in section 218(d)(3) of the Social Security Act have been met, the Governor or such State official as may be designated by him, shall so certify to the Secretary of Health, Education and Welfare. (1955, c. 1154, s. 11; 1961, c. 516, s. 8.)

§ 135-30. State employees members of Law-Enforcement Officers' Benefit and Retirement Fund.

The federal-state agreement provided in G.S. 135-21 shall be revised and extended to provide that, effective on, or retroactively as of, such date as may be fixed by the Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund, all or some of the members of said fund who are employees of the State of North Carolina or any of its agencies, shall be covered by the Social Security Act, dependent upon a referendum or referendums held pursuant to federal laws and regulations, at the request of said board, with the approval of the Governor: Provided, that such action shall be subject to the conditions and terms set forth in such agreement and subject to all applicable provisions of Article 2 of Chapter 135 of the General Statutes not inconsistent herewith: Provided, however, that the effecting of social security coverage shall not cause to be reduced or lowered the amount of the contributions to be made to the Law-Enforcement Officers' Benefit and Retirement Fund by any State employee who is a member thereof nor the amount to be contributed by the State to said fund with respect to each State employee member; provided, further, from and after the date the above-described employees become subject to the Social Security Act, there shall be deducted from each such employee's salary for each and every payroll period such sum as may be necessary to pay the amount of contributions of taxes required on his account with respect to social security coverage, and the State, or the appropriate State agency, as an employer, shall pay the amount of contributions or taxes with respect to such person, as may be necessary on his account to effect the above-described social security coverage. (1959, c. 618, s. 1.)

§ 135-31. Split referendums.

The provisions of this Article shall be construed as authorization for the State or political subdivisions or instrumentalities of government which have not heretofore secured social security coverage, and which are otherwise authorized to secure such coverage, to hold any type of referendum with respect thereto which federal law now or hereafter may authorize, and not be restricted to the types of referendums authorized by federal law at the time of the original enactment of this Article. (1959, c. 618, s. 1.)

G.S. 135-37 is set out twice. See notes.

ARTICLE 3.

Other Teacher, Employee Benefits; Child Health Benefits.

Part 1. General Provisions.

§§ 135-32 through 135-33.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1398, s. 1.

§ 135-34: Repealed by Session Laws 1987, c. 738, s. 29(*l*).

§ 135-35: Repealed by Session Laws 1981, c. 859, s. 13.17; 1981 (Regular Session, 1982), c. 1398, s. 1.

§ 135-36: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1398, s. 1.

§ 135-37. (Effective until July 1, 2008) Confidentiality.

Any information as herein described in this section which is in the possession of the Executive Administrator and the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan or its Claims Processor under the Teachers' and State Employees' Comprehensive Major Medical Plan shall be confidential and shall be exempt from the provisions of Chapter 132 of the General Statutes or any other provision requiring information and records held by State agencies to be made public or accessible to the public. This section shall apply to all information concerning individuals, including the fact of coverage or noncoverage, whether or not a claim has been filed, medical information, whether or not a claim has been paid, and any other information or materials concerning a plan participant. Provided, however, such information may be released to the State Auditor, or to the Attorney General, or to the persons designated under G.S. 135-39.3 in furtherance of their statutory duties and responsibilities, or to such persons or organizations as may be designated and approved by the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, but any information so released shall remain confidential as stated above and any party obtaining such information shall assume the same level of responsibility for maintaining such confidentiality as that of the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. (1981, c. 355; 1981 (Reg. Sess., 1982), c. 1398, ss. 3, 4; 1983, c. 922, s. 21.10; 1985, c. 732, s. 38; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 1998-1, s. 4(h).)

Section Set Out Twice. — The section above is effective until July 1, 2008. For the section as amended July 1, 2008, see the following section, also numbered G.S. 135-37.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Oper-

G.S. 135-37 is set out twice. See notes.

ations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 135-37. (Effective July 1, 2008) Confidentiality of information and medical records; provider contracts.

(a) Any information as herein described in this section which is in the possession of the Executive Administrator and the Board of Trustees of the State Health Plan for Teachers and State Employees or its Claims Processor under the Plan or the Predecessor Plan shall be confidential and shall be exempt from the provisions of Chapter 132 of the General Statutes or any other provision requiring information and records held by State agencies to be made public or accessible to the public. This section shall apply to all information concerning individuals, including the fact of coverage or noncoverage, whether or not a claim has been filed, medical information, whether or not a claim has been paid, and any other information or materials concerning a plan participant. Provided, however, such information may be released to the State Auditor, or to the Attorney General, or to the persons designated under G.S. 135-39.3 in furtherance of their statutory duties and responsibilities, or to such persons or organizations as may be designated and approved by the Executive Administrator and Board of Trustees of the Plan, but any information so released shall remain confidential as stated above and any party obtaining such information shall assume the same level of responsibility for maintaining such confidentiality as that of the Executive Administrator and Board of Trustees of the State Health Plan for Teachers and State Employees.

(b) Notwithstanding the provisions of this Article, the Executive Administrator and Board of Trustees of the State Health Plan for Teachers and State Employees may contract with providers of institutional and professional medical care and services to establish preferred provider networks. The terms pertaining to reimbursement rates or other terms of consideration of any contract between hospitals, hospital authorities, doctors, or other medical providers, or a pharmacy benefit manager and the Plan, or contracts pertaining to the provision of any medical benefit offered under the Plan, including its optional plans or programs, shall not be a public record under Chapter 132 of the General Statutes for a period of 30 months after the date of the expiration of the contract. Provided, however, nothing in this subsection shall be deemed to prevent or restrict the release of any information made not a public record under this subsection to the State Auditor, the Attorney General, the Director of the State Budget, the Plan's Executive Administrator, and the Committee on Employee Hospital and Medical Benefits solely and exclusively for their use in the furtherance of their duties and responsibilities. The design, adoption, and implementation of the preferred provider contracts, networks, and optional plans or programs as authorized under G.S. 135-40 are not subject to the requirements of Chapter 143 of the General Statutes. The Executive Administrator and Board of Trustees shall make reports as requested to the President of the Senate, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Committee on Employee Hospital and Medical Benefits on its progress in negotiating the preferred provider contracts. (1981, c. 355; 1981 (Reg. Sess., 1982), c. 1398, ss. 3, 4; 1983, c. 922, s.

G.S. 135-37 is set out twice. See notes.

21.10; 1985, c. 732, s. 38; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 1998-1, s. 4(h); 2007-323, s. 28.22A(c).)

Section Set Out Twice. — The section above is effective July 1, 2008. For the section in effect until July 1, 2008, see the preceding section, also numbered G.S. 135-37.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(c), effective July 1, 2008, added "of information and medical records; provider contracts" in the section heading; designated the existing provisions as subsection (a); in subsection (a), substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" twice, substituted "Plan or the Predecessor Plan" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in the first sentence, and deleted "Teachers' and State Employees' Comprehensive Major Medical" preceding "Plan, but any" in the last sentence; and added subsection (b).

§ 135-38. Committee on Employee Hospital and Medical Benefits.

(a) The Committee on Employee Hospital and Medical Benefits shall consist of 12 members as follows:

(1) The President Pro Tempore of the Senate or a designee thereof;
(2) Repealed by Session Laws 1995, c. 229, s. 1.
(2a) The Speaker of the House of Representatives or a designee thereof;
(3) Repealed by Session Laws 1995, c. 229, s. 1.
(3a) Five members of the Senate appointed by the President Pro Tempore of the Senate; and
(4) Repealed by Session Laws 1995, c. 229, s. 1.
(4a) Five members of the House of Representatives appointed by the Speaker.
(5), (6) Repealed by Session Laws 1995, c. 229, s. 1.
(7) through (10) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1038, s. 19.1.
(11) Repealed by Session Laws 1995, c. 229, s. 1.

(b) The President Pro Tempore of the Senate and the Speaker of the House of Representatives, or their designees, shall remain on the Committee for the duration of their terms in those offices. Terms of the other Committee members are for two years and begin on January 15 of each odd-numbered year, except the terms of the initial members, which begin on appointment and expire January 14, 1997. Members may complete a term of service on the Committee even if they do not seek reelection or are not reelected to the General Assembly, but resignation or removal from service in the General Assembly constitutes resignation or removal from service on the Committee. Members shall serve until their successors are appointed.

(c) The Committee shall review programs of hospital, medical and related care provided by Part 3 and Part 5 of this Article and programs of long-term care benefits provided by Part 4 of this Article as recommended by the

Executive Administrator and Board of Trustees of the Plan. The Executive Administrator and the Board of Trustees shall provide the Committee with any information or assistance requested by the Committee in performing its duties under this Article. The Committee shall meet not less than once each quarter to review the actions of the Executive Administrator and Board of Trustees. At each meeting, the Executive Administrator shall report to the Committee on any administrative and medical policies which have been issued as rules and regulations in accordance with G.S. 135-39.8, and on any benefit denials, resulting from the policies, which have been appealed to the Board of Trustees.

(d) The time members spend on Committee business shall be considered official legislative business for purposes of G.S. 120-3. (1981, c. 859, s. 13.18; 1981 (Reg. Sess., 1982), c. 1398, s. 5; 1983, c. 452, ss. 1, 2; 1985, c. 732, s. 45; 1987, c. 61; c. 857, s. 1; 1989 (Reg. Sess., 1990), c. 1038, s. 19.1; 1991, c. 739, s. 21; 1995, c. 229, s. 1; 1997-278, s. 2; 1997-468, s. 1; 1998-1, s. 4(b).)

Editor's Note. — Session Laws 2007-323, s. 28.22(k), provides: "The Committee on Employee Hospital and Medical Benefits, established under G.S. 135-38, shall convene one or more meetings to review current law as it applies to the Teachers' and State Employees' Comprehensive Major Medical Plan (Indemnity Plan) and to the State Health Plan for Teachers and State Employees (PPO and optional programs). The purpose of the review is to determine changes that need to be made to Article 3 of Chapter 135 of the General Statutes in order to smoothly and effectively transition health care coverage from the Indemnity Plan to the PPO and all optional plans or programs offered under the PPO. Not later than May 1, 2008, the Committee shall report its recommendations to the 2007 General Assembly, Regular Session 2008, and shall at that time provide copies of the report and recommendations to the cochairs of the House of Representatives Committee on Appropriations and the cochairs of the Senate Committee on Appropriations."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 135-38.1. Committee on Actuarial Valuation of Retired Employees' Health Benefits.

(a) There is established the Committee on Actuarial Valuation of Retired Employees' Health Benefits. The Committee shall be responsible for collecting data and reviewing assumptions for the sole purpose of conducting required actuarial valuations of State supported retired employees' health benefits under other post-employment benefit accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation.

(b) The Committee on Actuarial Valuation of Retired Employees' Health Benefits shall consist of five members serving ex officio, as follows:

(1) The State Budget Officer, who shall serve as the Chair;
(2) The State Auditor;
(3) The State Controller;
(4) The State Treasurer; and
(5) The Executive Administrator for the Teachers' and the State Employees' Comprehensive Major Medical Plan.

(c) A majority of the members of the Committee then serving shall constitute a quorum.

(d) Each member shall be entitled to one vote on the Committee. Three affirmative votes shall be necessary for a decision by the members at any meeting of the Committee.

(e) The Committee shall keep in convenient form such data as is necessary for actuarial valuation of retired employees' health benefits under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Department of State Treasurer, Retirement Systems Division, the Teachers' and State Employees' Comprehensive Major Medical Plan, and any other State agency, department, or university institution, local public school agency, or local community college institution shall provide any necessary data upon request of the Committee for the purpose of conducting its responsibilities.

(f) The Committee shall designate either the actuary under contract with the Department of State Treasurer, Retirement Systems Division, or the actuary under contract with the Teachers' and State Employees' Comprehensive Major Medical Plan as the technical adviser to the Committee on matters regarding the actuarial valuation of retired employees' health benefits created by the provisions of this Chapter. The technical advisor shall perform such actuarial valuation and other duties as are required under this Chapter.

(g) The Committee shall secure an annual calendar-year actuarial valuation of retired employees' health benefits under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation.

(h) The Committee shall keep a record of all of its proceedings which shall be open to public inspection. (2007-467, s. 1.)

Editor's Note. — Session Laws 2007-467, s. 2, made this section effective August 29, 2007.

Part 2. Administrative Structure.

§ 135-39. Board of Trustees established.

(a) **(Effective until July 1, 2008)** There is hereby established the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan.

(a) **(Effective July 1, 2008)** There is hereby established the Board of Trustees of the State Health Plan for Teachers and State Employees.

(a1) **(Effective until July 1, 2008)** The Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall consist of nine members.

(a1) **(Effective July 1, 2008)** The Board of Trustees of the State Health Plan for Teachers and State Employees shall consist of nine members.

(b) Three members shall be appointed by the Governor. Of the initial members, one shall serve a term to expire June 30, 1983, and two shall serve terms to expire June 30, 1984. Subsequent terms shall be for two years. Vacancies shall be filled by the Governor. Of the members appointed by the Governor, one shall be either:

(1) An employee of a State department, agency, or institution;
(2) A teacher employed by a North Carolina public school system;
(3) A retired employee of a State department, agency, or institution; or
(4) A retired teacher from a North Carolina public school system.

(c) Three members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. Of the initial members, two shall serve terms expiring June 30, 1983, and one shall serve a term expiring June 30, 1984. Vacancies shall be filled in accordance with G.S. 120-122.

(d) Three members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. Of the initial members, two shall serve terms expiring June 30, 1983, and one shall serve a term expiring June 30, 1984. Vacancies shall be filled in accordance with G.S. 120-122.

(d1) Repealed by Session Laws 1985, c. 732, s. 60.

(e) The Governor shall have the power to remove any member appointed by him under subsection (b). The General Assembly may remove any member appointed under subsections (c) or (d).

(f) The members of the Board of Trustees shall receive one hundred dollars ($100.00) per day, except employees eligible to enroll in the Plan, whenever the full Board of Trustees holds a public session, and travel allowances under G.S. 138-6 when traveling to and from meetings of the Board of Trustees or hearings under G.S. 135-39.7, but shall not receive any subsistence allowance or per diem under G.S. 138-5, except when holding a meeting or hearing where this section does not provide for payment of one hundred dollars ($100.00) per day.

(g) Repealed by Session Laws 2002-126, s. 28.16(a), effective October 1, 2002, and applicable to appointments and reappointments made on and after that date.

(h) No member of the Board of Trustees may serve more than three consecutive two-year terms.

(i) Meetings of the Board of Trustees may be called by the Executive Administrator, the Chairman, or by any three members. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 1; 1985, c. 732, ss. 2-5, 8, 11, 42, 59, 60; 1985 (Reg. Sess., 1986), c. 1020, s. 1; 1987, c. 857, s. 2; 1995, c. 490, s. 56; 2002-126, s. 28.16(a); 2007-323, s. 28.22A(b).)

Subsections (a) and (a1) Set Out Twice. — The first versions of subsections (a) and (a1) set out above are effective until July 1, 2008. The second versions of subsections (a) and (a1) set out above are effective July 1, 2008.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(b), effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subsections (a) and (a1).

CASE NOTES

Cited in Vass v. Board of Trustees, 89 N.C. App. 333, 366 S.E.2d 1 (1988).

§ 135-39.1. (Effective until July 1, 2008) Auditing of the Plan.

The Board of Trustees and the Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan and the Claims Processor shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 913, s. 24; 1985, c. 732, s. 46; 1985 (Reg. Sess., 1986), c. 1020, p. 20.)

Section Set Out Twice. — The section above is effective until July 1, 2008. For the section as amended July 1, 2008, see the following section, also numbered G.S. 135-39.1.

G.S. 135-39.1 is set out twice. See notes.

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§ 135-39.1. (Effective July 1, 2008) Auditing of the Plan.

The Board of Trustees and the Executive Administrator of the State Health Plan for Teachers and State Employees and the Claims Processor shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 913, s. 24; 1985, c. 732, s. 46; 1985 (Reg. Sess., 1986), c. 1020, p. 20; 2007-323, s. 28.22A(o); 2007-345, s. 12.)

Section Set Out Twice. — The section above is effective July 1, 2008. For the section in effect until July 1, 2008, see the preceding section, also numbered G.S. 135-39.1.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan."

§ 135-39.2. Officers, quorum, meetings.

(a) The Board of Trustees shall elect from its own membership such officers as it sees fit.

(b) Six members of the Board of Trustees in office shall constitute a quorum. Decisions of the Board of Trustees shall be made by a majority vote of the Trustees present, except as otherwise provided in this Part.

(c) Meetings may be called by the Chairman, or at the written request of three members. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1987, c. 857, s. 3.)

§ 135-39.3. Oversight team.

(a) The Committee on Employee Hospital and Medical Benefits may use employees of the Legislative Services Office and may employ contractual services as approved by the Legislative Services Commission to monitor the Executive Administrator and Board of Trustees, the Claims Processor, and the Comprehensive Major Medical Plan. The Director of the Budget may use employees of the Office of State Budget and Management to monitor the Executive Administrator and Board of Trustees, the Claims Processor, and the Comprehensive Major Medical Plan. Such assistance to the Committee on Employee Hospital and Medical Benefits and to the Director of the Budget shall comprise an oversight team.

(b) The oversight team shall, jointly or individually, have access to all records of the Board of Trustees, the Executive Administrator, the Claims Processor, and the Comprehensive Major Medical Plan. They shall, jointly or individually, be entitled to attend all meetings of the Board of Trustees.

(c) The oversight team shall report to the Committee on Employee Hospital and Medical Benefits when requested by the Committee. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 47, 67; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

§ 135-39.3A: Repealed by Session Laws 1987, c. 857, s. 4.

§ 135-39.4: Repealed by Session Laws 1985 (Regular Session, 1986), c. 1020, s. 2.

Editor's Note. — Subsection (d) of this repealed section was recodified as G.S. 135-39.5(16) by Session Laws 1985, c. 732, s. 23.

§ 135-39.4A. Executive Administrator.

(a) The Plan shall have an Executive Administrator and a Deputy Executive Administrator. The Executive Administrator and the Deputy Executive Administrator positions are exempt from the provisions of Chapter 126 of the General Statutes as provided in G.S. 126-5(c1).

(b) The Executive Administrator shall be appointed by the Commissioner of Insurance. The term of employment and salary of the Executive Administrator shall be set by the Commissioner of Insurance upon the advice of an executive committee of the Committee on Employee Hospital and Medical Benefits.

The Executive Administrator may be removed from office by the Commissioner of Insurance, upon the advice of an executive committee of the Committee on Employee Hospital and Medical Benefits, and any vacancy in the office of Executive Administrator may be filled by the Commissioner of Insurance with the term of employment and salary set upon the advice of an executive committee of the Committee on Employee Hospital and Medical Benefits.

(c) to (e) Repealed by Session Laws 1987, c. 857, s. 5.

(f) The Executive Administrator shall appoint the Deputy Executive Administrator and may employ such clerical and professional staff, and such other assistance as may be necessary to assist the Executive Administrator and the Board of Trustees in carrying out their duties and responsibilities under this Article. The Executive Administrator may designate managerial, professional, or policy-making positions as exempt from the State Personnel Act. The Executive Administrator may also negotiate, renegotiate and execute contracts with third parties in the performance of his duties and responsibilities under this Article; provided any contract negotiations, renegotiations and execution with a Claims Processor, with an optional hospital and medical benefit plan or program authorized under G.S. 135-40, with a preferred provider of institutional or professional hospital and medical care, or with a pharmacy benefit manager shall be done only after consultation with the Committee on Employee Hospital and Medical Benefits.

(g) The Executive Administrator shall be responsible for:

(1) Cost management programs;
(2) Education and illness prevention programs;
(3) Training programs for Health Benefit Representatives;
(4) Membership functions;
(5) Long-range planning;
(6) Provider and participant relations; and
(7) Communications.

Managed care practices used by the Executive Administrator in -cost management programs are subject to the requirements of G.S. 58-3-191, 58-3-221, 58-3-223, 58-3-235, 58-3-240, 58-3-245, 58-3-250, 58-3-265, 58-67-88, and 58-50-30.

(h) The Executive Administrator shall make reports and recommendations on the Plan to the President of the Senate, the Speaker of the House of

Representatives and the Committee on Employee Hospital and Medical Benefits. (1985, c. 732, s. 10; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 1987, c. 857, s. 5; 1991, c. 427, s. 2; 2000-141, s. 2; 2001-446, s. 6; 2004-124, s. 31.27(a); 2005-276, ss. 29.33(c), 29.34(a); 2007-323, s. 28.22A(*l*).)

Editor's Note. — Session Laws 2001-446, s. 7, is a severability clause.

Session Laws 2001-446, s. 8, provides: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 29.33(d), provides: "The Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan may, after consultation with the Joint Legislative Commission on Governmental Operations, negotiate an extension of the current claims processing contract. The extension shall not exceed three years beyond June 30, 2007, the expiration date of the current claims processing contract. In negotiating the extension, the Executive Administrator may include as part of the extension amendments to the terms of the current claims processing contract, as well as inclusion of optional plans or programs authorized under G.S. 135-39.5B, as amended by this section. Amendments to the terms of the current claims processing contract may also include changes in reimbursement levels, services, and other terms as deemed appropriate by the Executive Administrator. As used in this subsection, 'current claims processing contract' means the claims processing contract in effect on July 1, 2005, and expiring June 30, 2007. Consultation with the Joint Legislative Commission on Governmental Operations pursuant to this subsection meets the requirements of Article 3 of Chapter 135 of the General Statutes pertaining to consultation with the Committee on Employee Hospital and Medical Benefits."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-521, s. 1, provides: "The Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan shall evaluate the actuarial, administrative, financial, operational, and plan member impact of converting the Plan's benefit plan year to a calendar year basis from a fiscal year basis. Not later than April 1, 2008, the Executive Administrator shall report his findings and recommendations to the Committee on Employee Hospital and Medical Benefits and the Fiscal Research Division. The report shall include the following information:

"(1) An estimate of actuarial impact to the Plan under six-month and 18-month transition plan years respectively, as a means to implement a fiscal year to calendar year transition. Each respective transition plan year scenario estimate shall clearly state the Executive Administrator's assumptions about projected out-of-pocket requirements and limits for plan members for deductibles and co-insurance under each scenario.

"(2) A description of potential benefit option changes that may be possible in the event the General Assembly authorizes the Plan to switch its benefit plan year to a calendar year. Each option should be accompanied with an analysis of the change in benefits to plan members and a refined estimate of actuarial impact to the Plan with clearly stated assumptions and supporting data from which any analysis is offered by the Executive Administrator.

"(3) A description of any other actuarial, administrative, financial, operational, and plan member impacts including, but not limited to, costs increases or reductions in contracts providing claims processing of medical and drug claims, provision of provider networks, or other contractual administration.

"(4) Any specific recommendations or other issues by the Executive Administrator with respect to a possible transition to a calendar year based benefit plan year."

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(*l*), effective July 1, 2007, substituted "program authorized under G.S. 135-40" for "program authorized under G.S. 135-39.5B" in the middle of the last sentence of subsection (f).

§ 135-39.5. Powers and duties of the Executive Administrator and Board of Trustees.

The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall have the following powers and duties:

(1) Supervising and monitoring of the Claims Processor.

(2) Providing for enrollment of employees in the Plan.

(3) Communicating with employees enrolled under the Plan.

(4) Communicating with health care providers providing services under the Plan.

(5) Making payments at appropriate intervals to the Claims Processor for benefit costs and administrative costs.

(6) Conducting administrative reviews under G.S. 135-39.7.

(7) Annually assessing the performance of the Claims Processor.

(8) Preparing and submitting to the Governor and the General Assembly cost estimates for the health benefits plan, including those required by Article 15 of Chapter 120 of the General Statutes.

(9) Recommending to the Governor and the General Assembly changes or additions to the health benefits program and health care cost containment programs, together with statements of financial and actuarial effects as required by Article 15 of Chapter 120 of the General Statutes.

(10) Working with State employee groups to improve health benefit programs.

(11) Repealed by Session Laws 1985, c. 732, s. 9.

(12) Determining basis of payments to health care providers, including payments in accordance with G.S. 58-50-56. The Comprehensive Major Medical Plan and optional plans and programs adopted pursuant to G.S. 135-39.5B shall comply with G.S. 58-3-225.

(13) Requiring bonding of the Claims Processor in the handling of State funds.

(14) Repealed by Session Laws 1985, c. 732, s. 7.

(15) In case of termination of the contract under G.S. 135-39.5A, to select a new Claims Processor, after competitive bidding procedures approved by the Department of Administration.

(16) Notwithstanding the provisions of Part 3 of this Article, to formulate and implement cost-containment measures which are not in direct conflict with that Part.

(17) Implementing pilot programs necessary to evaluate proposed cost containment measures which are not in direct conflict with Part 3 of this Article, and expending funds necessary for the implementation of such programs.

(18) Authorizing coverage for alternative forms of care not otherwise provided by the Plan in individual cases when medically necessary, medically equivalent to services covered by the Plan, and when such alternatives would be less costly than would have been otherwise.

(19) Establishing and operating a hospital and other provider bill audit program and a fraud detection program.

(20) Determining administrative and medical policies that are not in direct conflict with Part 3 of this Article upon the advice of the Claims

Processor and upon the advice of the Plan's consulting actuary when Plan costs are involved.

(21) Supervising the payment of claims and all other disbursements under this Article, including the recovery of any disbursements that are not made in accordance with the provisions of this Article.

(22) Implementing and administering a program of long-term care benefits pursuant to Part 4 of this Article.

(23) Implementing and administering a program of child health insurance benefits pursuant to Part 5 of this Article.

(24) Implementing and administering a case management and disease management program.

(25) Implementing and administering a pharmacy benefit management program through a third-party contract awarded after receiving competitive quotes.

(26) Increasing annually the amount of the annual deductible and annual aggregate maximum deductible. The increase shall be established by determining the ratio of the CPI-Medical Index to such index one year earlier. If the ratio indicates an increase in the CPI-Medical Index, then the amount of the annual deductible and annual aggregate maximum deductible may be increased by not more than the percentage increase in the CPI-Medical Index. As used in this subdivision, the term "CPI-Medical Index" means the U.S. Consumer Price Index for All Urban Consumers for Total Medical Care.

(27) The Executive Administrator may establish pilot programs to measure potential cost savings and improvements in patient care available through local, provider-driven medical management.

(28) It is the intent of the General Assembly that active employees and retired employees covered under the Plan and its successor Plan shall have several opportunities in each fiscal year to attend presentations conducted by Plan management staff providing detailed information about benefits, limitations, premiums, co-payments, and other pertinent Plan matters. To this end, beginning in 2007 and annually thereafter, the Plan's management staff shall conduct multiple presentations each year to Plan members and association groups representing active and retired employees across all geographic regions of the State. Regional meetings shall be held in locations that afford reasonably convenient access to Plan members. The presentations shall be designed not only to present information about the Plan but also to hear and respond to Plan members' questions and concerns. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 2; 1985, c. 732, ss. 7, 9, 23, 24, 50; 1985 (Reg. Sess., 1986), c. 1020, ss. 3, 20; 1987, c. 857, ss. 6, 7; 1987 (Reg. Sess., 1988), c. 1091, s. 5; 1989, c. 752, s. 22(a); 1991, c. 427, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 10.3; 1997-468, s. 2; 1997-519, s. 3.15; 1998-1, s. 4(c); 2000-141, s. 3; 2001-253, ss. 1(a), 1(q); 2001-487, s. 85.5; 2006-249, s. 4(b); 2007-323, s. 28.22(i).)

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-249, s. 4(b), effective July 1, 2006, rewrote the last sentence in subdivision (12).

Session Laws 2007-323, s. 28.22.(i), effective July 1, 2007, added subdivision (28).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 135-39.5A. Termination.

The Executive Administrator and Board of Trustees may terminate the contract with the Claims Processor as provided in the request for proposal. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 51; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

§ 135-39.5B. (Repealed effective July 1, 2008) Optional plans.

(a) The Executive Administrator and Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, provide for optional prepaid hospital and medical benefits plans. Benefits offered under such optional plans shall be comparable to those offered under the Plan. The amounts of State funds contributed for such optional plans shall not be more than the amounts contributed for each person eligible under G.S. 135-40.2 on a noncontributory Employee Only basis, with the person selecting an optional plan paying any excess, if necessary. The amount of State funds contributed to such optional plans shall also not exceed the amount of an optional plan's cost for Employee Only coverage. The Executive Administrator and Board of Trustees are authorized to assess and collect fees from participating optional plans provided by this section for administrative purposes and for risk management purposes. Such fees may be based upon the enrollees' risk factors and the number and types of contracts enrolled by each participating optional plan, and may be collected by the Plan in a manner prescribed by the Executive Administrator and Board of Trustees. In no instance shall benefits be paid under Part 3 of this Article for persons enrolled in an optional prepaid hospital and medical benefit plan authorized under this section on and after the effective date of enrollment in the optional prepaid plan, except in cases of continuous hospital confinement approved by the Executive Administrator.

(b) The Executive Administrator and Board of Trustees may, after consulting with the Committee on Employee Hospital and Medical Benefits, adopt an arrangement for an optional hospital and medical benefits program other than the one specified in subsection (a) of this section. The optional program may include one that is purchased or underwritten by the State and may be a PPO or other type optional program. Optional programs under this section are not subject to benefits and cost-sharing requirements under G.S. 135-40.1(2) and G.S. 135-40.4 through G.S. 135-40.9, except that if a pharmacy benefit is not provided under the optional program, the pharmacy benefit under G.S. 135-40.59(g) [135-40.5(g)] shall apply. The Executive Administrator and Board of Trustees may set premium rates for coverage under an optional program on a partially contributory basis, provided that the amounts of State funds contributed for coverage on a partially contributory basis shall not be more than the Plan's total noncontributory premium for Employee Only coverage, with the person selecting the optional program coverage paying the balance of the partially contributory premium not paid by the Plan. The amount of State funds contributed for purchased optional programs shall not exceed the amount of a purchased optional program's cost for Employee Only coverage. Contracts for an optional program under this subsection are not subject to Article 3 of Chapter 143 of the General Statutes. In no instance shall benefits be paid under Part 3 of this Article for persons enrolled in an optional prepaid hospital and medical benefits program authorized under this subsection on and after the effective date of enrollment in the optional prepaid plan, except in cases of continuous hospital confinement approved by the Executive Administrator.

(c) Chemical dependency and mental health benefits under G.S. 135-40.7B apply to the optional program adopted under subsection (b) of this section.

(d) Optional programs adopted under subsection (b) of this section shall not limit the number of visits for covered services for physical therapy, occupational therapy, and speech therapy. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 37; 1985 (Reg. Sess., 1986), c. 1020, s. 6; 1987, c. 857, s. 8; 1991, c. 427, s. 4; c. 636, s. 15; 2005-276, s. 29.33(a); 2006-249, s. 4(a); 2007-323, ss. 28.22(a1), (h), 28.22A(a).)

Section Repealed Effective July 1, 2008. — This section is repealed effective July 1, 2008, by Session Laws 2007-323, s. 28.22A(a).

Editor's Note. — The reference in subsection (b) to "G.S. 135-40.59(g)" appears to be incorrect. The correct reference should probably be to G.S. 135-40.5(g).

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-249, s. 4(a), effective July 1, 2006, in subsection (b), added "except that if a pharmacy benefit is not provided under the optional program, the pharmacy benefit under G.S. 135-40.59(g) shall apply" at the end of the third sentence, and added the last sentence.

Session Laws 2007-323, ss. 28.22(a1) and 28.22(h), effective July 1, 2007, substituted "G.S. 135-40.1(2) and G.S. 135-40.4" for "G.S. 135-40.5" in the third sentence of subsection (b); and added subsections (c) and (d).

§ 135-39.6. Special funds created.

(a) There are hereby established two special funds, to be known as the Public Employee Health Benefit Fund and the Health Benefit Reserve Fund for the payment of hospital and medical benefits.

All premiums, fees, charges, rebates, refunds or any other receipts including, but not limited to, earnings on investments, occurring or arising in connection with health benefits programs established by this Article, shall be deposited into the Public Employee Health Benefit Fund. Disbursements from the Fund shall include any and all amounts required to pay the benefits and administrative costs of such programs as may be determined by the Executive Administrator and Board of Trustees.

Any unencumbered balance in excess of prepaid premiums or charges in the Public Employee Health Benefit Fund at the end of each fiscal year shall be used first, to provide an actuarially determined Health Benefit Reserve Fund for incurred but unpresented claims, second, to reduce the premiums required in providing the benefits of the health benefits programs, and third to improve the plan, as may be provided by the General Assembly. The balance in the Health Benefits Reserve Fund may be transferred from time to time to the Public Employee Health Benefit Fund to provide for any deficiency occurring therein.

The Public Employee Health Benefit Fund and the Health Benefit Reserve Fund shall be deposited with the State Treasurer and invested as provided in G.S. 147-69.2 and 147-69.3.

(b) Disbursement from the Public Employee Health Benefit Fund may be made by warrant drawn on the State Treasurer by the Executive Administrator, or the Executive Administrator and Board of Trustees may by contract authorize the Claims Processor to draw the warrant.

(c) Separate and apart from the special funds authorized by subsections (a) and (b) of this section, there shall be a Public Employee Long-Term Care Benefit Fund if the long-term care benefits provided by Part 4 of this Article are administered on a self-insured basis.

(d) Separate and apart from the special funds authorized by subsections (a), (b), and (c) of this section, there shall be a Child Health Insurance Fund. All premium receipts or any other receipts, including earnings on investments, occurring or arising in connection with acute medical care benefits provided under the Health Insurance Program for Children shall be deposited into the Child Health Insurance Fund. Disbursements from the Child Health Insurance Fund shall include any and all amounts required to pay the benefits and administrative costs of the Health Insurance Program for Children as may be determined by the Executive Administrator and Board of Trustees. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 43, 63; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 1997-468, s. 3; 1998-1, s. 4(d).)

§ 135-39.6A. Premiums set.

(a) **(Effective until July 1, 2008)** The Executive Administrator and Board of Trustees shall, from time to time, establish premium rates for the Teachers' and State Employees' Comprehensive Major Medical Plan except as they may be established by the General Assembly in the Current Operations Appropriations Act, and establish regulations for payment of the premiums. Premium rates shall be established for coverages where Medicare is the primary payer of health benefits separate and apart from the rates established for coverages where Medicare is not the primary payer of health benefits.

(a) **(Effective July 1, 2008)** The Executive Administrator and Board of Trustees shall, from time to time, establish premium rates for the State Health Plan for Teachers and State Employees except as they may be established by the General Assembly in the Current Operations Appropriations Act, and establish regulations for payment of the premiums. Premium rates shall be established for coverages where Medicare is the primary payer of health benefits separate and apart from the rates established for coverages where Medicare is not the primary payer of health benefits.

(b) The Executive Administrator and Board of Trustees shall establish separate premium rates for the long-term care benefits provided by Part 4 of this Article if the benefits are administered on a self-insured basis.

(c) The Executive Administrator and Board of Trustees shall establish premium rates for benefits provided under Part 5 of this Article. The Department of Health and Human Services shall, from State and federal appropriations and from any other funds made available for the Health Insurance Program for Children established under Part 8 of Article 2 of Chapter 108A of the General Statutes, make payments to the Plan as determined by the Plan for its administration, claims processing, and other services authorized to provide coverage for acute medical care for children eligible for benefits provided under Part 5 of this Article.

(d) In setting premiums for firemen, rescue squad workers, and members of the national guard, and their eligible dependents, the Executive Administrator and Board of Trustees shall establish rates separate from those affecting other members of the Plan. These separate premium rates shall include rate factors for incurred but unreported claim costs, for the effects of adverse selection from voluntary participation in the Plan, and for any other actuarially determined measures needed to protect the financial integrity of the Plan for the benefit of its served employees, retired employees, and their eligible dependents.

(e) The total amount of premiums due the Plan from charter schools as employing units, including amounts withheld from the compensation of Plan members, that is not remitted to the Plan by the fifteenth day of the month following the due date of remittance shall be assessed interest of one and one-half percent (1 ½%) of the amount due the Plan, per month or fraction thereof, beginning with the sixteenth day of the month following the due date of the remittance. The interest authorized by this section shall be assessed until the premium payment plus the accrued interest amount is remitted to the Plan. The remittance of premium payments under this section shall be presumed to have been made if the remittance is postmarked in the United States mail on a date not later than the fifteenth day of the month following the due date of the remittance. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 52; 1991, c. 427, s. 5; 1997-468, s. 4; 1998-1, s. 4(e); 1999-237, s. 28.29(h); 2003-69, s. 2; 2004-124, s. 31.21(c); 2005-276, s. 29.31(e); 2007-323, s. 28.22A(m), (m1), (o); 2007-345, ss. 11, 12.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2008. The second version of subsection (a) set out above is effective July 1, 2008.

Editor's Note. — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-124, s. 31.21(d), as amended by Session Laws 2005-276, s. 29.31(e), provides: "This section becomes effective July 1, 2004, but expires June 30, 2006."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2004-124, s. 31.21(c), effective July 1, 2004, in subsection (d), substituted "active and retired teachers, State employees, and their dependents enrolled in" for "other members" in the first sentence and inserted the second sentence.

Session Laws 2007-323, s. 28.22A(m), effective July 1, 2007, deleted "North Carolina Teachers' and State Employees' Comprehensive Major Medical" preceding "Plan as determined" in the middle of the last sentence of subsection (c).

Session Laws 2007-323, s. 28.22A(m1), as added by Session Laws 2007-345, s. 11, effective July 1, 2007, inserted "Teachers' and State Employees'" near the beginning of subsection (a).

Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" near the beginning of subsection (a).

§ 135-39.7. Administrative review.

(a) If, after exhaustion of internal appeal handling as outlined in the contract with the Claims Processor any person is aggrieved, the Claims Processor shall bring the matter to the attention of the Executive Administrator and Board of Trustees, which shall promptly decide whether the subject matter of the appeal is a determination subject to external review under Part 4 of Article 50 of Chapter 58 of the General Statutes. The Executive Administrator and Board of Trustees shall inform the aggrieved person and the aggrieved person's provider of the decision and shall provide the aggrieved person notice of the aggrieved person's right to appeal that decision as provided in this subsection. If the Executive Administrator and Board of Trustees decide that the subject matter of the appeal is not a determination subject to external review, then the Executive Administrator and Board of Trustees may make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees. The Executive Administrator and Board of Trustees shall provide a written summary of the decisions made pursuant to this section to all employing units, all health benefit representatives, the oversight team provided for in G.S. 135-39.3, all relevant health care providers affected by a decision, and to any other parties requesting a written summary and approved by the Executive Administrator and Board of Trustees to receive a summary immediately following the issuance of a decision. A decision by the Executive Administrator and Board of Trustees that a matter raised on internal appeal is a determination subject to external review as provided in subsection (b) of this section may be contested by the aggrieved person under Chapter 150B of the General Statutes. The person contesting the decision may proceed with external review pending a decision in the contested case under Chapter 150B of the General Statutes.

(b) The Executive Administrator and Board of Trustees shall adopt and implement utilization review and internal grievance procedures that are substantially equivalent to those required under G.S. 58-50-61 and G.S. 58-50-62. External review of determinations shall be conducted in accordance with Part 4 of Article 50 of Chapter 58 of the General Statutes. As used in this section, "determination" is a decision by the Executive Administrator and Board of Trustees, the Plan's designated utilization review organization, or a self-funded health maintenance organization administrated by or under contract with the Plan that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon information provided, does not meet the Plan's requirements for medical necessity, appropriateness, health care setting, or level of care or effectiveness, and the requested service is therefore denied, reduced, or terminated. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 53; 1985 (Reg. Sess., 1986), c. 1020, s. 20; 1991, c. 427, s. 6; 2001-446, s. 5(e).)

Editor's Note. — Session Laws 2001-446, s. 7, is a severability clause.

Session Laws 2001-446, s. 8, provides: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

CASE NOTES

Language in this section that Board of Trustees "may make a binding decision" concerning a dispute between an aggrieved individual and a claims administrator of a medical plan is not an express and unequivocal exemption of the Board from the requirements of the Administrative Procedure Act; instead, the use of the term "binding" in the statute was intended to mean only that the Board's decision would be binding upon the parties absent further review according to law. Vass v. Board of Trustees, 324 N.C. 402, 379 S.E.2d 26 (1989).

Case Commenced Prior to 1986 Governed by Chapter 150A. — A contested case commences when the dispute is presented to the board; therefore, where a contested case was commenced prior to Jan. 1, 1986, the dispute was governed by Chapter 150A and it was error to resolve this dispute according to Chapter 150B. Vass v. Board of Trustees, 108 N.C. App. 251, 423 S.E.2d 796 (1992).

Cited in Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

§ 135-39.8. Rules and regulations.

The Executive Administrator and Board of Trustees may issue rules and regulations to implement Parts 2, 3, 4, and 5 of this Article. The Executive Administrator and Board of Trustees shall provide to all employing units, all health benefit representatives, the oversight team provided for in G.S. 135-39.3, all relevant health care providers affected by a rule or regulation, and to any other persons requesting a written description and approved by the Executive Administrator and Board of Trustees written notice and an opportunity to comment not later than 30 days prior to adopting, amending, or rescinding a rule or regulation, unless immediate adoption of the rule or regulation without notice is necessary in order to fully effectuate the purpose of the rule or regulation. Rules and regulations of the Board of Trustees shall remain in effect until amended or repealed by the Executive Administrator and Board of Trustees. The Executive Administrator and Board of Trustees shall provide a written description of the rules and regulations issued under this section to all employing units, all health benefit representatives, the oversight team provided for in G.S. 135-39.3, all relevant health care providers affected by a rule or regulation, and to any other persons requesting a written description and approved by the Executive Administrator and Board of Trustees on a timely basis. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 54; 1991, c. 427, s. 7; 1997-278, s. 3; 1997-468, s. 5; 1998-1, s. 4(f); 2001-253, s. 1(r).)

Editor's Note. — Session Laws 2001-253, s. 1(s), provides: "The Plan shall develop as soon as practicable a prospective payment system for the payment of hospital outpatient services and the services of ambulatory surgical facilities. In developing this prospective payment system, the Plan shall make use of the expertise of the North Carolina Hospital Association, including any advisory committees of member hospitals that the Association may name, and ambulatory surgical facilities in this State. In addition, the Plan shall develop as soon as practicable a medical fee schedule for the payment of professional health care services. The fee schedule shall be developed with the expertise of the North Carolina Medical Society, the North Carolina Academy of Family Physicians, and any other groups of professional medical service providers that the Society may wish to include. Any prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities and a medical fee schedule for the providers of professional medical services shall not be implemented by the Plan before July 1, 2003."

§ 135-39.9. Reports to the General Assembly.

(a) The Executive Administrator and Board of Trustees shall report to the General Assembly at such times and in such forms as shall be provided by the Committee on Employee Hospital and Medical Benefits.

(b) Repealed by Session Laws 1985, c. 732, s. 55.1.

(c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 7. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 55, 55.1; 1985 (Reg. Sess., 1986), c. 1020, s. 7.)

§ 135-39.10. (Effective until July 1, 2008) Meaning of "Executive Administrator and Board of Trustees".

Whenever in this Article the words "Executive Administrator and Board of Trustees" appear, they mean that the Executive Administrator shall have the power, duty, right, responsibility, privilege or other function mentioned, after consulting with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. (1985, c. 732, s. 57; 1991, c. 427, s. 8.)

Section Set Out Twice. — The section above is effective until July 1, 2008. For the section as amended July 1, 2008, see the following section, also numbered G.S. 135-39.10.

§ 135-39.10. (Effective July 1, 2008) Meaning of "Executive Administrator and Board of Trustees".

Whenever in this Article the words "Executive Administrator and Board of Trustees" appear, they mean that the Executive Administrator shall have the power, duty, right, responsibility, privilege or other function mentioned, after consulting with the Board of Trustees of the State Health Plan for Teachers and State Employees. (1985, c. 732, s. 57; 1991, c. 427, s. 8; 2007-323, s. 28.22A(d).)

Section Set Out Twice. — The section above is effective July 1, 2008. For the section as in effect until July 1, 2008, see the preceding section, also numbered G.S. 135-39.10.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(d), effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" at the end of the section.

§ 135-39.11. Contract disputes.

A dispute involving the performance, terms, or conditions of a contract between the Plan and an entity under contract with the Plan is not a contested case under Article 3 of Chapter 150B of the General Statutes. (2001-192, s. 2.)

Part 3. Comprehensive Major Medical Plan

(Effective until July 1, 2008).

§ 135-40. (Effective until July 1, 2008) Undertaking.

(a) The State of North Carolina undertakes to make available a Comprehensive Major Medical Plan (hereinafter called the "Plan") exclusively for the benefit of its employees, retired employees and certain of their dependents which will pay benefits in accordance with the terms hereof. The Plan shall have all the powers and privileges of a corporation and shall be known as the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan. The Executive Administrator and Board of Trustees shall carry out their duties and responsibilities as fiduciaries for the Plan.

(a1) The State of North Carolina deems it to be in the public interest for North Carolina firemen, rescue squad workers, and members of the national guard, and certain of their dependents, who are not eligible for any other type of comprehensive group health insurance or other comprehensive group health benefits, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months, to be given the opportunity to participate in the benefits provided by the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan. Coverage under the Plan shall be voluntary for eligible firemen, rescue squad workers, and members of the national guard who elect participation in the Plan for themselves and their eligible dependents.

(b) The Plan benefits will be provided under contracts between the State and the Claims Processor selected by the State. Claims Processor refers to the administrator, third party administrator or other party contracting with the State to administer the Plan benefits. Such contracts shall include the substance of G.S. 135-40.1 through G.S. 135-40.13 and the description of Plan in the request for proposal, and shall be administered by the respective Claims Processor of the State which will determine benefits and other questions arising thereunder. The contracts necessarily will conform to applicable State laws. If any of the provisions of G.S. 135-40.1 through G.S. 135-40.13 and the request for proposals must be modified for inclusion in the contract because of State laws, such modification will be made.

(c) Payroll deduction shall be available for coverage under this Part or under G.S. 135-39.5B of amounts not paid by the State.

(d) Notwithstanding any other provisions of the Plan, the Executive Administrator and Board of Trustees are specifically authorized to use all appropriate means to secure tax qualification of the Plan under any applicable provisions of the Internal Revenue Code of 1954 as amended. The Executive Administrator and Board of Trustees shall furthermore comply with all applicable provisions of the Internal Revenue Code as amended, to the extent that this compliance is not prohibited by this Article. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 44, 61; 1985 (Reg. Sess., 1986), c. 1020, ss. 8, 20; 1989, c. 752, s. 22(b); 1999-237, s. 28.29(a).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-161, s. 31.1, provides: "The Committee on Employee Hospital and Medical Benefits may study the following issues pertaining to benefits under the Teachers' and State Employees' Comprehensive Major Medical Plan ('Plan'):

"(1) Whether to repeal or otherwise modify G.S. 135-40.6(7) that limits coverage for examination and supervision of a normal newborn infant to only when the mother of the infant is receiving maternity benefits under the Plan.

"(2) Whether to adopt a federally qualified health reimbursement arrangement as an additional component of the Plan.

"(3) Whether deductibles and co-payment amounts applicable under the Plan should be based on income of the Plan member, with lower-income Plan members paying less than higher-income Plan members."

Session Laws 2007-323, s. 28.22(a), provides: "The Teachers' and State Employees' Comprehensive Major Medical Plan (Plan) shall provide for an annual enrollment period in the Indemnity Plan and optional PPO program for the July 1, 2007, to June 30, 2008, Plan year. Plan member changes to coverage type or selection of benefit coverage under the Indemnity Plan or optional PPO program during an enrollment period shall become effective October 1, 2007. At least 45 days prior to October 1, 2007, the Plan shall provide to all Plan members sufficient information on premiums, cost-sharing, and benefits to enable the Plan member or other eligible participant to make an enrollment election effective October 1, 2007. As used in this subsection, the term "Plan member" includes active employees, retired employees, and other eligible participants with respect to the Indemnity Plan and the optional PPO program."

Session Laws 2007-323, s. 28.22B(a), (b), provides: "(a) The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan may use funds available in an amount not to exceed two hundred thousand dollars ($200,000) for the 2007-2008 fiscal year to establish and implement one or more wellness pilot programs for State employees. The purpose of the pilot programs is to reduce health care costs and improve worker productivity through improved health status of the employee. The pilot programs shall be designed to encourage State employee enrollment in a structured fitness program that includes measurable benchmarks. The Executive Administrator shall select one or more pilot sites that represent different geographic regions of the State, taking into consideration sites that have the highest density of State employees.

"(b) Not later than May 1, 2008, the Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan shall report to the Committee on Employee Hospital and Medical Benefits on State employee participation levels in the wellness pilot programs and health outcomes resulting from the participation. The Executive Administrator shall also recommend in its report whether the pilot programs should be continued and expanded in other areas of the State in the 2008-2009 fiscal year."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

CASE NOTES

Applicability of Administrative Procedure Act to Dispute. — State employee's dispute with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, an administrative agency, seeking to recover costs of surgery should have been brought under the Administrative Procedure Act, G.S. 150B-1 et seq. Vass v. Board of Trustees, 89 N.C. App. 333, 366 S.E.2d 1 (1988), modified and aff'd, 324 N.C. 402, 379 S.E.2d 26 (1989).

Cited in Vass v. Board of Trustees, 108 N.C. App. 251, 423 S.E.2d 796 (1992).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of G.S. 50-13.4(f), 50-13.9 and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

Part 3 of Article 3 of Chapter 135 is set out twice.

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§ 135-40.1. (Effective until July 1, 2008) General definitions.

As used in Parts 2 and 3 of this Article, the following terms have the meaning specified as follows:

(1) Chemical Dependency. — The term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(1a) Covered Services. — Any medically necessary, reasonable, and customary items of service, at least a portion of the expense of which is covered under at least one of the plans covering the person for whom claim is made or service provided. It shall be synonymous with allowable expenses, and with benefit or benefits.

(1b) Clinical Trials. — Patient research studies designed to evaluate new treatments, including prescription drugs. Regardless of the type of trial phases covered by the Plan, all covered trials must involve the treatment of life-threatening medical conditions, must be clearly superior to available noninvestigational treatment alternatives, and must have clinical and preclinical data that shows the trials will be at least as effective as noninvestigational alternatives. Trials must also involve determinations by treating physicians, relevant scientific data, and opinions of experts in relevant fields of medicine. Covered trials must be approved by the National Institutes of Health, a National Institutes of Health cooperative group or center, the U. S. Food and Drug Administration, the U.S. Department of Defense, or the U.S. Department of Veterans Affairs. The Plan may also cover clinical trials sponsored by other entities. Trials must also be approved by applicable qualified institutional review boards. All covered trials must be conducted in and by facilities and personnel that maintain a high level of expertise because of their training, experience, and volume of patients. To be covered by the Plan, patients participating in clinical trials must meet substantially all protocol requirements of the trials and exercise informed consent in the trials. Only medically necessary costs of health care services involved in treatments provided to patients for the purpose of the trials are covered by the Plan to the extent that such costs are not customarily funded by national agencies, commercial manufacturers, distributors, or other such providers. Clinical trial costs not covered by the Plan include, but are not limited to, the costs of services that are not health care services and costs associated with managing research in the trials. The Plan shall not exclude benefits for covered clinical trials if the proposed treatment is the only appropriate protocol for the condition being treated.

(2) Deductible. — Deductible shall mean an amount of covered expenses during a fiscal year which must be incurred after which benefits (subject to the deductible) becomes payable. The deductible for an employee, retired employee and/or his or her dependents shall be four hundred fifty dollars ($450.00) for each fiscal year.

The deductible applies separately to each covered individual in each fiscal year, subject to an aggregate maximum of one thousand three hundred fifty dollars ($1,350) per employee and child(ren) or employee and family coverage contract in any fiscal year.

If two or more family members are injured in the same accident only one deductible is required for charges related to that accident during the benefit period.

(3) Dependent Child. — A natural, legally adopted, or foster child of the employee and/or spouse, unmarried, up to the first of the month following his or her 19th birthday, whether or not the child is living with the employee, as long as the employee is legally responsible for such child's maintenance and support. Dependent child shall also include any child under age 19 who has reached his or her 18th birthday, provided the employee was legally responsible for such child's maintenance and support on his or her 18th birthday.

A foster child is covered (i) if living in a regular parent-child relationship with the expectation that the employee will continue to rear the child into adulthood, (ii) if at the time of enrollment, or at the time a foster child relationship is established, whichever occurs first, the employee applies for coverage for such child and submits evidence of a bona fide foster child relationship, identifying the foster child by name and setting forth all relevant aspects of the relationship, (iii) if the Claims Processor accepts the foster child as a participant through a separate written document identifying the foster child by name and specifically recognizing the foster child relationship, and (iv) if at the time a claim is incurred, the foster child relationship, as identified by the employee, continues to exist. Children placed in a home by a welfare agency which obtains control of, and provides for maintenance of, the child(ren), are not eligible participants.

Coverage may be extended beyond the 19th birthday under the following conditions:

a. If the dependent is a full-time student, between the ages of 19 and 26, who is pursuing a course of study that represents at least the normal workload of a full-time student at a school or college accredited by the state of jurisdiction.

b. The dependent is physically or mentally incapacitated to the extent that he or she is incapable of earning a living and (i) such handicap developed or began to develop before the dependent's 19th birthday, or (ii) such handicap developed or began to develop before the dependent's 26th birthday if the dependent was covered by the Plan in accordance with G.S. 135-40.1(3)a.

Dependent children of firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions as are other dependent children covered by this subdivision.

(4) Doctor. — A doctor of medicine, a doctor of osteopathy licensed to practice medicine or surgery by the Board of Medical Examiners of the state in which he or she practices, a doctor of dentistry, a doctor of podiatry or surgical chiropody, a doctor of optometry, a doctor of chiropractic, or a doctor of psychology who is licensed or certified in the State and has a doctorate practice degree in psychology and at least two years' clinical experience in a recognized health setting or has met the standards of the National Register of Health Services Providers in Psychology, each of whom is licensed to practice by the state in which he or she performs any service covered by this Plan, and who regularly charges and collects fees in his or her own right.

(5) Employee. — Any permanent full-time or permanent part-time regular employee (designated as half-time or more) of an employing unit.

Part 3 of Article 3 of Chapter 135 is set out twice.

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(6) Employing Unit. — A North Carolina School System; Community College; State Department, Agency or Institution; Administrative Office of the Courts; or Association or Examining Board whose employees are eligible for membership in a State-Supported Retirement System. An employing unit also shall mean a charter school in accordance with Part 6A of Chapter 115C of the General Statutes whose board of directors elects to become a participating employer in the Plan under G.S. 135-40.3A. Bona fide fire departments, rescue or emergency medical service squads, and national guard units are deemed to be employing units for the purpose of providing benefits under this Article.

(7) Enrollment. — New employees must enroll themselves and their dependents within 30 days from the date of employment or from first becoming eligible on a noncontributory basis. Coverage may become effective on the first day of the month following date of entry on payroll or on the first day of the following month. New employees not enrolling themselves and their dependents within 30 days, or not adding dependents when first eligible as provided herein may enroll on the first day of any month but will be subject to a 12-month waiting period for preexisting health conditions, except for employees who elect to change their coverage in accordance with rules established by the Executive Administrator and Board of Trustees for optional prepaid hospital and medical benefit plans. Children born to covered employees having coverage type (2), or (3), as outlined in G.S. 135-40.3(d) shall be automatically covered at the time of birth without any waiting period for preexisting health conditions. Children born to covered employees having coverage type (1) shall be automatically covered at birth without any waiting period for preexisting health conditions so long as the Claims Processor receives notification within 30 days of the date of birth that the employee desires to change from coverage (1) to coverage type (2), or (3), provided that the employee pays any additional premium required by the coverage type selected retroactive to the first day of the month in which the child was born.

Newly acquired dependents (spouse/child) enrolled within 30 days of becoming an eligible dependent will not be subject to the 12-month waiting period for preexisting conditions. A dependent can become qualified due to marriage, adoption, entering a foster child relationship, due to the divorce of a dependent child or the death of the spouse of a dependent child, and at the beginning of each legislative session (applies only to enrolled legislators). Effective date for newly acquired dependents if application was made within the 30 days can be the first day of the following month. Effective date for an adopted child can be date of adoption, or date of placement in the adoptive parent's home, or the first of the month following the date of adoption or placement. Firemen, rescue squad workers, and members of the national guard, and their eligible dependents are subject to the same terms and conditions as are new employees and their dependents covered by this subdivision. Enrollments in these circumstances must occur within 30 days of eligibility to enroll.

(7a) Experimental/Investigational Medical Procedures. — The use of a service, supply, drug, or device not recognized as standard medical care for the condition, disease, illness, or injury being treated as determined by the Executive Administrator and Board of Trustees upon the advice of the Claims Processor. Determinations are made after independent review of scientific data. Opinions of experts in a particular field and opinions and assessments of nationally recognized review organizations shall also be considered by the Plan but are not determinative or conclusive. The fact that an experimental/investigational treatment is the only available treatment for a particular condition will not result in coverage if the treatment is experimental/investigational in the treatment of the particular condition, nor is it relevant for purposes of coverage that the member has tried other more conventional therapies without success. The following criteria are the basis for determination that a service or supply is investigational:

a. Services or supplies requiring federal or other governmental body approval, such as drugs and devices that do not have market approval from the Food and Drug Administration (FDA) or final approval from any other governmental regulatory body for use in treatment of the condition being treated, or are not recognized for the treatment of a condition in one of the standard reference compendia or in generally accepted peer-reviewed medical literature;

b. There is insufficient or inconclusive scientific evidence in peer review medical literature to permit the Plan's evaluation of the therapeutic value of the service or supply;

c. There is inconclusive evidence that the service or supply has a beneficial effect on health outcomes;

d. Is provided as part of a research or phase I clinical or phase II clinical trial not approved by the Plan;

e. Are provided pursuant to a written protocol or other document that lists an evaluation of the service's safety, toxicity, or efficacy as among its objectives;

f. Are subject to approval or review of an Institutional Review Board or other body that approves or reviews research; or

g. Are provided pursuant to informed consent documents that describe the service as experimental, investigational, or part of a research study.

(7b) Fiscal Year. — The period beginning July 1 and ending on June 30 of the succeeding calendar year.

(7c) Firemen. — Eligible firemen as defined by G.S. 58-86-25 who belong to a bona fide fire department as defined by G.S. 58-86-25 and who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Firemen shall also include members of the North Carolina Firemen and Rescue Squad Workers' Pension Fund who are in receipt of a monthly pension, who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, CHAMPUS benefits, and other Uniformed Services benefits. North Carolina fire departments or their respective governing bodies shall certify the eligibility of their firemen to the Plan for their participation in its benefits prior to enrollment.

(8) Health Benefits Representative. — The employee designated by the employing unit to administer the Comprehensive Major Medical Plan for the unit and its employees. The HBR is responsible for enrolling new employees, reporting changes, explaining benefits, reconciling group statements and remitting group fees. The State Retirement System is the Health Benefits Representative for retired members.

(9) Home Health Aide. — An individual who provides medical or therapeutic care and who reports to and is under the direct supervision of a Home Health Care Agency.

(10) Home Health Care Agency. — An agency which is constituted, licensed and operated in accordance with the laws pertaining to agencies providing home health care.

(11) Home Health Care Coverage. — Coverage for home care and treatment established and approved in writing by a physician for an individual whom continual hospital confinement would be required without the care and treatment specified by this coverage.

(12) Hospital. — An institution which meets fully all the following criteria:

a. A general medical and surgical hospital, including eye, ear, nose and throat, maternity, pediatric, tuberculosis, or mental hospital, licensed as such by the applicable State agency.

b. It is primarily engaged in providing — for compensation from its patients and on an inpatient basis — diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment and care of injured and sick persons by or under the supervision of the staff of physicians;

c. It continuously provides 24-hour-a-day nursing service by registered graduate nurses; and

d. It is not, other than incidentally, a place for rest, a place for the aged, a place for drug addicts, a place for alcoholics, a nursing home, a hotel, or the like.

Hospitals classified and accredited as psychiatric hospitals by the Joint Commission on Accreditation of Healthcare Organizations will be deemed to be hospitals for the purpose of this Plan.

(13) Medicare. — The Health Insurance for the Aged and Disabled Program under Title XVIII of the Social Security Act as such act was amended by the Social Security Amendments of 1965 (Public Law 89-97), as such program is currently constituted and as it may be later amended.

(13a) Plan. — The Teachers' and State Employees' Comprehensive Major Medical Plan.

(13b) National guard members. — Members of the North Carolina army and air national guard who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Members of the North Carolina army and air national guard include those who are actively serving in the national guard as well as former members of the national guard who have completed 20 or more years of service in the national guard but have not attained the minimum age to begin receipt of a uniformed service military retirement benefit. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) benefits, and other Uniformed Services benefits. North Carolina national guard units shall certify the eligibility of their members to the Plan for their participation in its benefits prior to enrollment.

(14) Predecessor Plan. — The Hospital and Medical Benefits for the Teachers' and State Employees' Retirement System of the State of North Carolina.

(15) Preexisting Condition. — A condition, disease, illness or injury diagnosed and treated within six months prior to the effective date of coverage.

(16) Pregnancy. — Shall include resulting childbirth, miscarriage or abortion.

(16a) Rescue squad workers. — Eligible rescue squad workers as defined by the provisions of G.S. 58-86-30 who belong to a rescue or emergency medical services squad as defined by the same statute and who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Rescue squad workers shall also include members of the North Carolina Firemen and Rescue Squad Workers' Pension Fund who are in receipt of a monthly pension, who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, CHAMPUS benefits, and other Uniformed Services benefits. North Carolina rescue or emergency medical services squads or their respective governing bodies shall certify the eligibility of their rescue squad workers to the Plan for their participation in its benefits prior to enrollment.

(17) Retired Employee (Retiree). — Retired teachers, State employees, and members of the General Assembly who are receiving monthly retirement benefits from any retirement system supported in whole or in part by contributions of the State of North Carolina, so long as the retiree is enrolled. On and after January 1, 1988, a retiring employee or retiree must have completed at least five years of contributory retirement service with an employing unit prior to retirement from any State-supported retirement system in order to be eligible for group benefits under this Part as a retired employee or retiree.

(17a) Skilled Care. — Medically necessary services that can only be rendered under State law or regulation by licensed health professionals such as a medical doctor, physician's assistant, physical therapist, occupational therapist, speech therapist, certified clinical social worker, licensed clinical social worker, certified nurse midwife, licensed practical nurse, or registered nurse.

(18) Skilled Nursing Facility. — An institution licensed under applicable State laws and primarily engaged in providing to inpatients, under the supervision of a doctor and a registered professional nurse, skilled nursing care and related services on a 24-hour basis, and rehabilitative services.

(19) Usual, Customary and Reasonable. — The meaning of the term "UCR" shall be developed from criteria used for determining reasonable charges for services, including usual preoperative examination and customary postoperative care and care of usual complications, and shall be based on the usual charge made by an individual doctor for his or her private patients for a particular service, or the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, whichever is the lower. A fee is reasonable if it meets the above two criteria. In cases of unusual complexity and cases involving supplemental skills of two or more doctors, reasonable charges will be determined by the Claims Processor upon advice of its medical advisors. The Executive Administrator and Board of Trustees may update usual, customary and reasonable charges, or other such comparable allowances, semi-annually for physicians who accept the Plan's UCR or other comparable allowances as payment in full, other than for the Plan's deductibles, coinsurance, or other amounts to be paid by members of the Plan; otherwise, the Executive Administrator and Board of Trustees shall not update usual, customary and reasonable charges, or other such comparable allowances more frequently than on an annual basis. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 4, 21.1, 21.2, 21.7; 1983 (Reg. Sess., 1984), c. 1110, s. 10; 1985, c. 192, ss. 7, 16.1, 16.2; c. 732, ss. 12, 19, 25, 26; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(a), 9, 20, 24, 27; 1987, c. 564, s. 17; c. 857, ss. 9, 10; 1989, c. 752, s. 22(c), (d); 1991, c. 427, ss. 1(a), 9, 18, 36; 1995 (Reg. Sess., 1996), c. 731, s. 3; 1996, 2nd Ex. Sess., c. 18, s. 28.23(a); 1997-456, s. 27; 1997-512, ss. 1, 2, 9, 12, 16, 18; 1998-212, ss. 9.14A(d), 28.29(a), (b); 1999-237, s. 28.29(b)-(e); 2001-253, s. 1(b); 2001-487, s. 40(m); 2004-124, s. 31.21(a); 2005-276, s. 29.31(e); 2007-323, s. 28.22(b).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 731, s. 4, provides: "Nothing in this act shall be construed to obligate the General Assembly to appropriate funds to implement this act. In addition, all charters granted and all contracts entered into under this act are

Part 3 of Article 3 of Chapter 135 is set out twice.

subject to any future appropriations and subsequent legislative changes."

Subdivisions (7.1) and (7.a) of this section were renumbered as subdivisions (7a) and (7b), respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Session Laws 1999-237, s. 28.29(i), provides that section 28.29 of that act, which amended this section, becomes effective July 1, 2000. Until July 1, 2000, there were no subdivisions (7c), (13b) or (16a), which were added by s. 28.29.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Act of 1999.'"

Session Laws 1999-237, s. 30.4, contains a severability clause.

For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-124, s. 31.21(d), as amended by Session Laws 2005-276, s. 29.31(e), provides: "This section becomes effective July 1, 2004, but expires June 30, 2006."

Session Laws 2006-249, s. 5 provides: "The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan ("Plan") may admit up to four additional local government employers to participate in the Plan upon application in accordance with G.S. 135-40.1(6), as enacted in Section 31.26 of Session Laws 2004-424. The Executive Administrator and Board of Trustees shall have discretion in selecting the additional local government employers based on sound criteria developed by the Executive Administrator to evaluate the financial impact on the operations of the Plan. The Executive Administrator shall report the proposed selections and the criteria used in making the selections to the Committee on Employee Hospital and Medical Benefits prior to submitting the selections to the Board of Trustees for its approval. The local government employers selected by the Executive Administrator and the Board of Trustees in accordance with this section shall be in addition to local government employers participating in the Plan on July 1, 2006. In admitting local government employers into the Plan, the Executive Administrator shall ensure compliance with the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C.S. § 1003(b)."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22.(b), effective July 1, 2007, in subdivision (2), substituted "four hundred fifty dollars ($450.00)" for "three hundred fifty dollars ($350.00)" in the first paragraph, and substituted "one thousand three hundred fifty dollars ($1,350)" for "one thousand fifty dollars ($1,050)" in the middle of the second paragraph.

§ 135-40.2. (Effective until July 1, 2008) Eligibility.

(a) The following persons are eligible for coverage under the Plan, on a noncontributory basis, subject to the provisions of G.S. 135-40.3:

(1) All permanent full-time employees of an employing unit who meet the following conditions:

a. Paid from general or special State funds, or

b. Paid from non-State funds and in a group for which his or her employing unit has agreed to provide coverage.

Employees of State agencies, departments, institutions, boards, and commissions not otherwise covered by the Plan who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision.

(1a) Permanent hourly employees as defined in G.S. 126-5(c4) who work at least one-half of the workdays of each pay period.

(2) Retired teachers, State employees, members of the General Assembly, and retired State law enforcement officers who retired under the Law Enforcement Officers' Retirement System prior to January 1, 1985. For employees first hired on and after October 1, 2006, and members of the General Assembly first taking office on and after February 1, 2007, future coverage as retired employees and retired members of the General Assembly is subject to a requirement that the future retiree have 20 or more years of retirement service credit in order to be covered by the provisions of this subdivision.

(2a) Surviving spouses of:

a. Deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and

b. Deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986.

(3) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(b).

(3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.

(4) Members of the General Assembly.

(5) Notwithstanding the provisions of subsection (e) of this section, employees on official leave of absence while completing a full-time program in school administration in an approved program as a Principal Fellow in accordance with Article 5C of Chapter 116 of the General Statutes.

(6) Notwithstanding the provisions of G.S. 135-40.11, employees formerly covered by the provisions of this section, other than retired employees, who have been employed for 12 or more months by an employing unit and whose jobs are eliminated because of a reduction, in total or in part, in the funds used to support the job or its responsibilities, provided the employees were covered by the Plan at the time of separation from service resulting from a job elimination. Employees covered by this subsection shall be covered for a period of up to 12 months following a separation from service because of a job elimination.

(7) Any member enrolled pursuant to subdivision (1) or (1a) of this subsection who is on approved leave of absence with pay or receiving workers' compensation.

(8) Employees on approved Family and Medical Leave.

(a1) Repealed by Session Laws 2000-141, s. 6(b), effective August 2, 2000, and by Session Laws 2000-184, s. 1(b), effective August 1, 2000.

(a2) A school employee in a job-sharing position as defined in G.S. 130-40.3. If these employees elect to participate in the Plan, the employing unit shall pay fifty percent (50%) of the Plan's total noncontributory premiums. Individual employees shall pay the balance of the total noncontributory premiums not paid by the employing unit.

(a3) Subject to the provisions of G.S. 135-40.3, employees and members of the General Assembly with 10 but less than 20 years of retirement service credit shall be eligible for coverage under the Plan on a partially contributory basis, provided the employees were first hired on or after October 1, 2006, and the members first took office on or after February 1, 2007. For such future retirees, the State shall pay fifty percent (50%) of the Plan's total noncontributory premiums. Individual retirees shall pay the balance of the total noncontributory premiums not paid by the State.

(b) The following person shall be eligible for coverage under the Plan, on a fully contributory basis, subject to the provisions of G.S. 135-40.3:

(1) Repealed by Session Laws 1983, c. 761, s. 255.

(2) Former members of the General Assembly who enroll before October 1, 1986.

(2a) For enrollments after September 30, 1986, former members of the General Assembly if covered under the Plan at termination of membership in the General Assembly. To be eligible for coverage as a former member of the General Assembly, application must be made within 30 days of the end of the term of office. Only members of the General Assembly covered by the Plan at the end of the term of office are eligible. If application is not made within the specified time period, the member forfeits eligibility.

(3) Surviving spouses of deceased former members of the General Assembly who enroll before October 1, 1986.

(3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.

(3b) For enrollments after September 30, 1986, surviving spouses of deceased former members of the General Assembly, if covered under the Plan at the time of death of the former member of the General Assembly.

(4) All permanent part-time employees (designated as half-time or more) of an employing unit who meets the conditions outlined in subdivision (a)(1)a above, and who are not covered by the provisions of G.S. 135-40.2(a)(1).

(4a) Repealed by Session Laws 1997-512, s. 22.

(5) The spouses and eligible dependent children of enrolled teachers, State employees, retirees, former members of the General Assembly, former employees covered by the provisions of G.S. 135-40.2(a)(6), Disability Income Plan beneficiaries, enrolled continuation members, and members of the General Assembly. Spouses of surviving dependents are not eligible, nor are dependent children if they were not covered at the time of the member's death. Surviving spouses may cover their dependent children provided the children were enrolled at the time of the member's death or enroll within 30 days of the member's death.

(6) Blind persons licensed by the State to operate vending facilities under contract with the Department of Health and Human Services, Division of Services for the Blind and its successors, who are:

a. Operating such a vending facility;

b. Former operators of such a vending facility whose service as an operator would have made these operators eligible for an early or service retirement allowance under Article 1 of this Chapter had they been members of the Retirement System; and

c. Former operators of such a vending facility who attain five or more years of service as operators and who become eligible for and receive a disability benefit under the Social Security Act upon cessation of service as an operator.

Spouses, dependent children, surviving spouses, and surviving dependent children of such members are not eligible for coverage.

(7) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(j).

(8) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly provided the death of the former Plan member occurred after September 30, 1986, and the surviving spouse was covered under the Plan at the time of death.

(9) Repealed by Session Laws 1987, c. 857, s. 11.1.

(10) Any eligible dependent child of the deceased retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary, provided the child was covered at the time of death of the retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary, (or was in posse at the time and is covered at birth under this Part), or was covered under the Plan on September 30, 1986. An eligible surviving dependent child can remain covered until age 19, or age 26 if a full-time student, or indefinitely if certified as incapacitated under G.S. 135-40.1(3)b.

(11) Repealed by Session Laws 2000-141, s. 6(b), effective August 2, 2000, and by Session Laws 2000-184, s. 1(b), effective August 1, 2000.

(11a) Retired teachers, State employees, and members of the General Assembly with less than 10 years of retirement service credit, provided the teachers and State employees were first hired on or after October 1, 2006, and the members first took office on or after February 1, 2007.

(12) Notwithstanding the provisions of G.S. 135-40.11, former employees covered by the provisions of G.S. 135-40.2(a)(6), and their spouses and eligible dependent children who were covered by the Plan at the time of the former employees' separation from service pursuant to G.S. 135-40.2(a)(6), following expiration of the former employees' coverage provided by G.S. 135-40.2(a)(6). Election of coverage under this subdivision shall be made within 90 days after the termination of coverage provided under G.S. 135-40.2(a)(6).

(13) Firemen, rescue squad workers, and members of the national guard, their eligible spouses, and eligible dependent children.

(c) No person shall be eligible for coverage as a dependent if eligible as an employee or retired employee, except when a spouse is eligible on a fully contributory basis. In addition, no person shall be eligible for coverage as a dependent of more than one employee or retired employee at the same time.

(d) Former employees who are receiving disability retirement benefits or disability income benefits pursuant to Article 6 of Chapter 135 of the General Statutes, provided the former employee has at least five years of retirement membership service, shall be eligible for the benefit provisions of this Plan, as set forth in this Part, on a noncontributory basis. Such coverage shall terminate as of the end of the month in which such former employee is no longer eligible for disability retirement benefits or disability income benefits pursuant to Article 6 of this Chapter.

(e) Employees on official leave of absence without pay may elect to continue this group coverage at group cost provided that they pay the full employee and employer contribution through the employing unit during the leave period.

(f) For the support of the benefits made available to any member vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of employees who are receiving a survivor's alternate benefit under G.S. 135-5(m) of those associations listed in G.S. 135-27(a), licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association, organization or board shall pay to the Plan the full cost of providing these benefits under this section as determined by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. In addition, each association, organization or board shall pay to the Plan an amount equal to the cost of the benefits provided under this section to presently retired members of each association, organization or board since such benefits became available at no cost to the retired member.

(g) An eligible surviving spouse and any eligible surviving dependent child of a deceased retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary shall be eligible for group benefits under this section without waiting periods for preexisting conditions provided coverage is elected within 90 days after the death of the former plan member. Coverage may be elected at a later time, but will be subject to the 12-month waiting period for preexisting conditions and will be effective the first day of the month following receipt of the application.

(h) No person shall be eligible for coverage as an employee or retired employee or as a dependent of an employee or retired employee upon a finding by the Executive Administrator or Board of Trustees or by a court of competent jurisdiction that the employee or dependent knowingly and willfully made or caused to be made a false statement or false representation of a material fact in a claim for reimbursement of medical services under the Plan. The Executive Administrator and Board of Trustees may make an exception to the provisions of this subsection when persons subject to this subsection have had a cessation of coverage for a period of five years and have made a full and complete restitution to the Plan for all fraudulent claim amounts. Nothing in this subsection shall be construed to obligate the Executive Administrator and Board of Trustees to make an exception as allowed for under this subsection.

(i) Any employee receiving benefits pursuant to Article 6 of this Chapter when the employee has less than five years of retirement membership service, or an employee on leave without pay due to illness or injury for up to 12 months, is entitled to continued coverage under the Plan for the employee and any eligible dependents by paying one hundred percent (100%) of the cost. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, s. 29(a)-(*l*); 1987, c. 738, ss. 29(n), 36(a), 36(b); c. 809, ss. 3, 4; c. 857, ss. 11(a), 11.1, 11.2, 12; 1989, c. 752, s. 22(e), (f); 1989 (Reg. Sess., 1990), c. 1074, s. 22(a); 1993, c. 321, s. 85(b); 1995, c. 278, s. 1; c. 507, ss. 7.21(a)-(c), 7.28(a)-(c); 1997-443, s. 11A.118(a); 1997-512, ss. 17, 19-27; 1999-237, s. 28.29(f); 2000-141, ss. 6(a), (b); 2000-184, ss. 1(a),(b), 3; 2001-487, s. 86(a); 2002-174, s. 4; 2003-358, s. 4; 2004-124, s. 31.21(b); 2004-199, s. 34(b); 2005-276, s. 29.31(e); 2006-174, ss. 1, 2, 3.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-

124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — G.S. 126-5(c4), referred to in subdivision (a)(1a) of this section, was repealed by Session Laws 1993, c. 321, s. 145(b).

G.S. 115C-302.2(b), referred to in subsection (a2), was repealed by Session Laws 2003-358, s. 1, effective January 1, 2004. For present similar provisions, see G.S. 115C-326.5.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-124, s. 31.21(d), as amended by Session Laws 2005-276, s. 29.31(e), provides: "This section becomes effective July 1, 2004, but expires June 30, 2006."

Effect of Amendments. — Session Laws 2006-174, ss. 1 through 3, effective July 1, 2006, added the last sentence in subdivision (a)(2); added subsection (a3); and added subdivision (b)(11a).

§ 135-40.3. (Effective until July 1, 2008) Effective dates of coverage.

(a) Employees and Retired Employees. —

(1) Employees and retired employees covered under the Predecessor Plan will continue to be covered, subject to the terms hereof.

(2) New employees may apply for coverage to be effective on the first day of the month following employment, or on a like date the following month if the employee has enrolled.

(3) Employees not enrolling or adding dependents when first eligible in accordance with G.S. 135-40.1(7) may enroll later on the first of any following month but will be subject to a 12-month waiting period for a preexisting health condition, except employees who elect to change their coverage in accordance with rules adopted by the Executive Administrator and Board of Trustees for optional prepaid hospital and medical benefit plans.

(4) Members of the General Assembly, beginning with the 1985 Session, shall become first eligible with the convening of each Session of the General Assembly, regardless of a Member's service during previous Sessions. Members and their dependents enrolled when first eligible after the convening of each Session of the General Assembly will not be subject to any waiting periods for preexisting health conditions. Members of the 1983 Session of the General Assembly, not already enrolled, shall be eligible to enroll themselves and their dependents on or before October 1, 1983, without being subject to any waiting periods for preexisting health conditions.

(b) Waiting Periods and Preexisting Conditions. —

(1) New employees and dependents enrolling when first eligible are subject to no waiting period for preexisting conditions under the Plan.

(2) Employees not enrolling or not adding dependents when first eligible may enroll later on the first of any following month, but will be subject to a twelve-month waiting period for preexisting conditions except as provided in subdivision (a)(3) of this section.

(3) Retiring employees and dependents enrolled when first eligible after an employee's retirement are subject to no waiting period for preex-

isting conditions under the Plan. Retiring employees not enrolled or not adding dependents when first eligible after an employee's retirement may enroll later on the first of any following month, but will be subject to a 12-month waiting period for preexisting conditions except as provided in subdivision (a)(3) of this section.

(4) Employees and dependents enrolling or reenrolling within 12 months after a termination of enrollment or employment that were not enrolled at the time of this previous termination, regardless of the employing units involved, shall not be considered as newly-eligible employees or dependents for the purposes of waiting periods and preexisting conditions. Employees and dependents transferring from optional prepaid plans in accordance with G.S. 135-39.5B; employees and dependents immediately returning to service from an employing unit's approved periods of leave without pay for illness, injury, educational improvement, workers' compensation, parental duties, or for military reasons; employees and dependents immediately returning to service from a reduction in an employing unit's work force; retiring employees and dependents reenrolled in accordance with G.S. 135-40.3(b)(3); formerly-enrolled dependents reenrolling as eligible employees; formerly-enrolled employees reenrolling as eligible dependents; and employees and dependents reenrolled without waiting periods and preexisting conditions under specific rules and regulations adopted by the Executive Administrator and Board of Trustees in the best interests of the Plan shall not be considered reenrollments for the purpose of this subdivision. Furthermore, employees accepting permanent, full-time appointments who had previously worked in a part-time or temporary position and their qualified dependents shall not be covered by waiting periods and preexisting conditions under this division provided enrollment as a permanent, full-time employee is made when the employee and his dependents are first eligible to enroll.

(5) To administer the 12-month waiting period for preexisting conditions under this Article, the Plan must give credit against the 12-month period for the time that a person was covered under a previous plan if the previous plan's coverage was continuous to a date not more than 63 days before the effective date of coverage. As used in this subdivision, a "previous plan " means any policy, certificate, contract, or any other arrangement provided by any accident and health insurer, any hospital or medical service corporation, any health maintenance organization, any preferred provider organization, any multiple employer welfare arrangement, any self-insured health benefit arrangement, any governmental health benefit or health care plan or program, or any other health benefit arrangement.

(c) Dependents of Employees and Retired Employees. —

(1) Dependents of employees and retired employees who have family coverage under the Predecessor Plan will continue to be covered subject to the terms hereof.

(2) Employees who have dependents may apply for family coverage at the time they enroll as provided in subdivisions (a)(2) and (a)(3) and such dependents will be covered under the Plan beginning the same date as such employees.

(3) Employees and retired employees may change from individual or parent/child(ren) coverage to parent/child(ren) or family coverage or add dependents to existing family or parent/child(ren) coverage upon

acquiring a dependent without a waiting period for preexisting conditions, and such dependents will be covered under the Plan the first of the month or the first of the second month following the dependent's eligibility for coverage, provided written application is submitted to the Health Benefits Representative within 30 days of becoming eligible.

(4) Employees or retired employees who wish to change from family coverage to parent/child(ren) or individual or from parent/child(ren) to individual coverage shall give written notice to their Health Benefits Representative within 30 days after any change in the status of dependents, (resulting from death, divorce, etc.) that requires a change in contract type. The effective date will be the first of the month following the dependent's ineligibility event. If notification was not made within the 30 days following the dependent's ineligibility event, the dependent will be retroactively removed the first of the month following the dependent's ineligibility event, and the coverage type change will be the first of the month following written notification, except in cases of death, in which case the coverage type change will be made retroactive to the first of the month following the death.

(5) Employees not adding dependents when first eligible may enroll later on the first of any following month, but dependents will be subject to a 12-month waiting period for preexisting health conditions except as provided in subdivision (a)(3) of this section.

(6) Employees or retired employees who wish to change from family to parent/child(ren) or individual coverage or from parent/child(ren) to individual coverage, even though their dependents continue to be eligible, shall give written notification to their Health Benefits Representative. Effective date of this type change will be the first of the month following written notification or any first of the month thereafter as desired by the employee.

(7) The effective date for newborns or adopted children will be date of birth, date of adoption, or placement with adoptive parent provided member is currently covered under a family or parent/child(ren) coverage. If the member wishes to add a newborn or adopted child and is currently enrolled on individual coverage, the member must submit application for coverage and a coverage type change within 30 days of the child's birth or date of adoption or placement. Effective date for the coverage type change is the first of the month in which the child is born, adopted, or placed. Adopted children may also be covered the first of the month following placement or adoption.

(d) Types of Coverage Available. — There are three types of coverage which an employee or retiree may elect.

(1) Employee Only. — Covers enrolled employees only. Maternity benefits are provided to employee only.

(2) Employee and Child(ren). — Covers enrolled employee and all eligible dependent children. Maternity benefits are provided to the employee only.

(3) Employee and Family. — Covers employee and spouse, and all eligible dependent children. Maternity benefits are provided to employee or enrolled spouse.

(4) (5) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 5(b).

(e) Notwithstanding any other provision of this section, no coverage under the Plan shall become effective prior to the payment of premiums required by the Plan.

Part 3 of Article 3 of Chapter 135 is set out twice.

(f) Firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions of this section as are employees. Eligible dependents of firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions of this section as are dependents of employees. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(b), 20; 1987, c. 857, s. 13; 1991, c. 427, ss. 10-12; 1996, 2nd Ex. Sess., c. 18, s. 28.23(b); 1997-512, ss. 28-31, 40; 1999-237, s. 28.29(g).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

§ 135-40.3A. (Effective until July 1, 2008) Optional participation for charter schools operated by private nonprofit corporations.

(a) The board of directors of each charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Plan in accordance with this Article. This election shall be in writing, shall be made no later than 30 days after this section becomes law, and shall be filed with the Executive Administrator and Board of Trustees and with the State Board of Education. For each charter school employee who is employed on or before the date the board makes the election, membership in the Plan is effective as of the date the board makes the election. For each charter school employee who is employed after the date the board makes the election, membership in the Plan is effective as of the date of that employee's entry into eligible service. This subsection applies only to charter schools that received State Board of Education approval under G.S. 115C-238.29D in 1997 or 1998.

(b) No later than 30 days after both parties have signed the written charter under G.S. 115C-238.29E, the board of directors of a charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Plan in accordance with this Article. This election shall be in writing and filed with the Executive Administrator, the Board of Trustees, and the State Board of Education. This election is effective for each charter school employee as of the date of that employee's entry into eligible service. This subsection applies to charter schools that receive State Board of Education approval under G.S. 115C-238.29D after 1998.

Part 3 of Article 3 of Chapter 135 is set out twice.

(c) A board's election to become a participating employer in the Plan under this section is irrevocable and shall require all eligible employees of the charter school to participate.

(d) If a charter school's board of directors does not elect to become a participating employer in the Plan under this section, that school's employees and the dependents of those employees are not eligible for any benefits under the Plan on account of employment with a charter school.

(e) The board of directors of each charter school shall notify each of its employees as to whether the board elected to become a participating employer in the Plan under this section. This notification shall be in writing and shall be provided within 30 days of the board's election or at the time an initial offer for employment is made, whichever occurs last. If the board did not elect to become a participating employer in the Plan, the notice shall include a statement that the employee shall have no legal recourse against the board or the State for any possible benefit under the Plan. The employee shall provide written acknowledgment of the employee's receipt of the notification under this subsection. (1998-212, s. 9.14A(e).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Clover Garden Charter School: 2003-354, s. 1.

Editor's Note. — Session Laws 2003-69, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3(b) and G.S. 135-40.3A(b), the board of directors of any charter school that received State Board of Education approval under G.S. 115C-238.29D on or after January 1, 2002, and the board of directors of River Mill Academy in Alamance County may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2004-164, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of (i) New Century High School in Saxapahaw; (ii) Lake Norman Charter School in Huntersville; (iii) Exploris Middle School in Raleigh, a charter school division of Exploris; (iv) Magellan Charter School in Raleigh; (v) American Renaissance Charter School in Statesville; and (vi) Healthy Start Academy in Durham may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2005-317, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of Success Institute, a charter school in Statesville, and Piedmont Community Charter School in Gastonia may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2007-464, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the Board of Directors of Orange Charter School, a charter school located in Hillsborough, may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become a participating employing unit in the

Part 3 of Article 3 of Chapter 135 is set out twice.

North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. Notwithstanding the time limitations contained in G.S. 135-40.3A, the Board of Directors of Bethany Community Middle School, a charter school in Rockingham County, may elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. Notwithstanding the time limitations contained in G.S. 135-40.3A, the board of directors of Tiller School, a charter school, may elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135 of the General Statutes. The election authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-40.3A and, as applicable, with G.S. 135-5.3."

§ 135-40.4. (Effective until July 1, 2008) Benefits in general.

(a) In the event a covered person, as a result of accidental bodily injury, disease or pregnancy, incurs covered expenses, the Plan will pay benefits up to the amounts described in G.S. 135-40.5 through G.S. 135-40.9.

The Plan is divided into two parts. The first part includes certain benefits which are not subject to a deductible or coinsurance. The second part is a comprehensive plan and includes those benefits which are subject to both a four hundred fifty dollar ($450.00) deductible for each covered individual to an aggregate maximum of one thousand three hundred fifty dollars ($1,350) per employee and child(ren) or employee and family coverage contract and coinsurance of 80%/20%. There is a limit on out-of-pocket expenses under the second part.

Notwithstanding the provisions of this Article, the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan may contract with providers of institutional and professional medical care and services to established preferred provider networks. The terms pertaining to reimbursement rates or other terms of consideration of any contract between hospitals, hospital authorities, doctors or other medical providers, an optional program contract authorized under G.S. 135-39.5B(b), or a pharmacy benefit manager and the Plan shall not be a public record under Chapter 132 of the General Statutes for a period of thirty months after the date of the expiration of the contract. Provided, however, nothing in this subsection shall be deemed to prevent or restrict the release of any information made not a public record under this subsection to the State Auditor, the Attorney General, the Director of the State Budget, the Plan's Executive Administrator, and the Committee on Employee Hospital and Medical Benefits solely and exclusively for their use in the furtherance of their duties and responsibilities. The design, adoption, and implementation of the preferred provider contracts, networks, and optional plans or programs authorized under G.S. 135-39.5B(b) are not subject to the requirements of Chapter 143 of the General Statutes, provided that for any hospital preferred provider network all hospitals will have an opportunity to contract with the Plan if they meet the contract requirements. The Executive Administrator and Board of Trustees shall, under the provisions of G.S. 135-39.5(12), pursue such preferred provider contracts on a timely basis and shall make reports as requested to the President of the Senate, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Committee on Employee Hospital and Medical Benefits on its progress in negotiating the preferred provider contracts. The Executive Administrator and Board of Trustees shall implement a refined diagnostic-related grouping or diagnostic-related grouping-based reimbursement system for hospitals as soon as practicable, but no later than January 1, 1995.

(b) As used in this section the term "preferred provider contracts or networks" includes, but is not limited to, a refined diagnostic-related grouping or diagnostic-related grouping-based system of reimbursement for hospitals. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 21.8; 1985, c. 192, ss. 1, 13, 14; c. 732, s. 64; 1991, c. 427, s. 19; 1993, c. 547, s. 1; 2001-253, s. 1(c); 2001-516, s. 4; 2005-276, s. 29.33(b); 2007-323, s. 28.22(c).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Section Repealed Effective July 1, 2008. — This section is repealed effective July 1, 2008, by Session Laws 2007-323, s. 28.22A(a).

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2006-249, s. 1(a), expiring July 1, 2009, provides: "Cost-Saving Initiatives. — Coverage of Over-the-Counter Medications. — Notwithstanding any other provision of law to the contrary, the Executive Administrator and Board of Trustees may authorize coverage for over-the-counter medications as recommended by the Plan's pharmacy and therapeutics committee. In approving for coverage one or more over-the-counter medications, the Executive Administrator and Board of Trustees shall ensure that each recommended over-the-counter medication has been analyzed to ensure medical effectiveness and Plan member safety. The analysis shall also address the financial impact on the Plan. The Executive Administrator and Board of Trustees may impose a co-payment to be paid by each covered individual for each packaged over-the-counter medication. The Executive Administrator and Board of Trustees may adopt policies establishing limits on the amount of coverage available for over-the-counter medications for each covered individual over a 12-month period. Prior to implementing policy and co-payment changes authorized under this section, the Executive Administrator and Board of Trustees shall submit the proposed policies and co-payments to the Committee on Employee Hospital and Medical Benefits for its review."

Session Laws 2006-249, s. 1(b), expiring July 1, 2009, provides: "Incentive Programs. — For the purposes of helping Plan members to achieve and maintain a healthy lifestyle without impairing patient care, and to increase cost effectiveness in Plan coverage, the Executive Administrator and Board of Trustees may adopt programs offering incentives to Plan members to encourage changes in member behavior or lifestyle designed to improve member health and promote cost-efficiency in the Plan. Participation in one or more incentive programs is voluntary on the part of the Plan member. Before adopting an incentive program, the Executive Administrator and Board of Trustees shall conduct an impact analysis on the proposed incentive program to determine (i) whether the program is likely to result in significant member satisfaction, (ii) that it will not adversely affect quality of care, and (iii) whether it is likely to result in significant cost savings to the Plan. The impact analysis may be conducted by a committee of the Plan, in conjunction with the Plan's consulting actuary, provided that the Plan's medical director participates in the analysis. An approved incentive plan may provide for a waiver of deductibles, co-payments, and coinsurance required under this Article in order to determine the effectiveness of the incentive program in promoting healthy lifestyles for members and increasing cost-effectiveness to the Plan. The Executive Administrator and Board of Trustees shall, before implementing incentive programs authorized under this section, submit the proposed programs to the Committee on Employee Hospital and Medical Benefits for review."

Session Laws 2006-249, s. 6, provides in part: "Section 1 of this act expires July 1, 2009."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Oper ations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22(c) effective July 1, 2007, in subsection (a), in the third sentence of the second paragraph, substituted "four hundred fifty dollars ($450.00)" for "three hundred fifty dollar ($350.00)" and substituted "one thousand three hundred fifty dollars ($1,350)" for "one thousand fifty dollars ($1,050)," and in the third sentence of the third paragraph, substituted "contracts, networks, and optional plans or programs authorized under G.S. 135-39.5B(b)" for "contracts and networks."

CASE NOTES

Diagnostic Related Grouping Based Reimbursement System. — When insurers and employers who were ordered by the Industrial Commission to pay certain amounts to hospitals sought relief under G.S. 135-40.7(8), claiming they had been required to pay amounts for services greater than that which people not covered under the State Teachers' and Employees' Health Plan would have been required to pay, they were not entitled to relief because G.S. 135-40.4 authorized a diagnostic-related grouping system for the reimbursement of hospitals, such as that under which the amounts the employers and insurers were ordered to pay were approved. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Cited in Carolina Medicorp, Inc. v. Board of Trustees, 118 N.C. App. 485, 456 S.E.2d 116 (1995).

OPINIONS OF ATTORNEY GENERAL

The State Employees' Comprehensive Major Medical Plan is exempt from the requirements of Article 3C of Chapter 143, G.S. 143-64.20 et seq., with respect to contracts to assist the plan in negotiating preferred provider networks. See opinion of Attorney General to Jack W. Walker, Executive Administrator, Teachers' & State Employees' Comprehensive Major Medical Plan, 2001 N.C. AG LEXIS 38 (8/23/01).

§ 135-40.5. (Effective until July 1, 2008) Benefits not subject to deductible or coinsurance.

(a) Repealed by Session Laws 1985, c. 192, s. 5.

(b) Repealed by Session Laws 1991, c. 427, s. 20.

(c) Preadmission Testing. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for diagnostic, laboratory and x-ray examinations performed on an outpatient basis.

(d) Repealed by Session Laws 2001-253, s. 1(d), effective July 1, 2001.

(e) Routine Diagnostic Examinations. — The Plan will pay one hundred percent (100%) of allowable charges for routine diagnostic examinations and tests, including breast, colon, rectal, and prostate exams, X rays, blood and blood pressure checks, urine tests, tuberculosis tests, and general health checkups that are medically necessary for the maintenance and improvement of individual health but no more often than once every three years for covered individuals to age 40 years, once every two years for covered individuals to age 50 years, and once a year for covered individuals age 50 years and older, unless a more frequent occurrence is warranted by a medical condition when such charges are incurred in a medically supervised facility. The Plan will pay one hundred percent (100%) of allowable charges for mammograms once per year for covered individuals age 40 years and over, and not more often than once every three years for covered individuals to age 40 years, when such charges are incurred in a medically supervised facility. Routine diagnostic examinations and tests covered under this subsection also include examinations and tests for the screening for the early detection of cervical cancer. The coverage shall be in accordance with the most recently published American Cancer Society guidelines or guidelines adopted by the North Carolina Advisory Committee on Cancer Coordination and Control for any covered female. For the purposes of this subsection, "examinations and laboratory tests for the screening for the early detection of cervical cancer" means conventional PAP smear screening, liquid-based cytology, and human papilloma virus (HPV) detection methods for women with equivocal findings on cervical cytologic analysis that are subject to the approval of and have been approved by the United States Food and Drug Administration. Provided, however, that charges for such examinations and tests are not covered by the Plan when they are incurred to obtain or continue employment, to secure insurance coverage, to comply with legal proceedings, to attend schools or camps, to meet travel requirements, to participate in athletic and related activities, or to comply with governmental licensing requirements. The maximum amount payable under this subsection for a covered individual is one hundred fifty dollars ($150.00) per fiscal year.

(f) Immunizations. — The Plan will pay one hundred percent (100%) of allowable charges for immunizations for the prevention of contagious diseases as generally accepted medical practices would dictate when directed by an attending physician.

(g) Prescription Drugs. — The Plan's allowable charges for prescription legend drugs to be used outside of a hospital or skilled nursing facility are to be determined by the Plan's Executive Administrator and Board of Trustees. The Plan will pay allowable charges for each outpatient prescription drug less a copayment to be paid by each covered individual equal to the following amounts: pharmacy charges up to ten dollars ($10.00) for each generic prescription, thirty dollars ($30.00) for each preferred branded prescription, and forty dollars ($40.00) for each preferred branded prescription with a generic equivalent drug, and fifty dollars ($50.00) for each nonpreferred branded or generic prescription. These co-payments apply to the Plan's optional programs.

Allowable charges shall not be greater than a pharmacy's usual and customary charge to the general public for a particular prescription. Prescriptions shall be for no more than a 34-day supply for the purposes of the copayments paid by each covered individual. By accepting the copayments and any remaining allowable charges provided by this subsection, pharmacies shall not balance bill an individual covered by the Plan. A prescription legend drug is defined as an article the label of which, under the Federal Food, Drug, and Cosmetic Act, is required to bear the legend: "Caution: Federal Law Prohibits Dispensing Without Prescription." Such articles may not be sold to or purchased by the public without a prescription order. Benefits are provided for insulin even though a prescription is not required. The Plan may use a pharmacy benefit manager to help manage the Plan's outpatient prescription drug coverage. In managing the Plan's outpatient prescription drug benefits, the Plan and its pharmacy benefit manager shall not provide coverage for erectile dysfunction, growth hormone, antiwrinkle, weight loss, and hair growth drugs unless such coverage is medically necessary to the health of the member. The Plan and its pharmacy benefit manager shall not provide coverage for growth hormone and weight loss drugs and antifungal drugs for the treatment of nail fungus and botulinium toxin without approval in advance by the pharmacy benefit manager. Any formulary used by the Plan's Executive Administrator and pharmacy benefit manager shall be an open formulary. Plan members shall not be assessed more than two thousand five hundred dollars ($2,500) per person per fiscal year in copayments required by this subsection. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 7; 1985, c. 192, ss. 5, 9, 12; c. 732, ss. 16-18; 1985 (Reg. Sess., 1986), c. 1020, ss. 10, 20; 1987, c. 857, s. 14; 1991, c. 427, ss. 13, 20; 1995, c. 507, s. 7.24(a); 1999-237, s. 28.28(b); 2000-141, s. 1; 2000-184, s. 2; 2001-253, ss. 1(d), 1(e); 2003-186, s. 5(a); 2005-276, s. 29.31(a); 2006-249, s. 2(a); 2007-323, s. 28.22(d).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2003-186, s. 6, provides, in part, that for the purposes of this act, renewal of a health benefit plan is presumed to occur on each anniversary of the date on which coverage was first effective on the person or persons covered by the health benefit plan.

Subsection (e), as amended by Session Laws 2003-186, s. 5(a), effective January 1, 2004, is applicable to all health benefit plans that are delivered, issued for delivery, or renewed on and after that date.

Session Laws 2006-249, s. 1(a), expiring July 1, 2009, provides: "Cost-Saving Initiatives. — Coverage of Over-the-Counter Medications. — Notwithstanding any other provision of law to the contrary, the Executive Administrator and Board of Trustees may authorize coverage for over-the-counter medications as recommended by the Plan's pharmacy and therapeutics committee. In approving for coverage one or more over-the-counter medications, the Executive Administrator and Board of Trustees shall ensure that each recommended over-the-counter medication has been analyzed to ensure medical effectiveness and Plan member safety. The analysis shall also address the financial impact on the Plan. The Executive Administrator and Board of Trustees may impose a co-payment to be paid by each covered individual for each packaged over-the-counter medication. The Executive Administrator and Board of Trustees may adopt policies establishing limits on the amount of coverage available for over-the-counter medications for each covered individual over a 12-month period. Prior to implementing policy and co-payment changes authorized under this section, the Executive Administrator and Board of Trustees shall submit the proposed policies and co-payments to the Committee on Employee Hospital and Medical Benefits for its review."

Session Laws 2006-249, s. 1(b), provides: "Incentive Programs. — For the purposes of helping Plan members to achieve and maintain a healthy lifestyle without impairing patient care, and to increase cost effectiveness in Plan coverage, the Executive Administrator and Board of Trustees may adopt programs offering incentives to Plan members to encourage changes in member behavior or lifestyle designed to improve member health and promote cost-efficiency in the Plan. Participation in one or more incentive programs is voluntary on the part of the Plan member. Before adopting an incentive program, the Executive Administrator and Board of Trustees shall conduct an impact analysis on the proposed incentive program to determine (i) whether the program is likely to result in significant member satisfaction, (ii) that it will not adversely affect quality of care, and (iii) whether it is likely to result in significant cost savings to the Plan. The impact analysis may be conducted by a committee of the Plan, in conjunction with the Plan's consulting actuary, provided that the Plan's medical director participates in the analysis. An approved incentive plan may provide for a waiver of deductibles, co-payments, and coinsurance required under this Article in order to determine the effectiveness of the incentive program in promoting healthy lifestyles for members and increasing cost-effectiveness to the Plan. The Executive Administrator and Board of Trustees shall, before implementing incentive programs authorized under this section, submit the proposed programs to the Committee on Employee Hospital and Medical Benefits for review."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-249, s. 2(a), effective July 1, 2006, in the

Part 3 of Article 3 of Chapter 135 is set out twice.

first paragraph of subsection (g), inserted "preferred" preceding "branded prescription" twice, and substituted "each nonpreferred branded or generic prescription" for "each branded or generic prescription not on a formulary used by the Plan" at the end of the paragraph.

Session Laws 2007-323, s. 28.22(d), effective July 1, 2007, in subsection (g), substituted "thirty dollars ($30.00)" for "twenty-five dollars ($25.00)" in the second sentence, and added the last sentence.

CASE NOTES

Cited in Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

§ 135-40.6. (Effective until July 1, 2008) Benefits subject to deductible and coinsurance (comprehensive benefits).

The benefits provided in this section are subject to a deductible of four hundred fifty dollars ($450.00) per covered individual to an aggregate maximum of one thousand three hundred fifty dollars ($1,350) per employee and child(ren) or employee and family coverage contract per fiscal year and are payable on the basis of eighty percent (80%) by the Plan and twenty percent (20%) by the covered individual up to a maximum of two thousand dollars ($2,000) out-of-pocket per fiscal year. The aggregate maximum out-of-pocket required of individuals covered by this section shall not be more than six thousand dollars ($6,000) per employee and child(ren) or employee and family coverage contract per fiscal year.

(1) In-Hospital Benefits. — The Plan pays in-hospital benefits for each single confinement, when charged by a hospital, for room accommodations, including bed, board and general nursing care, but not to exceed the charge for semiprivate room or ward accommodations, or the rate negotiated for the Plan. Under the DRG reimbursement system, the coinsurance shall be based on the lower of the DRG amount or charges.

The Plan will pay the following covered charges, when charged by a hospital, for each confinement.

a. Intensive and cardiac nursing care.
b. All recognized drugs and medicines for use in the hospital.
c. Radiation services, including diagnostic x-rays, x-ray therapy, radiation therapy and treatment.
d. Clinical and pathological laboratory examinations.
e. Electrocardiograms and electroencephalograms.
f. Physical, speech, and occupational therapy.
g. Intravenous solutions.
h. Oxygen and oxygen therapy, plus the use of equipment.
i. Dressings, ordinary splints, plaster casts and sterile supplies.
j. Use of operating, delivery, recovery and treatment rooms and equipment.
k. Routine nursery charges, if the mother is eligible to receive maternity benefits.
l. Anesthetics and the administration thereof by the hospital's employee anesthesiologist.
m. Devices or appliances surgically inserted within the body.
n. Processing and administering of blood and blood plasma.

Part 3 of Article 3 of Chapter 135 is set out twice.

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o. Children are entitled to benefits for treatment of illnesses or congenital defect, incubation or isolette care, and treatment of prematurity or postmaturity.

If the mother is a covered individual, benefits are provided for the newborn's circumcision and routine nursery care.

p. When a covered individual is admitted to or transferred to a section of a hospital providing ambulant, convalescent, or rehabilitative care, benefits are provided up to the average number of days of service for treatment of the particular diagnosis or condition involved, or more if medical necessity requires.

q. The Plan pays benefits for laboratory testing and administration of blood provided to a covered individual.

When a covered individual is the recipient of transplanted organs or bones, benefits are provided for services to the donor which are directly and specifically related to the transplantation.

r. Repealed by Session Laws 1991, c. 427, s. 31.

s. The use of nebulizers when authorized as medically necessary by the attending physician.

(2) Limitations and Exclusions to In-Hospital Benefits. —

a. The services of physicians, surgeons and technicians not employed by or under contract to the hospital are not covered.

b. Any admission for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis, if no hospitalization would have been required except for such diagnostic services is not covered. However, benefits are provided at eighty percent (80%) of Plan benefits for diagnostic tests and procedures consistent with the symptoms or diagnosis for which admitted.

c. The Plan will not cover any admission to a hospital prior to the effective date of coverage or beginning prior to the expiration of any waiting period so long as the individual remains continuously in a hospital.

d. Hospitalization for custodial, adult care or sanitarium care, or rest cures, is not covered.

e. Hospitalization for dental care and treatment is not covered, except when a hospital setting is medically necessary.

f. Prior to admission for scheduled inpatient hospitalization, the admitting physician shall contact the Plan and secure approval certification for an inpatient admission, including a length of stay, based upon clinical criteria established by the medical community, before any in-hospital benefits are allowed under G.S. 135-40.8(a). Immediately following an emergency or unscheduled inpatient hospitalization, the admitting physician shall contact the Plan and secure approval certification for the admission's length of stay before any in-hospital benefits are allowed under G.S. 135-40.8(a). Failure to secure certification, or denial of certification, shall result in a penalty of fifty percent (50%) of the eligible expenses up to five hundred dollars ($500.00) per admission and the denial of services that were not medically necessary or appropriate, as determined by the Claims Processor. Denial of certification by the Plan shall be made only after contact with the admitting physician and shall be subject to appeal to the Executive Administrator and Board of Trustees. Inpatient hospital admission and length of stay certifications required by this subdivision do not apply to inpatient admissions outside of the United States. While approval certification for inpatient admissions is required to be initiated by the admitting physician, the employee or individual covered by the Plan shall be responsible for insuring that the required certification is secured. Failure to secure certification for inpatient hospitalization shall not result in a penalty to the employee or individual when approval would have been given if requested. Denial of services under this subsection shall be done only after notification of the Plan member of his or her personal financial responsibility for such services.

g. Repealed by Session Laws 2001-253, s. 1(o), effective July 1, 2001.

(3) Skilled Nursing Facility Benefits. — The Plan will pay benefits in a skilled nursing facility licensed under applicable State laws for not more than 100 days per fiscal year for the same reason, as follows:

After discharge from a hospital for which inpatient hospital benefits were provided by this Plan for a period of not less than three days, and treatment consistent with the same illness or condition for which the covered individual was hospitalized, the daily charges will be paid for room and board in a semiprivate room or any multibed unit up to the maximum benefit specified in subsection (1) of this section, less the days of care already provided for the same illness in a hospital. Plan allowances for total daily charges may be negotiated but will not exceed the daily semiprivate hospital room rate as determined by the Plan.

Credit will be allowed toward private room charges in an amount equal to the facility's most prevalent charge for semiprivate accommodations. Charges will also be paid for general nursing care and other services which would ordinarily be covered in a general hospital. In order to be eligible for these benefits, admission must occur within 14 days of discharge from the hospital.

In order to qualify for benefits provided by a skilled nursing facility, the following stipulations apply:

a. The services are medically required to be given on an inpatient basis because of the covered individual's need for medically necessary skilled nursing care on a continuing daily basis for any of the conditions for which he or she was receiving inpatient hospital services prior to transfer from a hospital to the skilled nursing facility or for a condition requiring such services which arose after such transfer and while he or she was still in the facility for treatment of the condition or conditions for which he or she was receiving inpatient hospital services,

b. Only on prior referral by and so long as, the patient remains under the active care of an attending doctor and the patient requires continual hospital confinement without the care and treatment of the skilled nursing facility, and

c. Approved in advance by the Claims Processor.

For facilities not qualified for delivery of services covered by the benefits of Title XVIII of the Social Security Act (Medicare), neither the Plan nor any of its members shall be billed or held liable by such facilities for charges that otherwise would be covered by Medicare.

(4) Outpatient Benefits. — The Plan pays for services rendered in the outpatient department of a hospital, in a doctor's office, in an ambulatory surgical facility, or elsewhere as determined by the Executive Administrator, as follows:

a. Accidental injury: All covered services. Dental services are excluded except for oral surgery specifically listed in subsection (5)c. of this section.

b. Operative procedures.

c. All hospital services for radiation therapy, treatment by use of x-rays, radium, cobalt and other radioactive substances.

d. Pathological examinations of tissue removed by resection or biopsy. Routine Pap smears are not covered by this subdivision.

e. Charges for diagnostic x-rays, clinical laboratory tests, and other diagnostic tests and procedures such as electrocardiograms and electroencephalograms.

No benefits are provided in this subdivision for screening examinations and routine physical examinations to assess general health status in the absence of specific symptoms of active illness, routine office visits or for doctor's services for diagnostic procedures covered under surgical benefits.

(5) Surgical Benefits. — The Plan pays the usual, customary and reasonable charges for covered surgical services as follows:

a. Surgery: Cutting procedures, treatment of fractures, transfusions, operative preparation for diagnostic x-ray examinations, surgical implantation radiation sources, major endoscopic examinations, biopsies, surgical sterilization, other standard services and operations.

For the purpose of this subdivision, the term "standard services and operations" includes the following organ transplants: liver, heart, corneal, bone marrow, lung, heart-lung, pancreas, and kidney. All other organ transplants shall be considered nonreimbursable under the Plan. Benefits for the above listed organ transplants shall be payable only in accordance with rules established by the Executive Administrator and Board of Trustees. The Executive Administrator and Board of Trustees may limit the Plan's reimbursement for selected organ transplants to amounts that would otherwise be allowed in accordance with G.S. 135-40.4.

b. Anesthesia: Administration of general, spinal block or local anesthesia. Covered services include pre- and postoperative visits, the administration of the anesthetic, fluids and/or blood provided by the anesthesiologist and incidental to the anesthesia, and necessary drugs and materials provided by the anesthesiologist. No benefits are provided for administration of local anesthesia or for anesthesia administered by the operating surgeon or surgical assistant(s).

c. Oral Surgery: Services which are within the scope of practice of both a doctor of medicine and a dentist, such as excision of tumors and lesions of the mouth, treatment of jaw fractures and surgery to correct injuries of the mouth structure other than teeth and their supporting structure. Developmental and congenital orthognathic surgery procedures will be covered under the Plan, provided such surgery is medically necessary, is the only method of treatment which will correct the patient's deformity, is not performed for cosmetic reasons, and is approved in advance by the Claims Processor on the basis of the surgeon's documentation that the correction of the deformity is medically necessary for the maintenance of good physical health.

Part 3 of Article 3 of Chapter 135 is set out twice.

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d. Maternity Care: Independent operative procedures in connection with pregnancy, such as: manipulative obstetrical delivery, delivery by Caesarean section, removal of ectopic pregnancy, dilation and curettage. Benefits for manipulative obstetrical delivery include use of forceps and/or episiotomy. No benefits are provided for antepartum or postpartum care, except for direct surgical procedures of delivery and surgical treatment.

e. Surgical Assistants: Services of an assistant surgeon when medical judgment requires the services of an assistant surgeon and no hospital-employed doctor in training is available.

f. Multiple Procedures: When multiple or bilateral surgical procedures are performed by the same doctor through separate incisions or approaches during the same session, the surgical benefits will be the greater UCR allowance, plus fifty percent (50%) of the lesser UCR allowance. Anesthesia benefits will be the greater UCR allowance.

When multiple surgical procedures are performed by the same doctor through the same incision or operative approach, the surgical benefits are limited to the procedure which has the highest UCR allowance.

When a surgical procedure is performed in two or more stages, the surgical benefit for the entire procedure is the same as it would be were the procedure performed in one stage (except where otherwise provided in the benefit schedule). This limitation does not apply to anesthesia benefits.

g. Cleft Palate: Notwithstanding G.S. 135-40.6(6)a and G.S. 135-40.7(11), medical treatment and care needed by an individual born with cleft palate, including specialized dental and orthodontic care necessitated by the congenital condition.

h. Reconstructive Breast Surgery: Reconstructive breast surgery resulting from a mastectomy. The coverage shall include all stages and revisions of reconstructive breast surgery performed on a nondiseased breast to establish symmetry when reconstructive surgery on a diseased breast is performed. As used in this sub-subdivision, (i) "mastectomy" means the surgical removal of all or part of a breast as a result of breast cancer or breast disease; (ii) "reconstructive breast surgery" means surgery performed as a result of a mastectomy to reestablish symmetry between the two breasts, and includes reconstruction of the mastectomy site, creation of a new breast mound, and creation of a new nipple/areolar complex. "Reconstructive breast surgery" also includes augmentation mammoplasty, reduction mammoplasty, and mastopexy of the nondiseased breast. Coverage described under this sub-subdivision shall not be denied on the basis that the coverage is for cosmetic surgery. Reconstruction of the nipple/areolar complex following a mastectomy is covered without regard to the lapse of time between the mastectomy and the reconstruction, subject to the approval of the treating physician.

(6) Limitations and Exclusions to Surgical Benefits. —

a. No benefits are provided for dental prostheses such as crowns, or dentures; orthodontic care; operative restoration of teeth (fillings); dental extractions (whether impacted or not impacted); apicoectomies; treatment of dental caries, gingivitis, or periodontal diseases by gingivectomies or other periodontal surgery;

vestibuloplasties, alveoplasties, removal of exostosis and tori preparatory to fitting of dentures; correction of malocclusion by orthognathic surgery or other procedures by repositioning of bone tissue except as permitted pursuant to G.S. 135-40.6(5)c; removal of cysts incidental to apicoectomies or extraction of teeth.

b. Cosmetic surgery or surgery solely for beautifying purposes is not covered, except for procedures related to injury sustained while the individual is continuously covered under the Plan.

c. If a covered individual is admitted for medical and surgical treatment for the same condition, by the same doctor, either medical or surgical care may be paid, whichever is greater, but not both.

d. When a covered individual is admitted for medical treatment and during the hospital admission is subsequently referred to another doctor for surgery, medical benefits are provided for hospital days prior to the date of referral.

e. If during the hospital admission for necessary medical treatment, surgery is provided for a wholly distinct and unrelated condition, both medical and surgical benefits are payable, however, the same doctor may not be paid both medical and surgical benefits provided on the same day.

f. If during hospital admission for necessary medical treatment, a covered individual receives related surgical procedures such as paracentesis, biopsy, endoscopy, operative preparation for x-ray examination, or other diagnostic procedures for which benefits are applicable under the surgical benefits section of the Plan, both medical and surgical benefits are payable.

g. No benefits are provided for concurrent co-attending medical and surgical care by two or more doctors for the same condition other than as provided above.

h. No benefits will be payable for surgical procedure specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value.

i. No benefits are payable for organ transplants not listed in G.S. 135-40.6(5)a, nor will benefits be payable for surgical procedures or organ transplants determined by the Executive Administrator and Board of Trustees upon the advice of the Claims Processor to be experimental.

j. No benefits are payable for radial keratotomy surgical procedures or for services to correct vision when performed in lieu of the use of corrective lenses.

(7) Medical Benefits. —

a. Services of Doctors. — The Plan pays the usual, reasonable and customary charges for covered inpatient medical (nonsurgical) services. Services are covered if the individual is hospital-confined and is eligible for hospitalization benefits as described in this section. Benefits are provided for exactly the same number of days as the individual is entitled to under this section, except that medical benefits are provided on both the day of admission and the day of discharge.

In the event a covered individual is treated by two or more co-attending doctors during the same hospital confinement for a medical (nonsurgical) condition, benefits are limited to payment for services provided by the primary attending doctor, except where need is established for supplementary skills for treatment of separate and distinct diagnoses or conditions.

Home, office, and skilled nursing facility visits including (i) charges for injected medications, (ii) inpatient care by attending medical doctors, radiologists, pathologists, and consultants during such time as hospital benefits are paid under any section of this Plan, (iii) care in the outpatient department of a hospital, and (iv) administration of shock therapy (drug or electric) including the services of anesthesiologists provided on an office or hospital outpatient basis for treatment of acute psychotic reaction or severe depression.

b. Consultations. — Consultation services are provided when requested by attending doctor and the consultation is necessary in conjunction with and directly related to care and treatment of the condition for which admitted. No benefits are provided for staff consultation required by hospital rules and regulations. When a covered individual is admitted for oral surgery, a single consultation allowance will be provided for medical examination and pre-anesthesia evaluation.

c. Newborn Care. — When a child is eligible at birth, benefits are provided for treatment of illness, injury, prematurity, or congenital condition as a registered inpatient. When delivery is by Caesarean section, a single consultation allowance will be provided for standby, resuscitation, and infant care in the operating room provided by a doctor other than the operating surgeon.

When a mother receives maternity benefits under the Plan for a child's delivery, benefits are provided for examination and supervision of a normal newborn infant.

d. Repealed by Session Laws 1991, c. 427, s. 31.

(8) Other Covered Charges. —

a. Repealed by Session Laws 1999-237, s. 28.28(a), effective January 1, 2000.

b. Private Duty Nursing: Services of licensed nurses (not immediate relatives or members of the participant's household or private duty nursing used in lieu of or as a substitute for hospital staff nurses) ordered by the attending doctor for a condition requiring skilled nursing services. Private Duty Nursing ordered must be approved in advance by the Claims Processor as medically necessary. Allowances for Private Duty Nursing shall not exceed the lesser of the Plan's usual, customary and reasonable allowances or ninety percent (90%) of the daily semiprivate rate at skilled nursing facilities as determined by the Plan.

c. Home Health Agency Services: Services provided in a covered individual's home, when ordered by the attending physician and hospital or skilled nursing facility confinement would be required for the patient without such treatment and cannot be readily provided by family members. Services may include medical supplies, equipment, appliances, therapy services (when provided by a qualified speech therapist or licensed physiotherapist), and nursing services. Nursing services will be allowed for:

1. Services of a registered nurse (RN); or
2. Services of a licensed practical nurse (LPN) under the supervision of a RN; or
3. Services of a home health aide which are an adjunct to or extension of concurrent medically necessary skilled services under the supervision of a RN, limited to four hours a day.

Part 3 of Article 3 of Chapter 135 is set out twice.

Home health services shall be limited to 60 days per fiscal year, except that additional home health services may be provided on an individual basis if prior approval is obtained from the Claims Processor. Plan allowances for home health services shall be limited to licensed or Medicare certified home health agencies and shall not exceed ninety percent (90%) of the skilled nursing facility semiprivate rates as determined by the Plan, or charges negotiated by the Plan.

d. Licensed Ambulance Service: Local ambulance transportation:
  1. To or from a hospital for inpatient care or outpatient accident care;
  2. From a hospital to the nearest facility able to provide needed services not available at the transferring hospital; or
  3. From a hospital to a skilled nursing facility.

The word "local" means ambulance transportation of not more than 50 miles unless the Claims Processor authorizes ambulance transportation beyond this distance.

e. Prosthetic and Orthopedic Appliances and Durable Medical Equipment: Appliances and equipment including corrective and supportive devices such as artificial limbs and eyes, wheelchairs, traction equipment, inhalation therapy and suction machines, hospital beds, braces, orthopedic corsets and trusses, not more than three hundred fifty dollars ($350.00) for therapeutic shoes for diabetes and other high-risk conditions, and other prosthetic appliances or ambulatory apparatus which are provided solely for the use of the participant. Eligible charges include repair and replacement when medically necessary. Benefits will be provided on a rental or purchase basis at the sole discretion of the Claims Processor and agreements to rent or purchase shall be between the Claims Processor and the supplier of the appliance.

For the purposes of this subdivision, the term "durable medical equipment" means standard equipment normally used in an institutional setting which can withstand repeated use, is primarily and customarily used to serve a medical purpose, is generally not useful to a person in the absence of an illness or injury and is appropriate for use in the home. Decisions of the Claims Processor, the Executive Administrator and Board of Trustees as to compliance with this definition and coverage under the Plan shall be final.

f. Dental Services: Oral surgery, including extraction of teeth, necessitated because of medical treatment. Dental surgery and appliances for mouth, jaw, and tooth restoration necessitated because of external violent and accidental means, such as the impact of moving body, vehicle collision, or fall occurring while an individual is covered under G.S. 135-40.3. No benefits are provided in connection with injury incurred in the act of chewing, nor for damage or breakage of an appliance such as bridge or denture being cleaned or otherwise not in normal mouth usage at the time of accident, nor for appliances for orthodontic treatment when a class of malocclusion, other than orthognathic, or cross bite has been diagnosed. Benefits for temporomandibular joint (TMJ) disfunction appliance therapy are limited to cases where the TMJ disfunction has been diagnosed as solely resulting from accidental means as certified by the attending practitioner and approved by the Claims Processor.

Benefits shall include extractions, fillings, crowns, bridges, or other necessary therapeutic and restorative techniques and appliances to reasonably restore condition and function to that existing immediately prior to the accident. Injury or breakage of existing appliances such as bridges and dentures is limited to repair of such appliances unless certified as damaged beyond repair.

g. Medical Supplies: Colostomy bags, catheters, dressings, oxygen, syringes and needles, and other similar supplies.

h. Blood: Transfusions including cost of blood, plasma, or blood plasma expanders.

i. Physical Therapy: Recognized forms of physical therapy for restoration of bodily function, provided by a doctor, hospital, licensed professional physiotherapist, or certified physical therapy assistant. No benefits are provided for eye exercises or visual training.

j. Inhalation Therapy: When provided by a doctor, hospital, or other organization.

k. Speech Therapy: Speech therapy provided by certified speech therapist.

l. Cataract Lenses: Cataract lenses prescribed as medically necessary for aphakia persons, including charges for necessary examinations and fittings. Benefits will be limited to one set of cataract lenses every 24 months for persons 18 years of age or older, and one set of cataract lenses every 12 months for persons less than 18 years of age.

m. Cardiac Rehabilitation: Charges not to exceed the lesser of one thousand eight hundred dollars ($1,800) or 90 days per fiscal year. Coverage is limited to patients with Coronary Artery Bypass Graft (CABG), status/post myocardial infarction, Percutaneous Transliminal Coronary Angioplasty (PTCA) or stent, valve replacement, heart transplant, or chronic and disabling angina provided such services are provided within six months of the qualifying event and in a medically supervised facility fully certified by the North Carolina Department of Health and Human Services.

n. Chiropractic Services: Limited to the alignment of the spine and releasing of pressure by manipulation in accordance with the definitions in G.S. 90-143. Maximum benefits for x-rays, manipulations, and modalities shall be two thousand dollars ($2,000) per fiscal year.

o. Foot Surgery: Foot surgery on bones and joints.

p. Outpatient Diabetes Self-Care Programs: Charges, not to exceed three hundred dollars ($300.00) per fiscal year, when determined to be medically necessary by an attending physician and approved by the Executive Administrator and Claims Processor as meeting the standards of the National Diabetes Advisory Board for patients with a medical history of diabetes, provided such charges are incurred in a medically supervised facility.

q. Necessary medical services provided to terminally ill patients by duly licensed hospice organizations, when directed by the attending physician and approved in advance by the Claims Processor and the Executive Administrator.

r. Occupational Therapy: Recognized forms of occupational therapy provided by a doctor, hospital, licensed professional occupational therapist, or certified occupational therapy assistant to restore fine motor skills for the resumption of bodily functions.

s. Routine Diagnostic Examinations: Allowable charges for routine diagnostic examinations and tests, including examinations and tests for the screening for the early detection of cervical cancer, breast, colon, rectal, and prostate exams, X rays, blood and blood pressure checks, urine tests, tuberculosis tests, and general health checkups that are medically necessary for the maintenance and improvement of individual health but no more often than once every three years for covered individuals to age 40 years, once every two years for covered individuals to age 50 years, and once a year for covered individuals age 50 years and older and, for examinations and tests for the screening for the early detection of cervical cancer, in accordance with the most recently published American Cancer Society guidelines or guidelines adopted by the North Carolina Advisory Committee on Cancer Coordination and Control, unless a more frequent occurrence is warranted by a medical condition when such charges are incurred in a medically supervised facility. The Plan will pay one hundred percent (100%) of allowable charges for mammograms once per year for covered individuals age 40 years and over, and not more often than once every three years for covered individuals to age 40 years, when such charges are incurred in a medically supervised facility. Provided, however, that charges for such examinations and tests are not covered by the Plan when they are incurred to obtain or continue employment, to secure insurance coverage, to comply with legal proceedings, to attend schools or camps, to meet travel requirements, to participate in athletic and related activities or to comply with governmental licensing requirements. For the purposes of this sub-subdivision, "examinations and laboratory tests for the screening for the early detection of cervical cancer" means conventional PAP smear screening, liquid-based cytology, and human papilloma virus (HPV) detection methods for women with equivocal findings on cervical cytologic analysis that are subject to the approval of and have been approved by the United States Food and Drug Administration.

t. Repealed by Session Laws 1995, c. 507, s. 7.24(c).

u. Treatment of adverse reactions to vaccinations undertaken as smallpox countermeasures: Necessary medical services provided to a covered individual for infection with smallpox, infection with vaccinia, or any adverse medical reaction due to the vaccination.

(9) Limitations and Exclusions to Other Covered Charges. — No benefits are available under this section of the Plan until full utilization is made of similar benefits available under other sections of this Plan.

No benefits will be payable for:

a. Private duty nursing provided by an immediate relative or member of the covered individual's household; or private duty nursing used in lieu of or as a substitute for hospital staff nurses;

b. Dental care except as covered under subsection (8)f and other dental services covered by the surgical benefits section of this Plan, subsection (5)c of this section;

c. Foot care except in connection with services covered by the surgical or inpatient medical benefits section of this Plan, subsections (1) and (5) of this section;

Part 3 of Article 3 of Chapter 135 is set out twice.

d. Repealed by Session Laws 1991, c. 427, s. 29.

e. Expenses incurred in the event a covered individual is a bed patient in a hospital, or skilled nursing facility on the effective date of coverage, so long as the covered individual remains so confined;

f. Eyeglasses or other corrective lenses (except for cataract lenses certified as medically necessary for aphakia persons), hearing aids, braces for teeth, dental plates or bridges or other dental prostheses, air-conditioners, vaporizers, humidifiers, mattresses (other than as supplied with a hospital bed) and specially built shoes (other than attached to artificial limbs or orthopedic braces, and other than therapeutic shoes for diabetes or other high-risk conditions);

g. The difference between charges made by doctors and the UCR allowance for covered benefits, and the coinsurance expenses required under this Plan;

h. Habit forming drugs to support drug dependency;

i. Any other services not specifically outlined in this Plan.

(10) Coverage for Services of Advanced Practice Registered Nurses. — Notwithstanding any other provision of this section or the Plan, benefits shall be payable for services performed by an advanced practice registered nurse subject to the following limitations:

a. The service performed is within the nurse's lawful scope of practice;

b. The Plan provides benefits for identical services performed by other licensed health care providers;

c. The service is not performed while the nurse is a regular employee in an office of a licensed physician;

d. The service is not performed while the registered nurse is employed by a nursing facility (including a hospital, skilled nursing facility, intermediate care facility, or home care agency); and

e. Nothing in this subdivision is intended to authorize payment to more than one provider for the same service.

No lack of signature, referral, or employment by any other health care provider may be asserted to deny benefits under this subdivision.

For purposes of this subdivision, an "advanced practice registered nurse" means only a registered nurse who is duly licensed or certified as a nurse practitioner, clinical specialist in psychiatric and mental health nursing, or a nurse midwife.

(11) Coverage for Physician Services Provided by Physician Assistants. — Notwithstanding any other provision of this section or the Plan, benefits shall be payable for physician services performed by a duly licensed physician assistant subject to the following limitations:

a. The service performed is within the lawful scope of practice of the physician assistant in accordance with rules adopted by the North Carolina Medical Board, pursuant to G.S. 90-18.1, or is within the scope of practice of a physician assistant licensed or certified in and acting pursuant to laws and rules applicable in the area where the service is provided;

b. The plan currently provides reimbursement for identical services performed by other licensed health care providers;

c. The reimbursement is made to the physician, clinic, agency, or institution employing the physician assistant; and

d. Nothing in this subdivision authorizes payment to more than one provider for the same service.

As used in this subdivision, a "duly licensed physician assistant" is a physician assistant as defined by G.S. 90-18.1.

(12) Coverage for services of Clinical Pharmacist Practitioners. — Notwithstanding any other provision of this section or the Plan, benefits shall be payable for services performed by a Clinical Pharmacist Practitioner subject to the following limitations:

a. The service performed is within the Clinical Pharmacist Practitioner's limitations pursuant to G.S. 90-18.4.

b. The Plan currently provides reimbursement for identical services provided by other health care providers.

c. The reimbursement shall be at the discretion of the Executive Administrator regarding services covered and compensation.

d. The reimbursement is made to the Clinical Pharmacist Practitioner.

e. Nothing in this subdivision authorizes payment to more than one provider for the same service. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 8-14, 21.3, 21.5, 21.9; 1983 (Reg. Sess., 1984), c. 1110, s. 12; 1985, c. 192, ss. 2, 3, 6, 6.1, 11, 16-17; c. 732, ss. 1, 14, 15, 20-22, 27-29, 31-33, 35, 65, 66; 1985 (Reg. Sess., 1986), c. 1020, ss. 4, 11-15, 20, 23; 1987, c. 282, ss. 23, 24; c. 857, ss. 15-18; 1989, c. 752, s. 22(g)-(k); c. 770, s. 32; 1991, c. 427, ss. 14, 15, 21-29, 31, 37, 38, 41; 1993, c. 464, s. 6; 1995, c. 507, ss. 7.24(b), (c), 7.26, 7.27, 7.28B; c. 535, s. 28; 1996, 2nd Ex. Sess., c. 18, s. 28.24; 1997-312, s. 5; 1997-443, s. 11A.118(a); 1997-512, ss. 3, 5, 7, 8, 10, 11, 36-38(a); 1999-210, s. 7; 1999-237, s. 28.28(a); 2001-253, ss. 1(f)-(k), (o), (p); 2001-487, s. 86(b); 2002-126, s. 28.17; 2003-169, s. 1; 2003-186, s. 5(b); 2005-276, s. 29.31(b), (c); 2007-323, s. 28.22(e).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Section Repealed Effective July 1, 2008. — This section is repealed effective July 1, 2008, by Session Laws 2007-323, s. 28.22A(a).

Condition Precedent to Recovery of Compensation and Benefits for Adverse Reactions to Vaccination. — Session Laws 2003-169, s. 7, provides: "In the event that federal regulatory or statutory provisions providing compensation and benefits to persons for infection with smallpox, infection with vaccinia, or any adverse medical reaction incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) are adopted, a condition precedent to recovery under this act shall be that the person claiming compensation and benefits under this act shall first seek compensation and benefits under the federal provisions, with those provisions constituting primary coverage and the person then being entitled to compensation and benefits under this act not exceeding a total recovery under the federal provisions and this act equal to the amount available under the applicable provisions of this act." The Smallpox Emergency Personnel Protection Act of 2003, Public Law 108-20, 117 Stat. 638, authorized the Secretary of Health and Human Services to establish the Smallpox Vaccine Injury Compensation Program, which covers individuals immunized through Jan. 23, 2005 (smallpox) or vaccinia contacts who show symptoms by Feb. 22, 2005.

Editor's Note. — Session Laws 1997-312, s. 6, provides: "Nothing in this act shall apply to specified accident, specified disease, hospital indemnity, or long-term care health insurance policies."

Session Laws 1999-237, s. 28.28(a), repealed former subdivision (8)a, concerning prescription drugs. For present comparable provisions, see G.S. 135-40.5(a).

For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2003-186, s. 6, provides, in part, that for the purposes of this act, renewal of a health benefit plan is presumed to occur on each anniversary of the date on which coverage was first effective on the person or persons covered by the health benefit plan.

Subdivision (8)s, as amended by Session Laws 2003-186, s. 5(b), effective January 1, 2004, is applicable to all health benefit plans that are delivered, issued for delivery, or renewed on and after that date.

Session Laws 2004-161, s. 31.1, provides: "The Committee on Employee Hospital and Medical Benefits may study the following issues pertaining to benefits under the Teachers' and State Employees' Comprehensive Major Medical Plan ('Plan'):

"(1) Whether to repeal or otherwise modify G.S. 135-40.6(7) that limits coverage for examination and supervision of a normal newborn infant to only when the mother of the infant is receiving maternity benefits under the Plan.

"(2) Whether to adopt a federally qualified health reimbursement arrangement as an additional component of the Plan.

"(3) Whether deductibles and co-payment amounts applicable under the Plan should be based on income of the Plan member, with lower-income Plan members paying less than higher-income Plan members."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22(e), effective July 1, 2007, in the first sentence of the introductory paragraph, substituted "four hundred fifty dollars ($450.00)" for "three hundred fifty dollars ($350.00)" and substituted "one thousand three hundred fifty dollars ($1,350)" for "one thousand fifty dollars ($1,050)".

CASE NOTES

Applicability of Administrative Procedure Act to Dispute. — State employee's dispute with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, an administrative agency, seeking to recover costs of surgery, should have been brought under the Administrative Procedure Act, G.S. 150B-1 et seq. Vass v. Board of Trustees, 89 N.C. App. 333, 366 S.E.2d 1 (1988), modified and aff'd, 324 N.C. 402, 379 S.E.2d 26 (1989).

§ 135-40.6A. (Effective until July 1, 2008) Prior approval procedures.

(a) The Executive Administrator and Board of Trustees shall establish procedures to require prior medical approvals for the following services:

(1) Home Health Care Agency Services in accordance with G.S. 135-40.6(8)c.
(2) Repealed by Session Laws 1991, c. 427, s. 31.
(3) Ambulance Transport over 50 miles in accordance with G.S. 135-40.6(8)d.
(4) Oral Surgery in accordance with G.S. 135-40.6(5)c.
(5) Durable Medical Equipment (rental and purchase) in accordance with G.S. 135-40.6(8)e.
(6) Covered Transplants in accordance with G.S. 135-40.6(5)a.
(7) Repealed by Session Laws 1997-512, s. 38(b).
(8) Hospice Services in accordance with G.S. 135-40.6(8)q.
(9) Phase II clinical trials in accordance with G.S. 135-40.1(1b). Decisions pursuant to this section must be rendered by the Plan within 30 days after receipt of all medical documentation requested by the Plan.

(b) The Executive Administrator and Board of Trustees may establish procedures to require prior medical approvals for the following services:

(1) Skilled Nursing Facility Care.
(2) Private Duty Nursing.
(3) Speech Therapy (unless rendered in an inpatient hospital).
(4) Physical Therapy (in the home).

(5), (6) Repealed by Session Laws 1997-512, s. 39.

(7) Surgical Procedures:
  a. Blepharoplasties
  b. Surgery for Hermaphroditism
  c. Excision of Keloids
  d. Reduction Mammoplasty
  e. Morbid Obesity Surgery
  f. Penile Prosthesis
  g. Excision of Gynecomastia
  h. Cochlear Implants
  i. Revision of the Nasal Structure
  j. Abdominoplasty
  k. Fimbrioplasty
  l. Tubotubal Anastomasis
  m. Varicose Vein Surgery.

(8) Subcutaneous injection of "filling" material (Example: zyderm, silicone).

(8a) Botulinium toxin.

(9) Suction Lipectomy.

(10) Outpatient prescription drugs requiring prospective review under the Plan's pharmacy benefit management program.

(11) Outpatient prescription drugs for growth hormone, weight loss, and antifungal drugs for the treatment of nail fungus.

(12) Bone Anchored Hearing Aids (BAHA) surgically implanted for the treatment of hearing loss.

(c) No procedure for prior approval may be established except as provided by this Article as it may be amended from time to time. (1985 (Reg. Sess., 1986), c. 1020, s. 22; 1987, c. 857, s. 19; 1989, c. 770, s. 33; 1991, c. 427, ss. 31, 39; 1997-512, ss. 6, 38(b), 39; 1998-212, s. 28.29(d); 2000-141, s. 4; 2001-253, s. 1(l); 2006-249, s. 2(b).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Effect of Amendments. — Session Laws 2006-249, s. 2(b), effective July 1, 2006, added subdivision (b)(12).

§ 135-40.7. (Effective until July 1, 2008) General limitations and exclusions.

The following shall in no event be considered covered expenses nor will benefits described in G.S. 135-40.5 through G.S. 135-40.11 be payable for:

(1) Charges for any services rendered to a person prior to the date coverage under this Plan becomes effective with respect to such person.

(2) Charges for care in a nursing home, adult care home, convalescent home, or in any other facility or location for custodial or for rest cures.

(3) Charges to the extent paid, or which the individual is entitled to have paid, or to obtain without cost, in accordance with any government laws or regulations except Medicare. If a charge is made to any such person which he or she is legally required to pay, any benefits under this Plan will be computed in accordance with its provisions, taking

into account only such charge. "Any government" includes the federal, State, provincial or local government, or any political subdivision thereof, of the United States, Canada or any other country.

(4) Charges for services rendered in connection with any occupational injury or disease arising out of and in the course of employment with any employer, if (i) the employer furnishes, pays for or provides reimbursement for such charges, or (ii) the employer makes a settlement payment for such charges, or (iii) the person incurring such charges waives or fails to assert his or her rights respecting such charges.

(5) Charges for any care, treatment, services or supplies other than those which are certified by a physician who is attending the individual as being required for the medically necessary treatment of the injury or disease and are deemed medically necessary and appropriate for the treatment of the injury or disease by the Executive Administrator and Board of Trustees upon the advice of the Claims Processor. This subdivision shall not be construed, however, to require certification by an attending physician for a service provided by an advanced practice registered nurse acting within the nurse's lawful scope of practice, subject to the limitations of G.S. 135-40.6(10).

(6) Charges for any services rendered as a result of injury or sickness due to an act of war, declared or undeclared, which act shall have occurred after the effective date of a person's coverage under the Plan.

(7) Charges for personal services such as barber services, guest meals, radio and TV rentals, etc.

(8) Charges for any services with respect to which there is no legal obligation to pay. For the purposes of this item, any charge which exceeds the charge that would have been made if a person were not covered under this Plan shall, to the extent of such excess, be treated as a charge for which there is no legal obligation to pay; and any charge made by any person for anything which is normally or customarily furnished by such person without payment from the recipient or user thereof shall also be treated as a charge for which there is no legal obligation to pay.

(9) Charges during a continuous hospital confinement which commenced prior to the effective date of the person's coverage under this Plan.

(10) Charges in excess of either the usual, customary and reasonable charge for or the fair and reasonable value of the services or supply which gives rise to the expense; provided that in each instance the extent that a particular charge is usual, customary and reasonable or fair and reasonable shall be measured and determined by comparing the charge with charges made for similar things to individuals of similar age, sex, income and medical condition in the locality concerned, and the result of such determination shall constitute the maximum allowable as covered medical expenses unless the Claims Processor finds that considerations of fairness and equity in a particular set of circumstances require that greater or lesser charges be considered as covered medical expenses in that set of circumstances.

(11) Charges for or in connection with any dental work or dental treatment except to the extent that such work or treatment is specifically provided for under the Plan. Excluded is payment for surgical benefits for tooth replacement, such as crowns, bridges or dentures; orthodontic care; filling of teeth; extraction of teeth (whether or not impacted); root canal therapy; removal of root tips from teeth; treatment for tooth

decay, inflammation of gingiva, or surgical procedures on diseased gingiva or other periodontal surgery; repositioning soft tissue, reshaping bone, and removal of bony projections from the ridges preparatory to fitting of dentures; removal of cysts incidental to removal of root tips from teeth and extraction of teeth; or other dental procedures involving teeth and their bones or tissue supporting structure.

(12) Charges incurred for any medical observations or diagnostic study when no disease or injury is revealed, unless proof satisfactory to the Claims Processor is furnished that (i) the claim is in order in all other respects, (ii) the covered individual had a definite symptomatic condition of disease or injury other than hypochondria, and (iii) the medical observation and diagnostic studies concerned were not undertaken as a matter of routine physical examination or health checkup as provided in G.S. 135-40.6(8)s.

(13) Charges for eyeglasses or other corrective lenses (except for cataract lenses certified as medically necessary for aphakia persons) and hearing aids or examinations for the prescription or fitting thereof.

(14) Charges for cosmetic surgery or treatment except that charges for cosmetic surgery or treatment required for correction of damage caused by accidental injury sustained by the covered individual while coverage under this plan is in force on his or her account or to correct congenital deformities or anomalies shall not be excluded if they otherwise qualify as covered medical expenses.

(15) Admissions for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis and inpatient services or supplies which are not consistent with the diagnosis, for which admitted.

(16) Costs denied by the Claims Processor as part of its overall program of claim review and cost containment.

(16a) Charges in excess of negotiated rates allowed for preferred providers of institutional and professional medical care and services in accordance with the provisions of G.S. 135-40.4, when such preferred providers are reasonably available to provide institutional and professional medical care.

(17) If a covered service becomes excluded from coverage under the Plan, the Executive Administrator and Claims Processor may, in the event of exceptional situations creating undue hardships or adverse medical conditions, allow persons enrolled in the Plan to remain covered by the Plan's previous coverage for up to three months after the effective date of the change in coverage, provided the persons so enrolled had been undergoing a continuous plan of specific treatment initiated within three months prior to the effective date of the change in coverage.

(18) Charges for services unless a claim is filed within 18 months from the date of service.

(19) Any service, treatment, facility, equipment, drug, supply, or procedure that is experimental or investigational as defined in G.S. 135-40.1(7a). Clinical trial phases III and IV are covered by the Plan as is clinical trial phase II when approved by the Plan.

(20) Complications arising from noncovered services known at the time the noncovered services were provided.

(21) Charges related to a noncovered service, even if the charges would have been covered if rendered in connection with a covered service.

(22) Charges for services covered by the long-term care benefit provisions of Part 4 of this Article.

Part 3 of Article 3 of Chapter 135 is set out twice.

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(23) Charges disallowed by the Plan's pharmacy benefits manager. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 15, 21.4; 1985 (Reg. Sess., 1986), c. 1020, ss. 16, 20, 21, 25, 26; 1987, c. 282, s. 35; 1991, c. 427, ss. 16, 30, 40; 1993, c. 464, s. 7; 1995, c. 535, s. 29; 1997-456, s. 55.9; 1997-468, s. 6; 1997-512, ss. 4, 13; 1998-212, s. 28.29(c); 2000-141, s. 5.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

CASE NOTES

No Legal Obligation to Pay. — When insurers and employers who were ordered by the Industrial Commission to pay certain amounts to hospitals sought relief under G.S. 135-40.7(8), claiming they had been required to pay amounts for services greater than that which people not covered under the State Teachers' and Employees' Health Plan would have been required to pay, they were not entitled to relief because G.S. 135-40.4 authorized a diagnostic-related grouping system for the reimbursement of hospitals, such as that under which the amounts the employers and insurers were ordered to pay were approved. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Cited in Vass v. Board of Trustees, 108 N.C. App. 251, 423 S.E.2d 796 (1992).

§ 135-40.7A: Repealed by Session Laws 1997-512, s. 15.

§ 135-40.7B. (Effective until July 1, 2008) Special provisions for chemical dependency and mental health benefits.

(a) Except as otherwise provided in this section, benefits for the treatment of mental illness and chemical dependency are covered by the Plan and shall be subject to the same deductibles, durational limits, and coinsurance factors as are benefits for physical illness generally.

(b) Notwithstanding any other provision of this Part, the following necessary services for the care and treatment of chemical dependency and mental illness shall be covered under this section: allowable institutional and professional charges for inpatient care, outpatient care, intensive outpatient program services, partial hospitalization treatment, and residential care and treatment:

(1) For mental illness treatment:
  a. Licensed psychiatric hospitals;
  b. Licensed psychiatric beds in licensed general hospitals;
  c. Licensed residential treatment facilities that have 24-hour on-site care provided by a registered nurse and that hold current accreditation by a national accrediting body approved by the Plan's mental health case manager;
  d. Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities;
  e. Licensed intensive outpatient treatment programs; and
  f. Licensed partial hospitalization programs.

(2) For chemical dependency treatment:
  a. Licensed chemical dependency units in licensed psychiatric hospitals;

Part 3 of Article 3 of Chapter 135 is set out twice.

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b. Licensed chemical dependency hospitals;
c. Licensed chemical dependency treatment facilities;
d. Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities;
e. Licensed intensive outpatient treatment programs;
f. Licensed partial hospitalization programs; and
g. Medical detoxification facilities or units.

(c) Notwithstanding any other provisions of this Part, the following providers and no others may provide necessary care and treatment for mental health under this section:

(1) Psychiatrists who have completed a residency in psychiatry approved by the American Council for Graduate Medical Education and who are licensed as medical doctors or doctors of osteopathy in the state in which they perform and services covered by the Plan;
(2) Licensed or certified doctors of psychology;
(3) Certified clinical social workers and licensed clinical social workers;
(3a) Licensed professional counselors;
(4) Certified clinical specialists in psychiatric and mental health nursing;
(4a) Nurses working under the employment and direct supervision of such physicians, psychologists, or psychiatrists;
(5) Repealed by Session Laws 1997-512, s. 14.
(6) Licensed psychological associates;
(7), (8) Repealed by Session Laws 1997-512, s. 14.
(9) Certified fee-based practicing pastoral counselors;
(10) Licensed physician assistants under the supervision of a licensed psychiatrist and acting pursuant to G.S. 90-18.1 or the applicable laws and rules of the area in which the physician assistant is licensed or certified; and
(11) Licensed marriage and family therapists.

(c1) Notwithstanding any other provisions of this Part, the following providers and no others may provide necessary care and treatment for chemical dependency under this section:

(1) The following providers with appropriate substance abuse training and experience in the field of alcohol and other drug abuse as determined by the mental health case manager, in facilities described in subdivision (b)(2) of this section, in day/night programs or outpatient treatment facilities licensed after July 1, 1984, under Article 2 of Chapter 122C of the General Statutes or in North Carolina area programs in substance abuse services are authorized to provide treatment for chemical dependency under this section:
  a. Licensed physicians including, but not limited to, physicians who are certified in substance abuse by the American Society of Addiction Medicine (ASAM);
  b. Licensed or certified psychologists;
  c. Psychiatrists;
  d. Certified substance abuse counselors working under the direct supervision of such physicians, psychologists, or psychiatrists;
  e. Licensed psychological associates;
  f. Nurses working under the direct supervision of such physicians, psychologists, or psychiatrists;
  g. Certified clinical social workers and licensed clinical social workers;
  h. Certified clinical specialists in psychiatric and mental health nursing;

- i. Licensed professional counselors;
- j. Certified fee-based practicing pastoral counselors;
- k. Substance abuse professionals certified under Article 5C of Chapter 90 of the General Statutes; and
- l. Licensed marriage and family and therapists.

(2) The following providers with appropriate substance abuse training and experience in the field of alcohol and other drug abuse as determined by the mental health case manager are authorized to provide treatment for chemical dependency in outpatient practice settings:

- a. Licensed physicians including, but not limited to, physicians who are certified in substance abuse by the American Society of Addiction Medicine (ASAM);
- b. Licensed or certified psychologists;
- c. Psychiatrists;
- d. Certified substance abuse counselors working under the direct supervision of such physicians, psychologists, or psychiatrists;
- e. Licensed psychological associates;
- f. Nurses working under the direct supervision of such physicians, psychologists, or psychiatrists;
- g. Certified clinical social workers and licensed clinical social workers;
- h. Certified clinical specialists in psychiatric and mental health nursing;
- i. Licensed professional counselors;
- j. Certified fee-based practicing pastoral counselors;
  - 1. Substance abuse professionals certified under Article 5C of Chapter 90 of the General Statutes;
- j1. Licensed marriage and family and therapists; and
- k. In the absence of meeting one of the criteria above, the Mental Health Case Manager could consider, on a case-by-case basis, a provider who supplies:
  - 1. Evidence of graduate education in the diagnosis and treatment of chemical dependency, and
  - 2. Supervised work experience in the diagnosis and treatment of chemical dependency (with supervision by an appropriately credentialed provider), and
  - 3. Substantive past and current continuing education in the diagnosis and treatment of chemical dependency commensurate with one's profession.

Provided, however, that nothing in this subsection shall prohibit the Plan from requiring the most cost-effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency.

(d) Benefits provided under this section shall be subject to a case management program for medical necessity and medical appropriateness consisting of (i) precertification of outpatient visits beyond 26 visits each Plan year, (ii) all electroconvulsive treatment, (iii) inpatient utilization review through preadmission and length-of-stay certification for nonemergency admissions to the following levels of care: inpatient units, partial hospitalization programs, residential treatment centers, chemical dependency detoxification and treatment programs, and intensive outpatient programs, (iv) length-of-stay certification of emergency inpatient admissions, and (v) a network of qualified, available providers of inpatient and outpatient psychiatric and chemical dependency treatment. Care which is not both medically necessary and medically appropriate will be noncertified, and benefits will be denied. Where qualified preferred providers of inpatient and outpatient care are reasonably available, use of providers outside of the preferred network shall be subject to a twenty percent (20%) coinsurance rate up to five thousand dollars ($5,000) per fiscal year to be assessed against each covered individual in addition to the general coinsurance percentage and maximum fiscal year amount specified by G.S. 135-40.4 and G.S. 135-40.6.

(e) For the purpose of this section, "emergency" is the sudden and unexpected onset of a condition manifesting itself by acute symptoms of sufficient severity that, in the absence of an immediate psychiatric or chemical dependency inpatient admission, could imminently result in injury or danger to self or others.

(f) For purposes of this section, the word "Plan" includes all optional programs or plans in effect under the Teachers' and State Employees' Comprehensive Major Medical Plan and its successor Plans. (1991, c. 427, s. 32; 1993, c. 464, ss. 3(a), 4; 1995, c. 157, s. 2; c. 406, s. 2; 1997-512, s. 14; 1999-186, s. 1; 1999-199, s. 3; 1999-210, s. 8; 1999-351, s. 7; 2001-258, s. 1; 2001-487, s. 40(n); 2003-368, ss. 2, 3; 2004-124, s. 31.28; 2007-323, s. 28.22(f).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22.(f), effective July 1, 2007, added subsection (f).

§ 135-40.8. (Effective until July 1, 2008) Out-of-pocket expenditures.

(a) For the balance of any fiscal year after each eligible employee, retired employee, or dependent satisfies the cash deductible, the Plan pays eighty percent (80%) of the eligible expenses outlined in G.S. 135-40.6. The remaining twenty percent (20%) is paid by the covered individual until two thousand dollars ($2,000) per covered individual up to an aggregate of six thousand dollars ($6,000) per employee and child(ren) or employee and family coverage contract per fiscal year in excess of the deductible has been paid out of pocket. The Plan then pays one hundred percent (100%) of the remaining covered expenses.

(b) Repealed by Session Laws 2001-253, s. 1(m), effective July 1, 2001.

(c) Notwithstanding any other provision of this Article, on the first day of each confinement the Plan does not pay the first one hundred fifty dollars ($150.00) of the room accommodation charge allowable under G.S. 135-40.6(1). Any readmission within 60 days after discharge for the same reason shall be considered the same confinement for the purpose of this subsection. The exclusion made under this subsection shall not count toward the deductible nor toward the maximum amount of coinsurance out-of-pocket costs.

(c1) Notwithstanding any other provision of this Article, the Plan does not pay the first seventy-five dollars ($75.00) of the facility fees and ancillary charges for allowable charges exceeding five hundred dollars ($500.00) per episode of care for hospital outpatient departments and ambulatory surgical facilities under G.S. 135-40.6(4). Readmission within 30 days after discharge for the same reason shall be considered the same episode of care for the purpose of this subsection. The exclusion made under this subsection shall not count toward the deductible nor toward the maximum amount of coinsurance out-of-pocket costs.

(c2) Notwithstanding any other provision of this Article, the Plan does not pay the first two hundred dollars ($200.00) of allowable emergency room charges when admission to a hospital pursuant to the emergency room use does not immediately follow. This subsection shall apply only when less costly alternative means of emergency medical care are reasonably available as determined by the Executive Administrator and Board of Trustees. The exclusion made under this subsection shall not count toward the deductible nor toward the maximum amount of coinsurance out-of-pocket costs.

(c3) Notwithstanding any other provision of this Article, the Plan does not pay for the first twenty-five dollars ($25.00) of allowable charges for each home, office, or skilled nursing facility visit under the provisions of G.S. 135-40.6(7)a. and b., G.S. 135-40.6(4), G.S. 135-40.6(8)i., j., k., n., r., and s., and G.S. 135-40.5(e). The co-payment assessed by this subsection shall be assessed only once per person per provider per day and shall not apply to laboratory, pathology, and radiology services, or to charges for injected medications. The exclusion made under this subsection shall not count toward the deductible nor toward the maximum amount of coinsurance out-of-pocket costs.

(d) Where a network of qualified preferred providers of inpatient and outpatient hospital care is reasonably available for use by those individuals covered by the Plan, use of providers outside of the preferred network shall be subject to a twenty percent (20%) coinsurance rate up to five thousand dollars ($5,000) per fiscal year per covered individual up to an aggregate of fifteen thousand dollars ($15,000) per employee and child(ren) or employee and family coverage contract per fiscal year in addition to the general coinsurance percentage and maximum fiscal year amount specified by G.S. 135-40.4 and G.S. 135-40.6. The Plan then pays one hundred percent (100%) of the remaining covered expenses.

(e) Where qualified out-of-state preferred providers of medical care are not reasonably available in medical emergencies, the Plan pays the amounts covered by subsection (a) of this section. Any amount of charges for services under this section that exceeds the amount allowed by the Plan for the services of qualified preferred providers under this section shall be negotiated between the Plan and the provider of medical services, and the Plan shall ensure that the Plan member is not held financially responsible for the amount of these excess charges. If a Plan member is not capable of making a decision about choosing an in-State qualified preferred provider and emergency services personnel transport the Plan member to a provider outside of the Plan network, then the coverage under this subsection shall apply. As used in this section, a "medical emergency" is the sudden and unexpected onset of a condition manifesting itself by acute symptoms of sufficient severity that, in the absence of immediate medical care, could imminently result in injury or danger to self or others. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 16; 1985, c. 192, ss. 4, 8, 10, 18; 1985 (Reg. Sess., 1986), c. 1020, s. 17; 1987, c. 857, s. 20; 1989, c. 752, s. 22(m), (n); 1989 (Reg. Sess., 1990), c. 1024, s. 2; 1991, c. 427, ss. 17, 33, 34; 2001-253, s. 1(m); 2001-513, s. 22(a); 2003-284, ss. 30.19C(a), 30.19C(b); 2005-276, s. 29.31(d); 2007-323, s. 28.22(g).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Section Repealed Effective July 1, 2008. — This section is repealed effective July 1, 2008, by Session Laws 2007-323, s. 28.22A(a).

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-139.8.

Session Laws 2001-513, s. 22(b), provides: "In accordance with G.S. 135-40.8(c3), enacted by Section l(m) of Session Law 2001-253, the first fifteen dollars ($15.00) of allowable charges not paid by the Plan does not apply to cardiac rehabilitation benefits."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22(g), effective July 1, 2007, substituted "twenty-five dollars ($25.00)" for "fifteen dollars ($15.00)" in the first sentence of subsection (c3).

§ 135-40.9. (Effective until July 1, 2008) Maximum benefits.

The maximum lifetime benefit for each covered individual will be five million dollars ($5,000,000). (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1991, c. 427, s. 35; 1995, c. 507, s. 7.25; 2001-253, s. 1(n).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 1995, c. 507, s. 7.25, which substituted "two million dollars ($2,000,000)" for "one million dollars ($1,000,000)", was effective retroactively to January 1, 1994.

For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

§ 135-40.10. (Effective until July 1, 2008) Persons eligible for Medicare.

(a) Benefits payable for covered expenses under this Plan in G.S. 135-40.5 through G.S. 135-40.9 will be reduced by any benefits payable for the same covered expenses under Medicare, so that Medicare will be the primary carrier except where compliance with federal law specifies otherwise.

(b) For those participants eligible for Medicare, the State's plan will be administered on a "carve out" basis. The provisions of the plan are applied to the charges not paid by Medicare (Parts A & B). In other words, those charges not paid by Medicare would be subject to the deductible and coinsurance of the Plan just as if the charges not paid by Medicare were the total bill.

(c) For those individuals eligible for Part A (at no cost to them), benefits under this program will be reduced by the amounts to which the covered individuals would be entitled to under Parts A and B of Medicare, even if they choose not to enroll for Part B.

(d) Notwithstanding the foregoing provisions of this section or any other provisions of the Plan, the Executive Administrator and Board of Trustees may enter into negotiations with the Health Care Financing Administration, U.S. Department of Health and Human Services, in order to secure a more favorable coordination of the Plan's benefits with those provided by Medicare, including but not limited to, measures by which the Plan would provide Medicare benefits for all of its Medicare-eligible members in return for adequate payments from the federal government in providing such benefits. Should such negotiations result in an agreement favorable to the Plan and its Medicare-eligible members, the Executive Administrator and Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, implement such an agreement which shall supersede all other provisions of the Plan to the contrary related to its payment of claims for Medicare-eligible members. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985 (Reg. Sess., 1986), c. 1020, s. 18; 1987, c. 857, s. 21; 1989, c. 752, s. 22(o).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.11. (Effective until July 1, 2008) Cessation of coverage.

(a) Coverage under this Plan of an employee and his or her surviving spouse or eligible dependent children or of a retired employee and his or her surviving spouse or eligible dependent children shall cease on the earliest of the following dates:

(1) The last day of the month in which an employee or retired employee dies. Provided such surviving spouse or eligible dependent children were covered under the Plan at the time of death of the former employee or retired employee, or were covered on September 30, 1986, any such surviving spouse or eligible dependent children may then elect to continue coverage under the Plan by submitting written application to the Claims Processor and by paying the cost for such coverage when due at the applicable fees. Such coverage shall cease on the last day of the month in which such surviving spouse or eligible dependent children die, except as provided by this Article.

(2) The last day of the month in which an employee's employment with the State is terminated as provided in subsection (c) of this section.

(3) The last day of the month in which a divorce becomes final.

(4) The last day of the month in which an employee or retired employee requests cancellation of coverage.

(5) The last day of the month in which a covered individual enters active military service.

(6) The last day of the month in which a covered individual is found to have knowingly and willfully made or caused to be made a false statement or false representation of a material fact in a claim for reimbursement of medical services under the Plan. The Executive Administrator and Board of Trustees may make an exception to the provisions of this subdivision when persons subject to this subdivision have had a cessation of coverage for a period of five years and have made a full and complete restitution to the Plan for all fraudulent claim amounts. Nothing in this subdivision shall be construed to obligate the Executive Administrator and Board of Trustees to make an exception as allowed for under this subdivision.

(7) The last day of the month in which an employee who is Medicare-eligible selects Medicare to be the primary payer of medical benefits. Coverage for a Medicare-eligible spouse of an employee shall also cease the last day of the month in which Medicare is selected to be the primary payer of medical benefits for the Medicare-eligible spouse. Such members are eligible to apply for conversion coverage.

(b) Coverage under this Plan as a dependent child ceases when the child ceases to be a dependent child as defined by G.S. 135-40.1(3) except, coverage may continue under this Plan for a period of not more than 36 months after loss of dependent status on a fully contributory basis provided the dependent child was covered under the Plan at the time of loss of dependent status.

Part 3 of Article 3 of Chapter 135 is set out twice.

(b1) Coverage under the Plan as a surviving dependent child whether covered as a dependent of a surviving spouse, or as an individual member (no living parent), ceases when the child ceases to be a dependent child as defined by G.S. 135-40.1(3), except coverage may continue under the Plan on a fully contributory basis for a period of not more than 36 months after loss of dependent status.

(c) Termination of employment shall mean termination for any reason, including layoff and leave of absence, except as provided in (a)(1) and (2) of this section, but shall not, for purposes of this Plan, include retirement upon which the employee is granted an immediate service or disability pension under and pursuant to a State-supported Retirement System.

(1) In the event of termination for any reason other than death, coverage under the Plan for an employee and his or her eligible spouse or dependent children, provided the eligible spouse or dependent children were covered under the Plan at termination of employment may be continued for a period of not more than 18 months following termination of employment on a fully contributory basis. Employees who were covered under the Plan at termination of employment may be continued for a period of not more than 18 months or 29 months if determined to be disabled under the Social Security Act, Title II, OASDI or Title XVI, SSI.

(2) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(r).

(3) In the event of approved leave of absence without pay, other than for active duty in the armed forces of the United States, coverage under this Plan for an employee and his or her dependents may be continued during the period of such leave of absence by the employee's paying one hundred percent (100%) of the cost.

(4) If employment is terminated in the second half of a calendar month and the covered individual has made the required contribution for any coverage in the following month, that coverage will be continued to the end of the calendar month following the month in which employment was terminated.

(5) Employees paid for less than 12 months in a year, who are terminated at the end of the work year and who have made contributions for the non-work months, will continue to be covered to the end of the period for which they have made contributions, with the understanding that if they are not employed by another State-covered employer under this Plan at the beginning of the next work year, the employee will refund to the ex-employer the amount of the employer's cost paid for them during the non-paycheck months.

(6) Any employee receiving benefits pursuant to Article 6 of this Chapter when the employee has less than five years of retirement membership service, or an employee on leave of absence without pay due to illness or injury for up to 12 months, is entitled to continued coverage under the Plan for the employee and any eligible dependents by the employee's paying one hundred percent (100%) of the cost.

(d) No benefits will be paid by this Plan for any expenses incurred or treatment received after cessation of coverage as provided in subsections (a) or (b) of this section, except that in the event of hospital confinement at that time, hospitalization benefits as described in G.S. 135-40.6 will continue to the extent provided therein.

(e) A legally divorced spouse and any eligible dependent children of a covered employee or retired employee may continue coverage under this Plan for a period of not more than 36 months following the first of the month after

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a divorce becomes final on a fully contributory basis, provided the former spouse and any eligible dependent children were covered under the Plan at the time a divorce became final.

(f) A legally separated spouse of a covered employee or retired employee may continue coverage under this Plan for a period not to exceed 36 months from the separation date on a fully contributory basis, provided the separated spouse was covered under the Plan at the time of separation and provided the covered employee's or retired employee's actions result in the loss of coverage for the separated spouse. Eligible dependent children may also continue coverage if covered under the Plan at time of separation, provided the employee's or retired employee's actions result in the loss of coverage for the dependent children.

(g) Whenever this section gives a right to continuation coverage, such coverage must be elected no later than a date set by the Executive Administrator and Board of Trustees.

(h) Continuation coverage under this Plan shall not be continued past the occurrence of any one of the following events:

(1) The termination of the Plan.

(2) Failure of a Plan member to pay monthly in advance any required premiums.

(3) A person becomes a covered employee or a dependent of a covered employee under any group health plan and that group health plan has no restrictions or limitations on benefits.

(4) A person becomes eligible for Medicare benefits on or after the effective date of the continuation coverage.

(5) The person was determined to be no longer disabled, provided the 18-month coverage was extended to 29 months due to having been determined to be disabled under the Social Security Act, Title II, OASDI or Title XVI, SSI.

(6) The person reaches the maximum applicable continuation period of 18, 29, or 36 months.

(i) Notice requirements concerning continuation coverage shall be developed by the Executive Administrator and Board of Trustees.

(j) The spouse and any eligible dependent children of a covered employee may continue coverage under the Plan on a fully contributory basis for a period not to exceed 36 months from the date the employee becomes eligible for Medicare benefits which results in a loss of coverage under the Plan, provided that the spouse and eligible dependent children were covered under the Plan at the time the employee became eligible for Medicare benefits which results in a loss of coverage under the Plan. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 17, 19-21; 1985, c. 732, ss. 13, 34; 1985 (Reg. Sess., 1986), c. 1020, ss. 19, 29(m)-(x); 1987, c. 738, s. 29(o); 1989, c. 752, s. 22(p); 1991, c. 427, s. 42; 1995, c. 278, s. 2; 1997-512, ss. 32-35; 2000-184, s. 4.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

CASE NOTES

Cited in Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Part 3 of Article 3 of Chapter 135 is set out twice.

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§ 135-40.12. (Effective until July 1, 2008) Conversion.

(a) Upon a cessation of group coverage under the Plan and/or eligibility for group coverage under the Plan, an employee or dependent shall be entitled to a conversion to nongroup coverage without the necessity of a physical examination. Such conversion coverage shall include hospitalization, surgical, and medical benefits as contained in the major medical and alternative plan conversion provisions of Article 53 of Chapter 58 of the General Statutes. The Executive Administrator and Board of Trustees in their sole discretion shall approve the conversion coverage, which shall be administered by the Claims Processor through an insurance contract arranged by the Claims Processor, or administered as otherwise directed by the Executive Administrator and Board of Trustees. An eligible employee or dependent must apply for conversion coverage within 30 days after termination of group eligibility.

(b) The Executive Administrator and Board of Trustees shall provide for the continuation of conversion privilege exercised under the predecessor plan, on a fully contributory basis. The Executive Administrator and Board of Trustees shall consult with the Committee on Employee Hospital and Medical Benefits before taking action under this subsection. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 21.6; 1985, c. 732, ss. 30, 56; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.13. (Effective until July 1, 2008) Coordination of benefits.

(a) Benefits Subject to This Provision. — All of the benefits provided under this Comprehensive Major Medical Plan.

(b) Definitions. —

(1) "Plan" means any Plan providing benefits or services for or by reason of medical or dental care or treatment, which benefits or services are provided by (i) group, blanket or franchise insured or uninsured coverage, (ii) hospital services prepayment Plan on a group basis, medical service prepayment Plan on a group basis, group practice, or other prepayment coverage on a group basis, (iii) any coverage under labor-management trusteed plans, union welfare plans, employer organization plans, or employee benefit organization plans, and (iv) any coverage under governmental programs except Medicare, or any coverage required or provided by any statute, which coverage is not otherwise excluded from the calculation of benefits under this Plan, but the term "Plan" shall not include any individual policies.

The term "Plan" shall be construed separately with respect to each policy, contract, or other arrangement for benefits or services and separately with respect to that portion of any such policy, contract, or other arrangement which reserves the right to take the benefits or services of other plans into consideration in determining its benefits and that portion which does not.

(2) "Covered services" means any necessary, reasonable and customary item of expense at least a portion of which is covered under at least one of the plans covering the person for whom claim is made. To the extent legally possible, it shall be synonymous with allowable ex-

penses. When a Plan provides benefits in the form of services rather than cash payments, the reasonable cash value of each service rendered shall be deemed to be both an allowable expense and a benefit paid.

(3) "Claim determination period" means any period of time during which a person covered by this Plan is eligible to receive benefits.

(c) Effect on Benefits. —

(1) This provision shall apply in determining the benefits as to a person covered under this Plan for any claim determination period if, for the covered services incurred as to such a person during such claim determination period, the sum of:

a. The benefits that would be payable under this Plan in the absence of this provision, and

b. The benefits that would be payable under all other plans in the absence therein of provisions of similar purpose of this provision would exceed the usual and customary charges for such covered services.

(2) As to any claim determination period with respect to which this provision is applicable, the benefits that would be payable under this Plan in the absence of this provision for the covered services incurred as to such person during such claim determination period shall be reduced to the extent necessary so that the sum of such reduced benefit and all the benefits payable for such covered services under all other plans, except as provided in Item (3) immediately below, shall not exceed the total of such covered services. Benefits payable under another Plan include the benefits that would have been payable had claim been duly made therefor. In the case of another Plan which does not contain a provision coordinating its benefits, the benefits of such other Plan shall be determined before the benefits of this Plan. A Plan without a coordination of benefits provision shall be deemed to be the primary carrier within the meaning of this Plan.

(3) If:

a. Another Plan which is involved in Item (2) immediately above and which contains provisions coordinating its benefits with those of this Plan would, according to its rules, determine its benefits after the benefits of this Plan have been determined, and

b. The rules set forth in Item (4) immediately below would require this Plan to determine its benefits before such other Plan, then the benefits of such other plan will be ignored for the purposes of determining the benefits under this Plan.

(4) For the purposes of Item (3) immediately above, the rules establishing the order of benefit determination are:

a. The benefits of a Plan which covers the person on whose covered services claim is based other than as a dependent shall be determined before the benefits of a Plan which covers such person as a dependent;

b. Except as stated in sub-subdivision c of this subdivision when this Plan and another Plan cover the same child as a dependent of different persons called parents:

1. the benefits of the Plan of the parent whose birthday falls earlier in the calendar year are determined before the benefits of the Plan of the parent whose birthday falls later in the calendar year; but

2. if both parents have the same birthday, the benefits of the Plan that has covered a parent for a longer period of time are

determined before those of the Plan that has covered the other parent for a shorter period of time; however, if the other Plan has a rule based on the gender of the parent, and if as a result, the Plans do not agree on the order of benefits, the rule in the other Plan will determine the order of benefits.

c. If two or more Plans cover a person as a dependent child of divorced or separated parents, benefits for the child are determined in this order:

1. first, the Plan of the parent with custody of the child;
2. second, the Plan of the spouse of the parent with custody of the child; and
3. third, the Plan of the parent not having custody of the child.

However, if the specific terms of a court decree state that one of the parents is responsible for the health care expenses of the child, and the entity obligated to pay or provide the benefits of the Plan of that parent has actual knowledge of those terms, the benefits of that Plan are determined first. This paragraph does not apply with respect to any claim determination period or Plan year during which any benefits are actually paid or provided before the entity has actual knowledge.

d. The benefits of a Plan that covers the person as an employee who is neither laid off nor retired (or as that employee's dependent) are determined before those of a Plan that covers that person as a laid-off or retired employee (or as that employee's dependent). If the other Plan does not have this rule, and if, as a result, the Plans do not agree on the order of benefits, this rule is ignored.

e. When rules a and b immediately above do not establish an order of benefit determination, the benefits of a Plan which has covered the person on whose covered services claim is based for the longer period of time shall be determined before the benefits of a Plan which had covered such person for the shorter period of time.

(5) When this provision operates to reduce the total amount of benefits otherwise payable as to a person covered under this Plan during any claim determination period, each benefit that would be payable in the absence of this provision shall be reduced proportionately, and such reduced amount shall be charged against any applicable benefit limit of this Plan.

(d) Medicare Participants' Eligibility. — In the case of employees eligible under the Plan who are also eligible for Medicare benefits, benefits under the Plan will be paid in coordination with Medicare benefits in a manner consistent with federal law.

(e) Right to Receive and Release Necessary Information. — For the purpose of determining the applicability of and implementing the terms of this provision of this Plan or any provision of similar purpose of any other Plan, the Claims Processor may, without the consent of or notice to any person, release to or obtain from any insurance company or other organization or person any information, with respect to any person, which the Claims Processor deems to be necessary for such purposes. Any person claiming benefits under this Plan shall furnish to the Claims Processor such information as may be necessary to implement the provision.

(f) Facility of Payment. — Whenever payments which should have been made under this Plan, in accordance with this provision, have been made under any other plans, the Claims Processor shall have the right, exercisable alone and in its sole discretion, to pay over to any organizations making such other payments any amounts it shall determine to be warranted in order to satisfy the intent of this provision, and amounts to be paid shall be deemed to be benefits paid under this Plan, and, to the extent of such payments, the Claims Processor shall be fully discharged from liability under the Plan.

(g) Right of Recovery. — Whenever payments have been made by the Claims Processor with respect to covered services in a total amount which is, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Claims Processor shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Claims Processor shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, or any other organizations. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 18; 1985 (Reg. Sess., 1986), c. 1020, ss. 20, 30; 1989, c. 770, s. 35.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.13A. (Effective until July 1, 2008) Liability of third person; right of subrogation; right of first recovery.

(a) The Plan shall have the right of subrogation upon all of the Plan member's right to recover from a liable third party for payment made under the Plan, for all medical expenses, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise. Notwithstanding any other provision of law to the contrary, the recovery limitation set forth in G.S. 28A-18-2 shall not apply to the Plan's right of subrogation of Plan members.

(b) If the Plan is precluded from exercising its right of subrogation, it may exercise its rights of recovery pursuant to G.S. 135-40.13(g). If the Plan recovers damages from a liable third party in excess of the claims paid, any excess will be paid to the member, less a proportionate share of the costs of collection.

(c) In the event a Plan member recovers any amounts from a liable third party to which the Plan is entitled under this section, the Plan may recover the amounts directly from the Plan member. The Plan has a lien, for not more than the value of claims paid related to the liability of the third party, on any damages subsequently recovered against the liable third party. If the Plan member fails to pursue the remedy against a liable third party, the Plan is subrogated to the rights of the Plan member and is entitled to enforce liability in the Plan's own name or in the name of the Plan member for the amount paid by the Plan.

(d) In no event shall the Plan's lien exceed fifty percent (50%) of the total damages recovered by the Plan member, exclusive of the Plan member's reasonable costs of collection as determined by the Plan in the Plan's sole discretion. The decision by the Plan as to the reasonable cost of collection is conclusive and is not a "final agency decision" for purposes of a contested case under Chapter 150B of the General Statutes. Notice of the Plan's lien or right to recovery shall be presumed when a Plan member is represented by an attorney, and the attorney shall disburse proceeds pursuant to this section. (2004-124, s. 31.25; 2006-264, s. 66(a).)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Effect of Amendments. — Session Laws 2006-264, s. 66(a), effective August 27, 2006, and applicable to payments made by the Plan after July 20, 2004, for which reimbursement is sought on or after August 27, 2006, rewrote the section.

§ 135-40.14. (Effective until July 1, 2008) Right to amend.

The General Assembly reserves the right to alter, amend, or repeal Parts 2 and 3 of this Article. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 62.)

Part 3 of Article 3 Set Out Twice. — This part is effective until July 1, 2008. For the Part as effective July 1, 2008, see the following Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Part 3. State Health Plan for Teachers and State Employees

(Effective July 1, 2008).

§ 135-40. (Effective July 1, 2008) Undertaking.

(a) The State of North Carolina undertakes to make available a State Health Plan (hereinafter called the 'Plan') exclusively for the benefit of its employees, retired employees and certain of their dependents which will pay benefits in accordance with the terms hereof. The Plan shall have all the powers and privileges of a corporation and shall be known as the State Health Plan for Teachers and State Employees. The Executive Administrator and Board of Trustees shall carry out their duties and responsibilities as fiduciaries for the Plan. The Plan shall be a comprehensive benefit plan that includes noncontributory coverage and may be an optional PPO or other type optional benefit plan. Chemical dependency and mental health benefits under G.S. 135-40.7B apply to the Plan and all optional benefit plans offered under an optional PPO or other type of optional benefit plan.

(a1) The State of North Carolina deems it to be in the public interest for North Carolina firemen, rescue squad workers, and members of the national guard, and certain of their dependents, who are not eligible for any other type of comprehensive group health insurance or other comprehensive group health benefits, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months, to be given the opportunity to participate in the benefits provided by the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan.State Health Plan for Teachers and State Employees. Coverage under the Plan shall be voluntary for eligible firemen, rescue squad workers, and members of the national guard who elect participation in the Plan for themselves and their eligible dependents.

(b) The Plan benefits will be provided under contracts between the State and the Claims Processor selected by the State. Claims Processor refers to the administrator, third party administrator or other party contracting with the

State to administer the Plan benefits. Such contracts shall include the substance of G.S. 135-40.1 through G.S. 135-40.13 and the description of Plan in the request for proposal, and shall be administered by the respective Claims Processor of the State which will determine benefits and other questions arising thereunder. The contracts necessarily will conform to applicable State laws. If any of the provisions of G.S. 135-40.1 through G.S. 135-40.13 and the request for proposals must be modified for inclusion in the contract because of State laws, such modification will be made.

(c) Payroll deduction shall be available for coverage under this Part or under G.S. 135-39.5B of amounts not paid by the State.

(d) Notwithstanding any other provisions of the Plan, the Executive Administrator and Board of Trustees are specifically authorized to use all appropriate means to secure tax qualification of the Plan under any applicable provisions of the Internal Revenue Code of 1954 as amended. The Executive Administrator and Board of Trustees shall furthermore comply with all applicable provisions of the Internal Revenue Code as amended, to the extent that this compliance is not prohibited by this Article. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 44, 61; 1985 (Reg. Sess., 1986), c. 1020, ss. 8, 20; 1989, c. 752, s. 22(b); 1999-237, s. 28.29(a); 2007-323, s. 28.22A(f), (o); 2007-345, s. 12.)

Part 3 of Article 3 Set Out Twice. — This Part is effective July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — The Part 3 heading has been rewritten by Session Laws 2007-323, s. 28.22A(e), effective July 1, 2008, by substituting "State Health Plan for Teachers and State Employees" for "Comprehensive Major Medical Plan."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-161, s. 31.1, provides: "The Committee on Employee Hospital and Medical Benefits may study the following issues pertaining to benefits under the Teachers' and State Employees' Comprehensive Major Medical Plan ('Plan'):

"(1) Whether to repeal or otherwise modify G.S. 135-40.6(7) that limits coverage for examination and supervision of a normal newborn infant to only when the mother of the infant is receiving maternity benefits under the Plan.

"(2) Whether to adopt a federally qualified health reimbursement arrangement as an additional component of the Plan.

"(3) Whether deductibles and co-payment amounts applicable under the Plan should be based on income of the Plan member, with lower-income Plan members paying less than higher-income Plan members."

Session Laws 2007-323, s. 28.22(a), provides: "The Teachers' and State Employees' Comprehensive Major Medical Plan (Plan) shall provide for an annual enrollment period in the Indemnity Plan and optional PPO program for the July 1, 2007, to June 30, 2008, Plan year. Plan member changes to coverage type or selection of benefit coverage under the Indemnity Plan or optional PPO program during an enrollment period shall become effective October 1, 2007. At least 45 days prior to October 1, 2007, the Plan shall provide to all Plan members sufficient information on premiums, cost-sharing, and benefits to enable the Plan member or other eligible participant to make an enrollment election effective October 1, 2007. As used in this subsection, the term "Plan member" includes active employees, retired employees, and other eligible participants with respect to the Indemnity Plan and the optional PPO program."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, provides: "Effective July 1, 2008, the Revisor of Statutes shall delete all statutory references to 'Teachers' and State Employees' Comprehensive Major Medical Plan' and 'North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan' and substitute therefor 'State Health Plan for Teachers and State Employees'."

Session Laws 2007-323, s. 28.22B(a) and (b), provides: "(a) The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan may use funds available in an amount not to exceed two hundred thousand dollars ($200,000) for the 2007-2008 fiscal year to establish and implement one or more wellness pilot programs for State employees. The purpose of the pilot programs is to reduce health care costs and improve worker productivity through improved health status of the employee. The pilot programs shall be designed to encourage State employee enrollment in a structured fitness program that includes measurable benchmarks. The Executive Administrator shall select one or more pilot sites that represent different geographic regions of the State, taking into consideration sites that have the highest density of State employees.

"(b) Not later than May 1, 2008, the Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan shall report to the Committee on Employee Hospital and Medical Benefits on State employee participation levels in the wellness pilot programs and health outcomes resulting from the participation. The Executive Administrator shall also recommend in its report whether the pilot programs should be continued and expanded in other areas of the State in the 2008-2009 fiscal year."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A, effective July 1, 2008, in subsection (a), substituted "State Health" for "comprehensive Major Medical" in the first sentence, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" at the end of the second sentence, and added the last sentence; and substituted "State Health Plan for Teachers and State Employees" for "North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan" at the end of the first sentence of subsection (a1).

CASE NOTES

Applicability of Administrative Procedure Act to Dispute. — State employee's dispute with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, an administrative agency, seeking to recover costs of surgery should have been brought under the Administrative Procedure Act, G.S. 150B-1 et seq. Vass v. Board of Trustees, 89 N.C. App. 333, 366 S.E.2d 1 (1988), modified and aff'd, 324 N.C. 402, 379 S.E.2d 26 (1989).

Cited in Vass v. Board of Trustees, 108 N.C. App. 251, 423 S.E.2d 796 (1992).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess. 1994) N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major

Part 3 of Article 3 of Chapter 135 is set out twice.

Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of G.S. 50-13.4(f), 50-13.9 and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 135-40.1. (Effective July 1, 2008) General definitions.

As used in Parts 2 and 3 of this Article, the following terms have the meaning specified as follows:

(1) Chemical Dependency. — The term "chemical dependency" means the pathological use or abuse of alcohol or other drugs in a manner or to a degree that produces an impairment in personal, social or occupational functioning and which may, but need not, include a pattern of tolerance and withdrawal.

(1a) Covered Services. — Any medically necessary, reasonable, and customary items of service, at least a portion of the expense of which is covered under at least one of the plans covering the person for whom claim is made or service provided. It shall be synonymous with allowable expenses, and with benefit or benefits.

(1b) Clinical Trials. — Patient research studies designed to evaluate new treatments, including prescription drugs. Regardless of the type of trial phases covered by the Plan, all covered trials must involve the treatment of life-threatening medical conditions, must be clearly superior to available noninvestigational treatment alternatives, and must have clinical and preclinical data that shows the trials will be at least as effective as noninvestigational alternatives. Trials must also involve determinations by treating physicians, relevant scientific data, and opinions of experts in relevant fields of medicine. Covered trials must be approved by the National Institutes of Health, a National Institutes of Health cooperative group or center, the U. S. Food and Drug Administration, the U.S. Department of Defense, or the U.S. Department of Veterans Affairs. The Plan may also cover clinical trials sponsored by other entities. Trials must also be approved by applicable qualified institutional review boards. All covered trials must be conducted in and by facilities and personnel that maintain a high level of expertise because of their training, experience, and volume of patients. To be covered by the Plan, patients participating in clinical trials must meet substantially all protocol requirements of the trials and exercise informed consent in the trials. Only medically necessary costs of health care services involved in treatments provided to patients for the purpose of the trials are covered by the Plan to the extent that such costs are not customarily funded by national agencies, commercial manufacturers, distributors, or other such providers. Clinical trial costs not covered by the Plan include, but are not limited to, the costs of services that are not health care services and costs associated with managing research in the trials. The Plan shall not exclude benefits for covered clinical trials if the proposed treatment is the only appropriate protocol for the condition being treated.

(2) Deductible. — Deductible shall mean an amount of covered expenses during a fiscal year which must be incurred after which benefits (subject to the deductible) becomes payable. The deductible for an

Part 3 of Article 3 of Chapter 135 is set out twice.

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employee, retired employee and/or his or her dependents shall be four hundred fifty dollars ($450.00) for each fiscal year.

The deductible applies separately to each covered individual in each fiscal year, subject to an aggregate maximum of one thousand three hundred fifty dollars ($1,350) per employee and child(ren) or employee and family coverage contract in any fiscal year.

If two or more family members are injured in the same accident only one deductible is required for charges related to that accident during the benefit period.

(3) Dependent Child. — A natural, legally adopted, or foster child of the employee and/or spouse, unmarried, up to the first of the month following his or her 19th birthday, whether or not the child is living with the employee, as long as the employee is legally responsible for such child's maintenance and support. Dependent child shall also include any child under age 19 who has reached his or her 18th birthday, provided the employee was legally responsible for such child's maintenance and support on his or her 18th birthday.

A foster child is covered (i) if living in a regular parent-child relationship with the expectation that the employee will continue to rear the child into adulthood, (ii) if at the time of enrollment, or at the time a foster child relationship is established, whichever occurs first, the employee applies for coverage for such child and submits evidence of a bona fide foster child relationship, identifying the foster child by name and setting forth all relevant aspects of the relationship, (iii) if the Claims Processor accepts the foster child as a participant through a separate written document identifying the foster child by name and specifically recognizing the foster child relationship, and (iv) if at the time a claim is incurred, the foster child relationship, as identified by the employee, continues to exist. Children placed in a home by a welfare agency which obtains control of, and provides for maintenance of, the child(ren), are not eligible participants.

Coverage may be extended beyond the 19th birthday under the following conditions:

a. If the dependent is a full-time student, between the ages of 19 and 26, who is pursuing a course of study that represents at least the normal workload of a full-time student at a school or college accredited by the state of jurisdiction.

b. The dependent is physically or mentally incapacitated to the extent that he or she is incapable of earning a living and (i) such handicap developed or began to develop before the dependent's 19th birthday, or (ii) such handicap developed or began to develop before the dependent's 26th birthday if the dependent was covered by the Plan in accordance with G.S. 135-40.1(3)a.

Dependent children of firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions as are other dependent children covered by this subdivision.

(4) Doctor. — A doctor of medicine, a doctor of osteopathy licensed to practice medicine or surgery by the Board of Medical Examiners of the state in which he or she practices, a doctor of dentistry, a doctor of podiatry or surgical chiropody, a doctor of optometry, a doctor of chiropractic, or a doctor of psychology who is licensed or certified in the State and has a doctorate practice degree in psychology and at least two years' clinical experience in a recognized health setting or

has met the standards of the National Register of Health Services Providers in Psychology, each of whom is licensed to practice by the state in which he or she performs any service covered by this Plan, and who regularly charges and collects fees in his or her own right.

(5) Employee. — Any permanent full-time or permanent part-time regular employee (designated as half-time or more) of an employing unit.

(6) Employing Unit. — A North Carolina School System; Community College; State Department, Agency or Institution; Administrative Office of the Courts; or Association or Examining Board whose employees are eligible for membership in a State-Supported Retirement System. An employing unit also shall mean a charter school in accordance with Part 6A of Chapter 115C of the General Statutes whose board of directors elects to become a participating employer in the Plan under G.S. 135-40.3A. Bona fide fire departments, rescue or emergency medical service squads, and national guard units are deemed to be employing units for the purpose of providing benefits under this Article.

(7) Enrollment. — New employees must enroll themselves and their dependents within 30 days from the date of employment or from first becoming eligible on a noncontributory basis. Coverage may become effective on the first day of the month following date of entry on payroll or on the first day of the following month. New employees not enrolling themselves and their dependents within 30 days, or not adding dependents when first eligible as provided herein may enroll on the first day of any month but will be subject to a 12-month waiting period for preexisting health conditions, except for employees who elect to change their coverage in accordance with rules established by the Executive Administrator and Board of Trustees for optional prepaid hospital and medical benefit plans. Children born to covered employees having coverage type (2), or (3), as outlined in G.S. 135-40.3(d) shall be automatically covered at the time of birth without any waiting period for preexisting health conditions. Children born to covered employees having coverage type (1) shall be automatically covered at birth without any waiting period for preexisting health conditions so long as the Claims Processor receives notification within 30 days of the date of birth that the employee desires to change from coverage (1) to coverage type (2), or (3), provided that the employee pays any additional premium required by the coverage type selected retroactive to the first day of the month in which the child was born.

Newly acquired dependents (spouse/child) enrolled within 30 days of becoming an eligible dependent will not be subject to the 12-month waiting period for preexisting conditions. A dependent can become qualified due to marriage, adoption, entering a foster child relationship, due to the divorce of a dependent child or the death of the spouse of a dependent child, and at the beginning of each legislative session (applies only to enrolled legislators). Effective date for newly acquired dependents if application was made within the 30 days can be the first day of the following month. Effective date for an adopted child can be date of adoption, or date of placement in the adoptive parent's home, or the first of the month following the date of adoption or placement. Firemen, rescue squad workers, and members of the national guard, and their eligible dependents are subject to the same terms and conditions as are new employees and their dependents covered by this subdivision. Enrollments in these circumstances must occur within 30 days of eligibility to enroll.

Part 3 of Article 3 of Chapter 135 is set out twice.

(7a) Experimental/Investigational Medical Procedures. — The use of a service, supply, drug, or device not recognized as standard medical care for the condition, disease, illness, or injury being treated as determined by the Executive Administrator and Board of Trustees upon the advice of the Claims Processor. Determinations are made after independent review of scientific data. Opinions of experts in a particular field and opinions and assessments of nationally recognized review organizations shall also be considered by the Plan but are not determinative or conclusive. The fact that an experimental/investigational treatment is the only available treatment for a particular condition will not result in coverage if the treatment is experimental/investigational in the treatment of the particular condition, nor is it relevant for purposes of coverage that the member has tried other more conventional therapies without success. The following criteria are the basis for determination that a service or supply is investigational:

a. Services or supplies requiring federal or other governmental body approval, such as drugs and devices that do not have market approval from the Food and Drug Administration (FDA) or final approval from any other governmental regulatory body for use in treatment of the condition being treated, or are not recognized for the treatment of a condition in one of the standard reference compendia or in generally accepted peer-reviewed medical literature;

b. There is insufficient or inconclusive scientific evidence in peer review medical literature to permit the Plan's evaluation of the therapeutic value of the service or supply;

c. There is inconclusive evidence that the service or supply has a beneficial effect on health outcomes;

d. Is provided as part of a research or phase I clinical or phase II clinical trial not approved by the Plan;

e. Are provided pursuant to a written protocol or other document that lists an evaluation of the service's safety, toxicity, or efficacy as among its objectives;

f. Are subject to approval or review of an Institutional Review Board or other body that approves or reviews research; or

g. Are provided pursuant to informed consent documents that describe the service as experimental, investigational, or part of a research study.

(7b) Fiscal Year. — The period beginning July 1 and ending on June 30 of the succeeding calendar year.

(7c) Firemen. — Eligible firemen as defined by G.S. 58-86-25 who belong to a bona fide fire department as defined by G.S. 58-86-25 and who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Firemen shall also include members of the North Carolina Firemen and Rescue Squad Workers' Pension Fund who are in receipt of a monthly pension, who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, CHAMPUS benefits, and other Uniformed Services benefits. North Carolina fire departments or their respective governing bodies shall certify the eligibility of their firemen to the Plan for their participation in its benefits prior to enrollment.

(8) Health Benefits Representative. — The employee designated by the employing unit to administer the State Health Plan for Teachers and State Employees for the unit and its employees. The HBR is responsible for enrolling new employees, reporting changes, explaining benefits, reconciling group statements and remitting group fees. The State Retirement System is the Health Benefits Representative for retired members.

(9) Home Health Aide. — An individual who provides medical or therapeutic care and who reports to and is under the direct supervision of a Home Health Care Agency.

(10) Home Health Care Agency. — An agency which is constituted, licensed and operated in accordance with the laws pertaining to agencies providing home health care.

(11) Home Health Care Coverage. — Coverage for home care and treatment established and approved in writing by a physician for an individual whom continual hospital confinement would be required without the care and treatment specified by this coverage.

(12) Hospital. — An institution which meets fully all the following criteria:

a. A general medical and surgical hospital, including eye, ear, nose and throat, maternity, pediatric, tuberculosis, or mental hospital, licensed as such by the applicable State agency.

b. It is primarily engaged in providing — for compensation from its patients and on an inpatient basis — diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment and care of injured and sick persons by or under the supervision of the staff of physicians;

c. It continuously provides 24-hour-a-day nursing service by registered graduate nurses; and

d. It is not, other than incidentally, a place for rest, a place for the aged, a place for drug addicts, a place for alcoholics, a nursing home, a hotel, or the like.

Hospitals classified and accredited as psychiatric hospitals by the Joint Commission on Accreditation of Healthcare Organizations will be deemed to be hospitals for the purpose of this Plan.

(13) Medicare. — The Health Insurance for the Aged and Disabled Program under Title XVIII of the Social Security Act as such act was amended by the Social Security Amendments of 1965 (Public Law 89-97), as such program is currently constituted and as it may be later amended.

(13a) Plan. — The State Health Plan for Teachers and State Employees.

(13b) National guard members. — Members of the North Carolina army and air national guard who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Members of the North Carolina army and air national guard include those who are actively serving in the national guard as well as former members of the national guard who have completed 20 or more years of service in the national guard but have not attained the minimum age to begin receipt of a uniformed service military retirement benefit. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) benefits, and other Uniformed Services benefits. North Carolina national guard units shall certify the eligibility of their members to the Plan for their participation in its benefits prior to enrollment.

(14) Predecessor Plan. — The Hospital and Medical Benefits for the Teachers' and State Employees' Retirement System of the State of North Carolina, or the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, as applicable.

(15) Preexisting Condition. — A condition, disease, illness or injury diagnosed and treated within six months prior to the effective date of coverage.

(16) Pregnancy. — Shall include resulting childbirth, miscarriage or abortion.

(16a) Rescue squad workers. — Eligible rescue squad workers as defined by the provisions of G.S. 58-86-30 who belong to a rescue or emergency medical services squad as defined by the same statute and who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Rescue squad workers shall also include members of the North Carolina Firemen and Rescue Squad Workers' Pension Fund who are in receipt of a monthly pension, who are not eligible for any type of comprehensive group health insurance or other comprehensive group health benefit coverage, and who have been without any form of group health insurance or other comprehensive group health benefit coverage for at least six months. Comprehensive group health insurance and other benefit coverage consists of inpatient and outpatient hospital and medical benefits, as well as other outpatient medical services, prescription drugs, medical supplies, and equipment that are generally available in the health insurance market. Comprehensive group health insurance and other benefit coverage includes Medicare benefits, CHAMPUS benefits, and other Uniformed Services benefits. North Carolina rescue or emergency medical services squads or their respective governing bodies shall certify the eligibility of their rescue squad workers to the Plan for their participation in its benefits prior to enrollment.

(17) Retired Employee (Retiree). — Retired teachers, State employees, and members of the General Assembly who are receiving monthly retirement benefits from any retirement system supported in whole or in part by contributions of the State of North Carolina, so long as the

retiree is enrolled. On and after January 1, 1988, a retiring employee or retiree must have completed at least five years of contributory retirement service with an employing unit prior to retirement from any State-supported retirement system in order to be eligible for group benefits under this Part as a retired employee or retiree.

(17a) Skilled Care. — Medically necessary services that can only be rendered under State law or regulation by licensed health professionals such as a medical doctor, physician's assistant, physical therapist, occupational therapist, speech therapist, certified clinical social worker, licensed clinical social worker, certified nurse midwife, licensed practical nurse, or registered nurse.

(18) Skilled Nursing Facility. — An institution licensed under applicable State laws and primarily engaged in providing to inpatients, under the supervision of a doctor and a registered professional nurse, skilled nursing care and related services on a 24-hour basis, and rehabilitative services.

(19) Usual, Customary and Reasonable. — The meaning of the term "UCR" shall be developed from criteria used for determining reasonable charges for services, including usual preoperative examination and customary postoperative care and care of usual complications, and shall be based on the usual charge made by an individual doctor for his or her private patients for a particular service, or the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, whichever is the lower. A fee is reasonable if it meets the above two criteria. In cases of unusual complexity and cases involving supplemental skills of two or more doctors, reasonable charges will be determined by the Claims Processor upon advice of its medical advisors. The Executive Administrator and Board of Trustees may update usual, customary and reasonable charges, or other such comparable allowances, semi-annually for physicians who accept the Plan's UCR or other comparable allowances as payment in full, other than for the Plan's deductibles, coinsurance, or other amounts to be paid by members of the Plan; otherwise, the Executive Administrator and Board of Trustees shall not update usual, customary and reasonable charges, or other such comparable allowances more frequently than on an annual basis. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 4, 21.1, 21.2, 21.7; 1983 (Reg. Sess., 1984), c. 1110, s. 10; 1985, c. 192, ss. 7, 16.1, 16.2; c. 732, ss. 12, 19, 25, 26; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(a), 9, 20, 24, 27; 1987, c. 564, s. 17; c. 857, ss. 9, 10; 1989, c. 752, s. 22(c), (d); 1991, c. 427, ss. 1(a), 9, 18, 36; 1995 (Reg. Sess., 1996), c. 731, s. 3; 1996, 2nd Ex. Sess., c. 18, s. 28.23(a); 1997-456, s. 27; 1997-512, ss. 1, 2, 9, 12, 16, 18; 1998-212, ss. 9.14A(d), 28.29(a), (b); 1999-237, s. 28.29(b)-(e); 2001-253, s. 1(b); 2001-487, s. 40(m); 2004-124, s. 31.21(a); 2005-276, s. 29.31(e); 2007-323, ss. 28.22(b), 28.22A(g).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-

124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 731, s. 4, provides: "Nothing in this act shall be construed to obligate the General Assembly to appropriate funds to implement this act. In addition, all charters granted and all contracts entered into under this act are subject to any future appropriations and subsequent legislative changes."

Subdivisions (7.1) and (7.a) of this section were renumbered as subdivisions (7a) and (7b), respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Session Laws 1999-237, s. 28.29(i), provides that section 28.29 of that act, which amended this section, becomes effective July 1, 2000. Until July 1, 2000, there were no subdivisions (7c), (13b) or (16a), which were added by s. 28.29.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Act of 1999.'"

Session Laws 1999-237, s. 30.4, contains a severability clause.

For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2001-253, s. 2, provides: "Notwithstanding G.S. 97-26, payment for medical treatment and services rendered to workers' compensation patients by a hospital on or after July 1, 2001, and before August 1, 2001, shall be equal to the payment the hospital would have received for such treatment and services on June 30, 2001."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-124, s. 31.21(d), as amended by Session Laws 2005-276, s. 29.31(e), provides: "This section becomes effective July 1, 2004, but expires June 30, 2006."

Session Laws 2006-249, s. 5 provides: "The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan ("Plan") may admit up to four additional local government employers to participate in the Plan upon application in accordance with G.S. 135-40.1(6), as enacted in Section 31.26 of Session Laws 2004-424. The Executive Administrator and Board of Trustees shall have discretion in selecting the additional local government employers based on sound criteria developed by the Executive Administrator to evaluate the financial impact on the operations of the Plan. The Executive Administrator shall report the proposed selections and the criteria used in making the selections to the Committee on Employee Hospital and Medical Benefits prior to submitting the selections to the Board of Trustees for its approval. The local government employers selected by the Executive Administrator and the Board of Trustees in accordance with this section shall be in addition to local government employers participating in the Plan on July 1, 2006. In admitting local government employers into the Plan, the Executive Administrator shall ensure compliance with the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C.S. § 1003(b)."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22(b), effective July 1, 2007, in subdivision (2), substituted "four hundred fifty

Part 3 of Article 3 of Chapter 135 is set out twice.

dollars ($450.00)" for "three hundred fifty dollars ($350.00)" in the first paragraph, and substituted "one thousand three hundred fifty dollars ($1,350)" for "one thousand fifty dollars ($1,050)" in the middle of the second paragraph.

Session Laws 2007-323, s. 28.22A(g), effective July 1, 2008, substituted "State Health Plan for Teachers and State employees" for "Comprehensive Major Medical Plan" in subdivision (8); substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subdivision (13a); and added "or the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, as applicable" at the end of subdivision (14).

§ 135-40.2. (Effective July 1, 2008) Eligibility.

(a) The following persons are eligible for coverage under the Plan, on a noncontributory basis, subject to the provisions of G.S. 135-40.3:

(1) All permanent full-time employees of an employing unit who meet the following conditions:
  a. Paid from general or special State funds, or
  b. Paid from non-State funds and in a group for which his or her employing unit has agreed to provide coverage.

  Employees of State agencies, departments, institutions, boards, and commissions not otherwise covered by the Plan who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision.

(1a) Permanent hourly employees as defined in G.S. 126-5(c4) who work at least one-half of the workdays of each pay period.

(2) Retired teachers, State employees, members of the General Assembly, and retired State law enforcement officers who retired under the Law Enforcement Officers' Retirement System prior to January 1, 1985. For employees first hired on and after October 1, 2006, and members of the General Assembly first taking office on and after February 1, 2007, future coverage as retired employees and retired members of the General Assembly is subject to a requirement that the future retiree have 20 or more years of retirement service credit in order to be covered by the provisions of this subdivision.

(2a) Surviving spouses of:
  a. Deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and
  b. Deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986.

(3) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(b).

(3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.

(4) Members of the General Assembly.

(5) Notwithstanding the provisions of subsection (e) of this section, employees on official leave of absence while completing a full-time program in school administration in an approved program as a Principal Fellow in accordance with Article 5C of Chapter 116 of the General Statutes.

(6) Notwithstanding the provisions of G.S. 135-40.11, employees formerly covered by the provisions of this section, other than retired employees,

who have been employed for 12 or more months by an employing unit and whose jobs are eliminated because of a reduction, in total or in part, in the funds used to support the job or its responsibilities, provided the employees were covered by the Plan at the time of separation from service resulting from a job elimination. Employees covered by this subsection shall be covered for a period of up to 12 months following a separation from service because of a job elimination.

(7) Any member enrolled pursuant to subdivision (1) or (1a) of this subsection who is on approved leave of absence with pay or receiving workers' compensation.

(8) Employees on approved Family and Medical Leave.

(a1) Repealed by Session Laws 2000-141, s. 6(b), effective August 2, 2000, and by Session Laws 2000-184, s. 1(b), effective August 1, 2000.

(a2) A school employee in a job-sharing position as defined in G.S. 130-40.3. If these employees elect to participate in the Plan, the employing unit shall pay fifty percent (50%) of the Plan's total noncontributory premiums. Individual employees shall pay the balance of the total noncontributory premiums not paid by the employing unit.

(a3) Subject to the provisions of G.S. 135-40.3, employees and members of the General Assembly with 10 but less than 20 years of retirement service credit shall be eligible for coverage under the Plan on a partially contributory basis, provided the employees were first hired on or after October 1, 2006, and the members first took office on or after February 1, 2007. For such future retirees, the State shall pay fifty percent (50%) of the Plan's total noncontributory premiums. Individual retirees shall pay the balance of the total noncontributory premiums not paid by the State.

(a4) The Executive Administrator and Board of Trustees may in addition to noncontributory coverage offer optional coverage on a partially contributory basis and may set premium rates for the optional coverage on a partially contributory basis. The amount of State funds contributed for optional coverage on a partially contributory basis shall not be more than the Plan's total noncontributory premium for Employee Only coverage, with the person selecting the coverage paying the balance of the partially contributory premium not paid by the Plan. The amount of State funds contributed shall not exceed the Plan's cost for Employee Only coverage. The Executive Administrator and Board of Trustees shall not impose a partially contributory premium until after it has consulted on the premium and the optional coverage design with the Committee on Employee Hospital and Medical Benefits.

(b) The following person shall be eligible for coverage under the Plan, on a fully contributory basis, subject to the provisions of G.S. 135-40.3:

(1) Repealed by Session Laws 1983, c. 761, s. 255.

(2) Former members of the General Assembly who enroll before October 1, 1986.

(2a) For enrollments after September 30, 1986, former members of the General Assembly if covered under the Plan at termination of membership in the General Assembly. To be eligible for coverage as a former member of the General Assembly, application must be made within 30 days of the end of the term of office. Only members of the General Assembly covered by the Plan at the end of the term of office are eligible. If application is not made within the specified time period, the member forfeits eligibility.

(3) Surviving spouses of deceased former members of the General Assembly who enroll before October 1, 1986.

(3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.

(3b) For enrollments after September 30, 1986, surviving spouses of deceased former members of the General Assembly, if covered under the Plan at the time of death of the former member of the General Assembly.

(4) All permanent part-time employees (designated as half-time or more) of an employing unit who meets the conditions outlined in subdivision (a)(1)a above, and who are not covered by the provisions of G.S. 135-40.2(a)(1).

(4a) Repealed by Session Laws 1997-512, s. 22.

(5) The spouses and eligible dependent children of enrolled teachers, State employees, retirees, former members of the General Assembly, former employees covered by the provisions of G.S. 135-40.2(a)(6), Disability Income Plan beneficiaries, enrolled continuation members, and members of the General Assembly. Spouses of surviving dependents are not eligible, nor are dependent children if they were not covered at the time of the member's death. Surviving spouses may cover their dependent children provided the children were enrolled at the time of the member's death or enroll within 30 days of the member's death.

(6) Blind persons licensed by the State to operate vending facilities under contract with the Department of Health and Human Services, Division of Services for the Blind and its successors, who are:

a. Operating such a vending facility;

b. Former operators of such a vending facility whose service as an operator would have made these operators eligible for an early or service retirement allowance under Article 1 of this Chapter had they been members of the Retirement System; and

c. Former operators of such a vending facility who attain five or more years of service as operators and who become eligible for and receive a disability benefit under the Social Security Act upon cessation of service as an operator.

Spouses, dependent children, surviving spouses, and surviving dependent children of such members are not eligible for coverage.

(7) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(j).

(8) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly provided the death of the former Plan member occurred after September 30, 1986, and the surviving spouse was covered under the Plan at the time of death.

(9) Repealed by Session Laws 1987, c. 857, s. 11.1.

(10) Any eligible dependent child of the deceased retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary, provided the child was covered at the time of death of the retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary, (or was in posse at the time and is covered at birth under this Part), or was covered under the Plan on September 30, 1986. An eligible surviving dependent child can remain covered until age 19, or age 26 if a full-time student, or indefinitely if certified as incapacitated under G.S. 135-40.1(3)b.

Part 3 of Article 3 of Chapter 135 is set out twice.

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(11) Repealed by Session Laws 2000-141, s. 6(b), effective August 2, 2000, and by Session Laws 2000-184, s. 1(b), effective August 1, 2000.

(11a) Retired teachers, State employees, and members of the General Assembly with less than 10 years of retirement service credit, provided the teachers and State employees were first hired on or after October 1, 2006, and the members first took office on or after February 1, 2007.

(12) Notwithstanding the provisions of G.S. 135-40.11, former employees covered by the provisions of G.S. 135-40.2(a)(6), and their spouses and eligible dependent children who were covered by the Plan at the time of the former employees' separation from service pursuant to G.S. 135-40.2(a)(6), following expiration of the former employees' coverage provided by G.S. 135-40.2(a)(6). Election of coverage under this subdivision shall be made within 90 days after the termination of coverage provided under G.S. 135-40.2(a)(6).

(13) Firemen, rescue squad workers, and members of the national guard, their eligible spouses, and eligible dependent children.

(c) No person shall be eligible for coverage as a dependent if eligible as an employee or retired employee, except when a spouse is eligible on a fully contributory basis. In addition, no person shall be eligible for coverage as a dependent of more than one employee or retired employee at the same time.

(d) Former employees who are receiving disability retirement benefits or disability income benefits pursuant to Article 6 of Chapter 135 of the General Statutes, provided the former employee has at least five years of retirement membership service, shall be eligible for the benefit provisions of this Plan, as set forth in this Part, on a noncontributory basis. Such coverage shall terminate as of the end of the month in which such former employee is no longer eligible for disability retirement benefits or disability income benefits pursuant to Article 6 of this Chapter.

(e) Employees on official leave of absence without pay may elect to continue this group coverage at group cost provided that they pay the full employee and employer contribution through the employing unit during the leave period.

(f) For the support of the benefits made available to any member vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of employees who are receiving a survivor's alternate benefit under G.S. 135-5(m) of those associations listed in G.S. 135-27(a), licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association, organization or board shall pay to the Plan the full cost of providing these benefits under this section as determined by the Board of Trustees of the State Health Plan for Teachers and State Employees. In addition, each association, organization or board shall pay to the Plan an amount equal to the cost of the benefits provided under this section to presently retired members of each association, organization or board since such benefits became available at no cost to the retired member.

(g) An eligible surviving spouse and any eligible surviving dependent child of a deceased retiree, teacher, State employee, member of the General Assembly, former member of the General Assembly, or Disability Income Plan beneficiary shall be eligible for group benefits under this section without waiting periods for preexisting conditions provided coverage is elected within 90 days after the death of the former plan member. Coverage may be elected at a later time, but will be subject to the 12-month waiting period for preexisting conditions and will be effective the first day of the month following receipt of the application.

Part 3 of Article 3 of Chapter 135 is set out twice.

(h) No person shall be eligible for coverage as an employee or retired employee or as a dependent of an employee or retired employee upon a finding by the Executive Administrator or Board of Trustees or by a court of competent jurisdiction that the employee or dependent knowingly and willfully made or caused to be made a false statement or false representation of a material fact in a claim for reimbursement of medical services under the Plan. The Executive Administrator and Board of Trustees may make an exception to the provisions of this subsection when persons subject to this subsection have had a cessation of coverage for a period of five years and have made a full and complete restitution to the Plan for all fraudulent claim amounts. Nothing in this subsection shall be construed to obligate the Executive Administrator and Board of Trustees to make an exception as allowed for under this subsection.

(i) Any employee receiving benefits pursuant to Article 6 of this Chapter when the employee has less than five years of retirement membership service, or an employee on leave without pay due to illness or injury for up to 12 months, is entitled to continued coverage under the Plan for the employee and any eligible dependents by paying one hundred percent (100%) of the cost. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, s. 29(a)-(*l*); 1987, c. 738, ss. 29(n), 36(a), 36(b); c. 809, ss. 3, 4; c. 857, ss. 11(a), 11.1, 11.2, 12; 1989, c. 752, s. 22(e), (f); 1989 (Reg. Sess., 1990), c. 1074, s. 22(a); 1993, c. 321, s. 85(b); 1995, c. 278, s. 1; c. 507, ss. 7.21(a)-(c), 7.28(a)-(c); 1997-443, s. 11A.118(a); 1997-512, ss. 17, 19-27; 1999-237, s. 28.29(f); 2000-141, ss. 6(a), (b); 2000-184, ss. 1(a),(b), 3; 2001-487, s. 86(a); 2002-174, s. 4; 2003-358, s. 4; 2004-124, s. 31.21(b); 2004-199, s. 34(b); 2005-276, s. 29.31(e); 2006-174, ss. 1, 2, 3; 2007-323, s. 28.22A(g1), (o); 2007-345, s. 12.)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — G.S. 126-5(c4), referred to in subdivision (a)(1a) of this section, was repealed by Session Laws 1993, c. 321, s. 145(b).

G.S. 115C-302.2(b), referred to in subsection (a2), was repealed by Session Laws 2003-358, s. 1, effective January 1, 2004. For present similar provisions, see G.S. 115C-326.5.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-124, s. 31.21(d), as amended by Session Laws 2005-276, s. 29.31(e), provides: "This section becomes effective July 1, 2004, but expires June 30, 2006."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employ-

Part 3 of Article 3 of Chapter 135 is set out twice.

ees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2004-124, s. 31.21(b), effective July 1, 2004, rewrote subsection (a2).

Session Laws 2006-174, ss. 1 through 3, effective July 1, 2006, added the last sentence in subdivision (a)(2); added subsection (a3); and added subdivision (b)(11a).

Session Laws 2007-323, s. 28.22A(g1), effective July 1, 2008, added subsection (a4).

Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subsection (f).

§ 135-40.3. (Effective July 1, 2008) Effective dates of coverage.

(a) Employees and Retired Employees. —

(1) Employees and retired employees covered under the Predecessor Plan will continue to be covered, subject to the terms hereof.

(2) New employees may apply for coverage to be effective on the first day of the month following employment, or on a like date the following month if the employee has enrolled.

(3) Employees not enrolling or adding dependents when first eligible in accordance with G.S. 135-40.1(7) may enroll later on the first of any following month but will be subject to a 12-month waiting period for a preexisting health condition, except employees who elect to change their coverage in accordance with rules adopted by the Executive Administrator and Board of Trustees for optional prepaid hospital and medical benefit plans.

(4) Members of the General Assembly, beginning with the 1985 Session, shall become first eligible with the convening of each Session of the General Assembly, regardless of a Member's service during previous Sessions. Members and their dependents enrolled when first eligible after the convening of each Session of the General Assembly will not be subject to any waiting periods for preexisting health conditions. Members of the 1983 Session of the General Assembly, not already enrolled, shall be eligible to enroll themselves and their dependents on or before October 1, 1983, without being subject to any waiting periods for preexisting health conditions.

(b) Waiting Periods and Preexisting Conditions. —

(1) New employees and dependents enrolling when first eligible are subject to no waiting period for preexisting conditions under the Plan.

(2) Employees not enrolling or not adding dependents when first eligible may enroll later on the first of any following month, but will be subject to a twelve-month waiting period for preexisting conditions except as provided in subdivision (a)(3) of this section.

(3) Retiring employees and dependents enrolled when first eligible after an employee's retirement are subject to no waiting period for preexisting conditions under the Plan. Retiring employees not enrolled or not adding dependents when first eligible after an employee's retirement may enroll later on the first of any following month, but will be subject to a 12-month waiting period for preexisting conditions except as provided in subdivision (a)(3) of this section.

Part 3 of Article 3 of Chapter 135 is set out twice.

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(4) Employees and dependents enrolling or reenrolling within 12 months after a termination of enrollment or employment that were not enrolled at the time of this previous termination, regardless of the employing units involved, shall not be considered as newly-eligible employees or dependents for the purposes of waiting periods and preexisting conditions. Employees and dependents transferring from optional prepaid plans in accordance with G.S. 135-39.5B; employees and dependents immediately returning to service from an employing unit's approved periods of leave without pay for illness, injury, educational improvement, workers' compensation, parental duties, or for military reasons; employees and dependents immediately returning to service from a reduction in an employing unit's work force; retiring employees and dependents reenrolled in accordance with G.S. 135-40.3(b)(3); formerly-enrolled dependents reenrolling as eligible employees; formerly-enrolled employees reenrolling as eligible dependents; and employees and dependents reenrolled without waiting periods and preexisting conditions under specific rules and regulations adopted by the Executive Administrator and Board of Trustees in the best interests of the Plan shall not be considered reenrollments for the purpose of this subdivision. Furthermore, employees accepting permanent, full-time appointments who had previously worked in a part-time or temporary position and their qualified dependents shall not be covered by waiting periods and preexisting conditions under this division provided enrollment as a permanent, full-time employee is made when the employee and his dependents are first eligible to enroll.

(5) To administer the 12-month waiting period for preexisting conditions under this Article, the Plan must give credit against the 12-month period for the time that a person was covered under a previous plan if the previous plan's coverage was continuous to a date not more than 63 days before the effective date of coverage. As used in this subdivision, a "previous plan " means any policy, certificate, contract, or any other arrangement provided by any accident and health insurer, any hospital or medical service corporation, any health maintenance organization, any preferred provider organization, any multiple employer welfare arrangement, any self-insured health benefit arrangement, any governmental health benefit or health care plan or program, or any other health benefit arrangement.

(c) Dependents of Employees and Retired Employees. —

(1) Dependents of employees and retired employees who have family coverage under the Predecessor Plan will continue to be covered subject to the terms hereof.

(2) Employees who have dependents may apply for family coverage at the time they enroll as provided in subdivisions (a)(2) and (a)(3) and such dependents will be covered under the Plan beginning the same date as such employees.

(3) Employees and retired employees may change from individual or parent/child(ren) coverage to parent/child(ren) or family coverage or add dependents to existing family or parent/child(ren) coverage upon acquiring a dependent without a waiting period for preexisting conditions, and such dependents will be covered under the Plan the first of the month or the first of the second month following the dependent's eligibility for coverage, provided written application is submitted to the Health Benefits Representative within 30 days of becoming eligible.

(4) Employees or retired employees who wish to change from family coverage to parent/child(ren) or individual or from parent/child(ren) to individual coverage shall give written notice to their Health Benefits Representative within 30 days after any change in the status of dependents, (resulting from death, divorce, etc.) that requires a change in contract type. The effective date will be the first of the month following the dependent's ineligibility event. If notification was not made within the 30 days following the dependent's ineligibility event, the dependent will be retroactively removed the first of the month following the dependent's ineligibility event, and the coverage type change will be the first of the month following written notification, except in cases of death, in which case the coverage type change will be made retroactive to the first of the month following the death.

(5) Employees not adding dependents when first eligible may enroll later on the first of any following month, but dependents will be subject to a 12-month waiting period for preexisting health conditions except as provided in subdivision (a)(3) of this section.

(6) Employees or retired employees who wish to change from family to parent/child(ren) or individual coverage or from parent/child(ren) to individual coverage, even though their dependents continue to be eligible, shall give written notification to their Health Benefits Representative. Effective date of this type change will be the first of the month following written notification or any first of the month thereafter as desired by the employee.

(7) The effective date for newborns or adopted children will be date of birth, date of adoption, or placement with adoptive parent provided member is currently covered under a family or parent/child(ren) coverage. If the member wishes to add a newborn or adopted child and is currently enrolled on individual coverage, the member must submit application for coverage and a coverage type change within 30 days of the child's birth or date of adoption or placement. Effective date for the coverage type change is the first of the month in which the child is born, adopted, or placed. Adopted children may also be covered the first of the month following placement or adoption.

(d) Types of Coverage Available. — There are three types of coverage which an employee or retiree may elect.

(1) Employee Only. — Covers enrolled employees only. Maternity benefits are provided to employee only.

(2) Employee and Child(ren). — Covers enrolled employee and all eligible dependent children. Maternity benefits are provided to the employee only.

(3) Employee and Family. — Covers employee and spouse, and all eligible dependent children. Maternity benefits are provided to employee or enrolled spouse.

(4) (5) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 5(b).

(4a) Employee and spouse. — Covers employee and spouse only. Maternity benefits are provided to the employee or the employee's enrolled spouse.

(e) Notwithstanding any other provision of this section, no coverage under the Plan shall become effective prior to the payment of premiums required by the Plan.

(f) Firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions of this section as are employees. Eligible dependents of firemen, rescue squad workers, and members of the national guard are subject to the same terms and conditions of this section as are dependents of employees. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(b), 20; 1987, c. 857, s. 13; 1991, c. 427, ss. 10-12; 1996, 2nd Ex. Sess., c. 18, s. 28.23(b); 1997-512, ss. 28-31, 40; 1999-237, s. 28.29(g); 2007-323, s. 28.22A(h).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Bladen: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Cherokee: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Mitchell: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Rutherford: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Washington: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Wilkes: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; and towns of Biltmore Forest: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Creek: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Black Mountain: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Blowing Rock: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Forest City: 2004-124, s. 31.26, as amended by 2005-276, s. 29.32; Ocean Isle Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Sunset Beach: 2004-124, s. 31.26, as amended by 2007-405, s. 1; Tabor City: 2004-124, s. 31.26, as amended by 2007-405, s. 1.

Editor's Note. — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-322, s. 28.22A.(h), effective July 1, 2008, added subdivision (d)(4a).

§ 135-40.3A. (Effective July 1, 2008) Optional participation for charter schools operated by private nonprofit corporations.

(a) The board of directors of each charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Plan in accordance with this Article. This election shall be in writing, shall be made no later than 30 days after this section becomes law, and shall be filed with the Executive Administrator and Board of Trustees and with the State Board of Education. For each charter school employee who is employed on or before the date the board makes the election, membership in the Plan is effective as of the date the board makes the election. For each charter school employee who is employed after the date the board makes the election, membership in the Plan is effective as of the date of that employee's entry into eligible service. This subsection applies only to charter schools that received State Board of Education approval under G.S. 115C-238.29D in 1997 or 1998.

(b) No later than 30 days after both parties have signed the written charter under G.S. 115C-238.29E, the board of directors of a charter school operated by a private nonprofit corporation shall elect whether to become a participating employer in the Plan in accordance with this Article. This election shall be in writing and filed with the Executive Administrator, the Board of Trustees, and the State Board of Education. This election is effective for each charter school employee as of the date of that employee's entry into eligible service. This subsection applies to charter schools that receive State Board of Education approval under G.S. 115C-238.29D after 1998.

(c) A board's election to become a participating employer in the Plan under this section is irrevocable and shall require all eligible employees of the charter school to participate.

(d) If a charter school's board of directors does not elect to become a participating employer in the Plan under this section, that school's employees and the dependents of those employees are not eligible for any benefits under the Plan on account of employment with a charter school.

(e) The board of directors of each charter school shall notify each of its employees as to whether the board elected to become a participating employer in the Plan under this section. This notification shall be in writing and shall be provided within 30 days of the board's election or at the time an initial offer for employment is made, whichever occurs last. If the board did not elect to become a participating employer in the Plan, the notice shall include a statement that the employee shall have no legal recourse against the board or the State for any possible benefit under the Plan. The employee shall provide written acknowledgment of the employee's receipt of the notification under this subsection. (1998-212, s. 9.14A(e).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Local Modification. — Clover Garden Charter School: 2003-354, s. 1.

Editor's Note. — Session Laws 2003-69, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3(b) and G.S. 135-40.3A(b), the board of directors of any charter school that received State Board of Education approval under G.S. 115C-238.29D on or after January 1, 2002, and the board of directors of River Mill Academy in Alamance County may elect to become a participating employer in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become a participating employing unit in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2004-164, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of (i) New Century High School in Saxapahaw; (ii) Lake Norman Charter School in Huntersville; (iii) Exploris Middle School in Raleigh, a charter school division of Exploris; (iv) Magellan Charter School in Raleigh; (v) American Renaissance Charter School in Statesville; and (vi) Healthy Start Academy in Durham may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

Session Laws 2005-317, s. 1, provides: "Notwithstanding the time limitations contained in G.S. 135-5.3 and G.S. 135-40.3A, the boards of directors of Success Institute, a charter school in Statesville, and Piedmont Community Charter School in Gastonia may elect to become participating employers in the Teachers' and State Employees' Retirement System in accordance with Article 1 of Chapter 135 of the

Part 3 of Article 3 of Chapter 135 is set out twice.

General Statutes and may also elect to become participating employing units in the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in accordance with Article 3 of Chapter 135. The elections authorized by this section shall be made no later than 30 days after the effective date of this act and shall be made in accordance with all other requirements of G.S. 135-5.3 and G.S. 135-40.3A."

§ 135-40.4: Repealed by Session Laws 2007-323, s. 28.22A(a), effective July 1, 2008.

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 135-40.5. (Effective July 1, 2008) Benefits not subject to deductible or coinsurance.

(a) Repealed by Session Laws 1985, c. 192, s. 5.

(b) Repealed by Session Laws 1991, c. 427, s. 20.

(c) Preadmission Testing. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for diagnostic, laboratory and x-ray examinations performed on an outpatient basis.

(d) Repealed by Session Laws 2001-253, s. 1(d), effective July 1, 2001.

(e) Repealed by Session Laws 2007-323, s. 28.22A(a), effective July 1, 2008.

(f) Immunizations. — The Plan will pay one hundred percent (100%) of allowable charges for immunizations for the prevention of contagious diseases as generally accepted medical practices would dictate when directed by an attending physician.

(g) Prescription Drugs. — The Plan's allowable charges for prescription legend drugs to be used outside of a hospital or skilled nursing facility are to be determined by the Plan's Executive Administrator and Board of Trustees. The Plan will pay allowable charges for each outpatient prescription drug less a copayment to be paid by each covered individual equal to the following amounts: pharmacy charges up to ten dollars ($10.00) for each generic prescription, thirty dollars ($30.00) for each preferred branded prescription, and forty dollars ($40.00) for each preferred branded prescription with a generic equivalent drug, and fifty dollars ($50.00) for each nonpreferred branded or generic prescription. These co-payments apply to the Plan's optional programs.

Allowable charges shall not be greater than a pharmacy's usual and customary charge to the general public for a particular prescription. Prescriptions shall be for no more than a 34-day supply for the purposes of the copayments paid by each covered individual. By accepting the copayments and any remaining allowable charges provided by this subsection, pharmacies shall not balance bill an individual covered by the Plan. A prescription legend drug is defined as an article the label of which, under the Federal Food, Drug, and Cosmetic Act, is required to bear the legend: "Caution: Federal Law Prohibits Dispensing Without Prescription." Such articles may not be sold to or purchased by the public without a prescription order. Benefits are provided for insulin even though a prescription is not required. The Plan may use a pharmacy benefit manager to help manage the Plan's outpatient prescription drug coverage. In managing the Plan's outpatient prescription drug benefits, the Plan and its pharmacy benefit manager shall not provide coverage for erectile dysfunction, growth hormone, antiwrinkle, weight loss, and hair growth drugs unless such coverage is medically necessary to the health of the member. The Plan and its pharmacy benefit manager shall not provide coverage for growth hormone and weight loss drugs and antifungal drugs for the treatment of nail fungus and botulinium toxin without approval in advance by the pharmacy benefit manager. Any formulary used by the Plan's Executive Administrator and pharmacy benefit manager shall be an open formulary. Plan members shall not be assessed more than two thousand five hundred dollars ($2,500) per person per fiscal year in copayments required by this subsection. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 7; 1985, c. 192, ss. 5, 9, 12; c. 732, ss. 16-18; 1985 (Reg. Sess., 1986), c. 1020, ss. 10, 20; 1987, c. 857, s. 14; 1991, c. 427, ss. 13, 20; 1995, c. 507, s. 7.24(a); 1999-237, s. 28.28(b); 2000-141, s. 1; 2000-184, s. 2; 2001-253, ss. 1(d), 1(e); 2003-186, s. 5(a); 2005-276, s. 29.31(a); 2006-249, s. 2(a); 2007-323, s. 28.22A(a).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2001-253, s. 2, provides: "Notwithstanding G.S. 97-26, payment for medical treatment and services rendered to workers' compensation patients by a hospital on or after July 1, 2001, and before August 1, 2001, shall be equal to the payment the hospital would have received for such treatment and services on June 30, 2001."

Session Laws 2003-186, s. 6, provides, in part, that for the purposes of this act, renewal of a health benefit plan is presumed to occur on each anniversary of the date on which coverage was first effective on the person or persons covered by the health benefit plan.

Subsection (e), as amended by Session Laws 2003-186, s. 5(a), effective January 1, 2004, is applicable to all health benefit plans that are delivered, issued for delivery, or renewed on and after that date.

Session Laws 2006-249, s. 1(a), expiring July 1, 2009, provides: "Cost-Saving Initiatives. — Coverage of Over-the-Counter Medications. — Notwithstanding any other provision of law to the contrary, the Executive Administrator and Board of Trustees may authorize coverage for over-the-counter medications as recommended by the Plan's pharmacy and therapeutics committee. In approving for coverage one or more over-the-counter medications, the Executive Administrator and Board of Trustees shall ensure that each recommended over-the-counter medication has been analyzed to ensure medical effectiveness and Plan member safety. The analysis shall also address the financial impact on the Plan. The Executive Administrator and Board of Trustees may impose a co-payment to be paid by each covered individual for each packaged over-the-counter medication. The Executive Administrator and Board of Trustees may adopt policies establishing limits on the amount of coverage available for over-the-counter medications for each covered individual over a 12-month period. Prior to implementing policy and co-payment changes authorized under this section, the Executive Administrator and Board of Trustees shall submit the proposed policies and co-payments to the Committee on Employee Hospital and Medical Benefits for its review."

Session Laws 2006-249, s. 1(b), provides: "Incentive Programs. — For the purposes of helping Plan members to achieve and maintain a healthy lifestyle without impairing patient care, and to increase cost effectiveness in Plan coverage, the Executive Administrator and Board of Trustees may adopt programs offering incentives to Plan members to encourage changes in member behavior or lifestyle designed to improve member health and promote cost-efficiency in the Plan. Participation in one or more incentive programs is voluntary on the part of the Plan member. Before adopting an incentive program, the Executive Administrator and Board of Trustees shall conduct an impact analysis on the proposed incentive program to determine (i) whether the program is likely to result in significant member satisfaction, (ii) that it will not adversely affect quality of care, and (iii) whether it is likely to result in significant cost savings to the Plan. The impact analysis may be conducted by a committee of the Plan, in conjunction with the Plan's consulting actuary, provided that the Plan's medical director participates in the analysis. An approved incentive plan may provide for a waiver of deductibles, co-payments, and coinsurance required under this Article in order to determine the effectiveness of the incentive program in promoting healthy lifestyles for members and increasing cost-effectiveness to the Plan. The Executive Administrator and Board of Trustees shall, before implementing incentive programs authorized under this section, submit the proposed programs to the Committee on Employee Hospital and Medical Benefits for review."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-249, s. 2(a), effective July 1, 2006, in the first paragraph of subsection (g), inserted "preferred" preceding "branded prescription" twice, and substituted "each nonpreferred branded or generic prescription" for "each branded or generic prescription not on a formulary used by the Plan" at the end of the paragraph.

Session Laws 2007-323, s. 28.22(d), effective July 1, 2007, in subsection (g), substituted "thirty dollars ($30.00)" for "twenty-five dollars ($25.00)" in the second sentence, and added the last sentence.

Session Laws 2007-323, s. 28.22A(a), effective July 1, 2008, repealed subsection (e), related to routine diagnostic examinations.

CASE NOTES

Cited in Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

§ 135-40.6: Repealed by Session Laws 2007-323, s. 28.22A(a), effective July 1, 2008.

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Part 3 of Article 3 of Chapter 135 is set out twice.

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§ 135-40.6A. (Effective July 1, 2008) Prior approval procedures.

(a) The Executive Administrator and Board of Trustees shall establish procedures to require prior medical approvals for the following services:

(1) Home Health Care Agency Services in accordance with G.S. 135-40.6(8)c.
(2) Repealed by Session Laws 1991, c. 427, s. 31.
(3) Ambulance Transport over 50 miles in accordance with G.S. 135-40.6(8)d.
(4) Oral Surgery in accordance with G.S. 135-40.6(5)c.
(5) Durable Medical Equipment (rental and purchase) in accordance with G.S. 135-40.6(8)e.
(6) Covered Transplants in accordance with G.S. 135-40.6(5)a.
(7) Repealed by Session Laws 1997-512, s. 38(b).
(8) Hospice Services in accordance with G.S. 135-40.6(8)q.
(9) Phase II clinical trials in accordance with G.S. 135-40.1(1b). Decisions pursuant to this section must be rendered by the Plan within 30 days after receipt of all medical documentation requested by the Plan.

(b) The Executive Administrator and Board of Trustees may establish procedures to require prior medical approvals for the following services:

(1) Skilled Nursing Facility Care.
(2) Private Duty Nursing.
(3) Speech Therapy (unless rendered in an inpatient hospital).
(4) Physical Therapy (in the home).
(5), (6) Repealed by Session Laws 1997-512, s. 39.
(7) Surgical Procedures:
  a. Blepharoplasties
  b. Surgery for Hermaphroditism
  c. Excision of Keloids
  d. Reduction Mammoplasty
  e. Morbid Obesity Surgery
  f. Penile Prosthesis
  g. Excision of Gynecomastia
  h. Cochlear Implants
  i. Revision of the Nasal Structure
  j. Abdominoplasty
  k. Fimbrioplasty
  l. Tubotubal Anastomasis
  m. Varicose Vein Surgery.
(8) Subcutaneous injection of "filling" material (Example: zyderm, silicone).
(8a) Botulinium toxin.
(9) Suction Lipectomy.
(10) Outpatient prescription drugs requiring prospective review under the Plan's pharmacy benefit management program.
(11) Outpatient prescription drugs for growth hormone, weight loss, and antifungal drugs for the treatment of nail fungus.
(12) Bone Anchored Hearing Aids (BAHA) surgically implanted for the treatment of hearing loss.

(c) No procedure for prior approval may be established except as provided by this Article as it may be amended from time to time. (1985 (Reg. Sess., 1986), c. 1020, s. 22; 1987, c. 857, s. 19; 1989, c. 770, s. 33; 1991, c. 427, ss. 31, 39;

Part 3 of Article 3 of Chapter 135 is set out twice.

1997-512, ss. 6, 38(b), 39; 1998-212, s. 28.29(d); 2000-141, s. 4; 2001-253, s. 1(l); 2006-249, s. 2(b).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — For Session Laws 2001-253, s. 1(s), regarding development of a prospective payment system for hospital outpatient services and the services of ambulatory surgical facilities under the Teachers' and State Employees' Comprehensive Major Medical Plan, see note at G.S. 135-39.8.

Session Laws 2001-253, s. 2, provides: "Notwithstanding G.S. 97-26, payment for medical treatment and services rendered to workers' compensation patients by a hospital on or after July 1, 2001, and before August 1, 2001, shall be equal to the payment the hospital would have received for such treatment and services on June 30, 2001."

Effect of Amendments. — Session Laws 2006-249, s. 2(b), effective July 1, 2006, added subdivision (b)(12).

§ 135-40.7. (Effective July 1, 2008) General limitations and exclusions.

(a) **(Expires June 30, 2009 — See note.)** The Plan and optional plans or programs shall not limit the number of visits for covered services for physical therapy, occupational therapy, and speech therapy.

(b) The following shall in no event be considered covered expenses nor will benefits described in G.S. 135-40.5 through G.S. 135-40.11 be payable for:

(1) Charges for any services rendered to a person prior to the date coverage under this Plan becomes effective with respect to such person.

(2) Charges for care in a nursing home, adult care home, convalescent home, or in any other facility or location for custodial or for rest cures.

(3) Charges to the extent paid, or which the individual is entitled to have paid, or to obtain without cost, in accordance with any government laws or regulations except Medicare. If a charge is made to any such person which he or she is legally required to pay, any benefits under this Plan will be computed in accordance with its provisions, taking into account only such charge. "Any government" includes the federal, State, provincial or local government, or any political subdivision thereof, of the United States, Canada or any other country.

(4) Charges for services rendered in connection with any occupational injury or disease arising out of and in the course of employment with any employer, if (i) the employer furnishes, pays for or provides reimbursement for such charges, or (ii) the employer makes a settlement payment for such charges, or (iii) the person incurring such charges waives or fails to assert his or her rights respecting such charges.

(5) Charges for any care, treatment, services or supplies other than those which are certified by a physician who is attending the individual as being required for the medically necessary treatment of the injury or disease and are deemed medically necessary and appropriate for the treatment of the injury or disease by the Executive Administrator and Board of Trustees upon the advice of the Claims Processor. This subdivision shall not be construed, however, to require certification by an attending physician for a service provided by an advanced practice registered nurse acting within the nurse's lawful scope of practice, subject to the limitations of G.S. 135-40.6(10).

Part 3 of Article 3 of Chapter 135 is set out twice.

(6) Charges for any services rendered as a result of injury or sickness due to an act of war, declared or undeclared, which act shall have occurred after the effective date of a person's coverage under the Plan.

(7) Charges for personal services such as barber services, guest meals, radio and TV rentals, etc.

(8) Charges for any services with respect to which there is no legal obligation to pay. For the purposes of this item, any charge which exceeds the charge that would have been made if a person were not covered under this Plan shall, to the extent of such excess, be treated as a charge for which there is no legal obligation to pay; and any charge made by any person for anything which is normally or customarily furnished by such person without payment from the recipient or user thereof shall also be treated as a charge for which there is no legal obligation to pay.

(9) Charges during a continuous hospital confinement which commenced prior to the effective date of the person's coverage under this Plan.

(10) Charges in excess of either the usual, customary and reasonable charge for or the fair and reasonable value of the services or supply which gives rise to the expense; provided that in each instance the extent that a particular charge is usual, customary and reasonable or fair and reasonable shall be measured and determined by comparing the charge with charges made for similar things to individuals of similar age, sex, income and medical condition in the locality concerned, and the result of such determination shall constitute the maximum allowable as covered medical expenses unless the Claims Processor finds that considerations of fairness and equity in a particular set of circumstances require that greater or lesser charges be considered as covered medical expenses in that set of circumstances.

(11) Charges for or in connection with any dental work or dental treatment except to the extent that such work or treatment is specifically provided for under the Plan. Excluded is payment for surgical benefits for tooth replacement, such as crowns, bridges or dentures; orthodontic care; filling of teeth; extraction of teeth (whether or not impacted); root canal therapy; removal of root tips from teeth; treatment for tooth decay, inflammation of gingiva, or surgical procedures on diseased gingiva or other periodontal surgery; repositioning soft tissue, reshaping bone, and removal of bony projections from the ridges preparatory to fitting of dentures; removal of cysts incidental to removal of root tips from teeth and extraction of teeth; or other dental procedures involving teeth and their bones or tissue supporting structure.

(12) Charges incurred for any medical observations or diagnostic study when no disease or injury is revealed, unless proof satisfactory to the Claims Processor is furnished that (i) the claim is in order in all other respects, (ii) the covered individual had a definite symptomatic condition of disease or injury other than hypochondria, and (iii) the medical observation and diagnostic studies concerned were not undertaken as a matter of routine physical examination or health checkup as provided in G.S. 135-40.6(8)s.

(13) Charges for eyeglasses or other corrective lenses (except for cataract lenses certified as medically necessary for aphakia persons) and hearing aids or examinations for the prescription or fitting thereof.

(14) Charges for cosmetic surgery or treatment except that charges for cosmetic surgery or treatment required for correction of damage caused by accidental injury sustained by the covered individual while

coverage under this plan is in force on his or her account or to correct congenital deformities or anomalies shall not be excluded if they otherwise qualify as covered medical expenses.

(15) Admissions for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis and inpatient services or supplies which are not consistent with the diagnosis, for which admitted.

(16) Costs denied by the Claims Processor as part of its overall program of claim review and cost containment.

(16a) Charges in excess of negotiated rates allowed for preferred providers of institutional and professional medical care and services in accordance with the provisions of G.S. 135-40.4, when such preferred providers are reasonably available to provide institutional and professional medical care.

(17) If a covered service becomes excluded from coverage under the Plan, the Executive Administrator and Claims Processor may, in the event of exceptional situations creating undue hardships or adverse medical conditions, allow persons enrolled in the Plan to remain covered by the Plan's previous coverage for up to three months after the effective date of the change in coverage, provided the persons so enrolled had been undergoing a continuous plan of specific treatment initiated within three months prior to the effective date of the change in coverage.

(18) Charges for services unless a claim is filed within 18 months from the date of service.

(19) Any service, treatment, facility, equipment, drug, supply, or procedure that is experimental or investigational as defined in G.S. 135-40.1(7a). Clinical trial phases III and IV are covered by the Plan as is clinical trial phase II when approved by the Plan.

(20) Complications arising from noncovered services known at the time the noncovered services were provided.

(21) Charges related to a noncovered service, even if the charges would have been covered if rendered in connection with a covered service.

(22) Charges for services covered by the long-term care benefit provisions of Part 4 of this Article.

(23) Charges disallowed by the Plan's pharmacy benefits manager. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 15, 21.4; 1985 (Reg. Sess., 1986), c. 1020, ss. 16, 20, 21, 25, 26; 1987, c. 282, s. 35; 1991, c. 427, ss. 16, 30, 40; 1993, c. 464, s. 7; 1995, c. 535, s. 29; 1997-456, s. 55.9; 1997-468, s. 6; 1997-512, ss. 4, 13; 1998-212, s. 28.29(c); 2000-141, s. 5; 2007-323, ss. 28.22A(j), (k).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Part 3 of Article 3 of Chapter 135 is set out twice.

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(j), (k), effective July 1, 2008, and expiring June 30, 2009, added subsection (a); and designated the existing provisions as subsection (b).

§ 135-40.7A: Repealed by Session Laws 1997-512, s. 15.

§ 135-40.7B. (Effective July 1, 2008) Special provisions for chemical dependency and mental health benefits.

(a) Except as otherwise provided in this section, benefits for the treatment of mental illness and chemical dependency are covered by the Plan and shall be subject to the same deductibles, durational limits, and coinsurance factors as are benefits for physical illness generally.

(b) Notwithstanding any other provision of this Part, the following necessary services for the care and treatment of chemical dependency and mental illness shall be covered under this section: allowable institutional and professional charges for inpatient care, outpatient care, intensive outpatient program services, partial hospitalization treatment, and residential care and treatment:

(1) For mental illness treatment:
  a. Licensed psychiatric hospitals;
  b. Licensed psychiatric beds in licensed general hospitals;
  c. Licensed residential treatment facilities that have 24-hour on-site care provided by a registered nurse and that hold current accreditation by a national accrediting body approved by the Plan's mental health case manager;
  d. Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities;
  e. Licensed intensive outpatient treatment programs; and
  f. Licensed partial hospitalization programs.

(2) For chemical dependency treatment:
  a. Licensed chemical dependency units in licensed psychiatric hospitals;
  b. Licensed chemical dependency hospitals;
  c. Licensed chemical dependency treatment facilities;
  d. Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities;
  e. Licensed intensive outpatient treatment programs;
  f. Licensed partial hospitalization programs; and
  g. Medical detoxification facilities or units.

(c) Notwithstanding any other provisions of this Part, the following providers and no others may provide necessary care and treatment for mental health under this section:

(1) Psychiatrists who have completed a residency in psychiatry approved by the American Council for Graduate Medical Education and who are licensed as medical doctors or doctors of osteopathy in the state in which they perform and services covered by the Plan;
(2) Licensed or certified doctors of psychology;
(3) Certified clinical social workers and licensed clinical social workers;
(3a) Licensed professional counselors;
(4) Certified clinical specialists in psychiatric and mental health nursing;

(4a) Nurses working under the employment and direct supervision of such physicians, psychologists, or psychiatrists;
(5) Repealed by Session Laws 1997-512, s. 14.
(6) Licensed psychological associates;
(7), (8) Repealed by Session Laws 1997-512, s. 14.
(9) Certified fee-based practicing pastoral counselors;
(10) Licensed physician assistants under the supervision of a licensed psychiatrist and acting pursuant to G.S. 90-18.1 or the applicable laws and rules of the area in which the physician assistant is licensed or certified; and
(11) Licensed marriage and family therapists.

(c1) Notwithstanding any other provisions of this Part, the following providers and no others may provide necessary care and treatment for chemical dependency under this section:

(1) The following providers with appropriate substance abuse training and experience in the field of alcohol and other drug abuse as determined by the mental health case manager, in facilities described in subdivision (b)(2) of this section, in day/night programs or outpatient treatment facilities licensed after July 1, 1984, under Article 2 of Chapter 122C of the General Statutes or in North Carolina area programs in substance abuse services are authorized to provide treatment for chemical dependency under this section:
  a. Licensed physicians including, but not limited to, physicians who are certified in substance abuse by the American Society of Addiction Medicine (ASAM);
  b. Licensed or certified psychologists;
  c. Psychiatrists;
  d. Certified substance abuse counselors working under the direct supervision of such physicians, psychologists, or psychiatrists;
  e. Licensed psychological associates;
  f. Nurses working under the direct supervision of such physicians, psychologists, or psychiatrists;
  g. Certified clinical social workers and licensed clinical social workers;
  h. Certified clinical specialists in psychiatric and mental health nursing;
  i. Licensed professional counselors;
  j. Certified fee-based practicing pastoral counselors;
  k. Substance abuse professionals certified under Article 5C of Chapter 90 of the General Statutes; and
  l. Licensed marriage and family and therapists.

(2) The following providers with appropriate substance abuse training and experience in the field of alcohol and other drug abuse as determined by the mental health case manager are authorized to provide treatment for chemical dependency in outpatient practice settings:
  a. Licensed physicians including, but not limited to, physicians who are certified in substance abuse by the American Society of Addiction Medicine (ASAM);
  b. Licensed or certified psychologists;
  c. Psychiatrists;
  d. Certified substance abuse counselors working under the direct supervision of such physicians, psychologists, or psychiatrists;
  e. Licensed psychological associates;

f. Nurses working under the direct supervision of such physicians, psychologists, or psychiatrists;
g. Certified clinical social workers and licensed clinical social workers;
h. Certified clinical specialists in psychiatric and mental health nursing;
i. Licensed professional counselors;
j. Certified fee-based practicing pastoral counselors;
    1. Substance abuse professionals certified under Article 5C of Chapter 90 of the General Statutes;
j1. Licensed marriage and family and therapists; and
k. In the absence of meeting one of the criteria above, the Mental Health Case Manager could consider, on a case-by-case basis, a provider who supplies:
    1. Evidence of graduate education in the diagnosis and treatment of chemical dependency, and
    2. Supervised work experience in the diagnosis and treatment of chemical dependency (with supervision by an appropriately credentialed provider), and
    3. Substantive past and current continuing education in the diagnosis and treatment of chemical dependency commensurate with one's profession.

Provided, however, that nothing in this subsection shall prohibit the Plan from requiring the most cost-effective treatment setting to be utilized by the person undergoing necessary care and treatment for chemical dependency.

(d) Benefits provided under this section shall be subject to a case management program for medical necessity and medical appropriateness consisting of (i) precertification of outpatient visits beyond 26 visits each Plan year, (ii) all electroconvulsive treatment, (iii) inpatient utilization review through preadmission and length-of-stay certification for nonemergency admissions to the following levels of care: inpatient units, partial hospitalization programs, residential treatment centers, chemical dependency detoxification and treatment programs, and intensive outpatient programs, (iv) length-of-stay certification of emergency inpatient admissions, and (v) a network of qualified, available providers of inpatient and outpatient psychiatric and chemical dependency treatment. Care which is not both medically necessary and medically appropriate will be noncertified, and benefits will be denied. Where qualified preferred providers of inpatient and outpatient care are reasonably available, use of providers outside of the preferred network shall be subject to a twenty percent (20%) coinsurance rate up to five thousand dollars ($5,000) per fiscal year to be assessed against each covered individual in addition to the general coinsurance percentage and maximum fiscal year amount specified by G.S. 135-40.4 and G.S. 135-40.6.

(e) For the purpose of this section, "emergency" is the sudden and unexpected onset of a condition manifesting itself by acute symptoms of sufficient severity that, in the absence of an immediate psychiatric or chemical dependency inpatient admission, could imminently result in injury or danger to self or others.

(f) For purposes of this section, the word "Plan" includes all optional programs or plans in effect under the Teachers' and State Employees' Comprehensive Major Medical Plan and its successor Plans. (1991, c. 427, s. 32; 1993, c. 464, ss. 3(a), 4; 1995, c. 157, s. 2; c. 406, s. 2; 1997-512, s. 14; 1999-186, s. 1; 1999-199, s. 3; 1999-210, s. 8; 1999-351, s. 7; 2001-258, s. 1; 2001-487, s. 40(n); 2003-368, ss. 2, 3; 2004-124, s. 31.28; 2007-323, s. 28.22(f).)

Part 3 of Article 3 of Chapter 135 is set out twice.

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — The amendment by Session Laws 1999-199, s. 3, added new subdivisions (c1)(1)k and (c1)(2)*l* in the coded bill drafting format. The designation of (c1)(1)k was not changed, and new subdivision (c1)(2)*l* was redesignated (c1)(2)j1, at the direction of the Revisor of Statutes.

Subdivisions (c)(1), (c1)(1)e, and (c1)(2)(e), as amended by Session Laws 2003-368, s. 3, effective January 1, 2004, are applicable to services rendered by psychological associates on and after that date.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22.(f), effective July 1, 2007, added subsection (f).

§§ 135-40.8, 135-40.9: Repealed by Session Laws 2007-323, s. 28.22A(a), effective July 1, 2008.

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Editor's Note. — Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 135-40.10. (Effective July 1, 2008) Persons eligible for Medicare.

(a) Benefits payable for covered expenses under this Plan in G.S. 135-40.5 through G.S. 135-40.9 will be reduced by any benefits payable for the same covered expenses under Medicare, so that Medicare will be the primary carrier except where compliance with federal law specifies otherwise.

(b) For those participants eligible for Medicare, the State's plan will be administered on a "carve out" basis. The provisions of the plan are applied to the charges not paid by Medicare (Parts A & B). In other words, those charges not paid by Medicare would be subject to the deductible and coinsurance of the Plan just as if the charges not paid by Medicare were the total bill.

(c) For those individuals eligible for Part A (at no cost to them), benefits under this program will be reduced by the amounts to which the covered individuals would be entitled to under Parts A and B of Medicare, even if they choose not to enroll for Part B.

(d) Notwithstanding the foregoing provisions of this section or any other provisions of the Plan, the Executive Administrator and Board of Trustees may enter into negotiations with the Health Care Financing Administration, U.S. Department of Health and Human Services, in order to secure a more favorable coordination of the Plan's benefits with those provided by Medicare, including but not limited to, measures by which the Plan would provide Medicare benefits for all of its Medicare-eligible members in return for adequate payments from the federal government in providing such benefits. Should such negotiations result in an agreement favorable to the Plan and its Medicare-eligible members, the Executive Administrator and Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, implement such an agreement which shall supersede all other provisions of the Plan to the contrary related to its payment of claims for Medicare-eligible members. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985 (Reg. Sess., 1986), c. 1020, s. 18; 1987, c. 857, s. 21; 1989, c. 752, s. 22(o).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.11. (Effective July 1, 2008) Cessation of coverage.

(a) Coverage under this Plan of an employee and his or her surviving spouse or eligible dependent children or of a retired employee and his or her surviving spouse or eligible dependent children shall cease on the earliest of the following dates:

(1) The last day of the month in which an employee or retired employee dies. Provided such surviving spouse or eligible dependent children were covered under the Plan at the time of death of the former employee or retired employee, or were covered on September 30, 1986, any such surviving spouse or eligible dependent children may then elect to continue coverage under the Plan by submitting written application to the Claims Processor and by paying the cost for such coverage when due at the applicable fees. Such coverage shall cease on the last day of the month in which such surviving spouse or eligible dependent children die, except as provided by this Article.

(2) The last day of the month in which an employee's employment with the State is terminated as provided in subsection (c) of this section.

(3) The last day of the month in which a divorce becomes final.

(4) The last day of the month in which an employee or retired employee requests cancellation of coverage.

(5) The last day of the month in which a covered individual enters active military service.

(6) The last day of the month in which a covered individual is found to have knowingly and willfully made or caused to be made a false statement or false representation of a material fact in a claim for reimbursement of medical services under the Plan. The Executive Administrator and Board of Trustees may make an exception to the provisions of this subdivision when persons subject to this subdivision have had a cessation of coverage for a period of five years and have made a full and complete restitution to the Plan for all fraudulent claim amounts. Nothing in this subdivision shall be construed to obligate the Executive Administrator and Board of Trustees to make an exception as allowed for under this subdivision.

(7) The last day of the month in which an employee who is Medicare-eligible selects Medicare to be the primary payer of medical benefits. Coverage for a Medicare-eligible spouse of an employee shall also cease the last day of the month in which Medicare is selected to be the primary payer of medical benefits for the Medicare-eligible spouse. Such members are eligible to apply for conversion coverage.

(b) Coverage under this Plan as a dependent child ceases when the child ceases to be a dependent child as defined by G.S. 135-40.1(3) except, coverage may continue under this Plan for a period of not more than 36 months after loss of dependent status on a fully contributory basis provided the dependent child was covered under the Plan at the time of loss of dependent status.

(b1) Coverage under the Plan as a surviving dependent child whether covered as a dependent of a surviving spouse, or as an individual member (no living parent), ceases when the child ceases to be a dependent child as defined by G.S. 135-40.1(3), except coverage may continue under the Plan on a fully contributory basis for a period of not more than 36 months after loss of dependent status.

(c) Termination of employment shall mean termination for any reason, including layoff and leave of absence, except as provided in (a)(1) and (2) of this section, but shall not, for purposes of this Plan, include retirement upon which the employee is granted an immediate service or disability pension under and pursuant to a State-supported Retirement System.

(1) In the event of termination for any reason other than death, coverage under the Plan for an employee and his or her eligible spouse or dependent children, provided the eligible spouse or dependent children were covered under the Plan at termination of employment may be continued for a period of not more than 18 months following termination of employment on a fully contributory basis. Employees who were covered under the Plan at termination of employment may be continued for a period of not more than 18 months or 29 months if determined to be disabled under the Social Security Act, Title II, OASDI or Title XVI, SSI.

(2) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(r).

(3) In the event of approved leave of absence without pay, other than for active duty in the armed forces of the United States, coverage under this Plan for an employee and his or her dependents may be continued during the period of such leave of absence by the employee's paying one hundred percent (100%) of the cost.

(4) If employment is terminated in the second half of a calendar month and the covered individual has made the required contribution for any coverage in the following month, that coverage will be continued to the end of the calendar month following the month in which employment was terminated.

(5) Employees paid for less than 12 months in a year, who are terminated at the end of the work year and who have made contributions for the non-work months, will continue to be covered to the end of the period for which they have made contributions, with the understanding that if they are not employed by another State-covered employer under this Plan at the beginning of the next work year, the employee will refund to the ex-employer the amount of the employer's cost paid for them during the non-paycheck months.

(6) Any employee receiving benefits pursuant to Article 6 of this Chapter when the employee has less than five years of retirement membership service, or an employee on leave of absence without pay due to illness or injury for up to 12 months, is entitled to continued coverage under the Plan for the employee and any eligible dependents by the employee's paying one hundred percent (100%) of the cost.

(d) No benefits will be paid by this Plan for any expenses incurred or treatment received after cessation of coverage as provided in subsections (a) or (b) of this section, except that in the event of hospital confinement at that time, hospitalization benefits as described in G.S. 135-40.6 will continue to the extent provided therein.

Part 3 of Article 3 of Chapter 135 is set out twice.

(e) A legally divorced spouse and any eligible dependent children of a covered employee or retired employee may continue coverage under this Plan for a period of not more than 36 months following the first of the month after a divorce becomes final on a fully contributory basis, provided the former spouse and any eligible dependent children were covered under the Plan at the time a divorce became final.

(f) A legally separated spouse of a covered employee or retired employee may continue coverage under this Plan for a period not to exceed 36 months from the separation date on a fully contributory basis, provided the separated spouse was covered under the Plan at the time of separation and provided the covered employee's or retired employee's actions result in the loss of coverage for the separated spouse. Eligible dependent children may also continue coverage if covered under the Plan at time of separation, provided the employee's or retired employee's actions result in the loss of coverage for the dependent children.

(g) Whenever this section gives a right to continuation coverage, such coverage must be elected no later than a date set by the Executive Administrator and Board of Trustees.

(h) Continuation coverage under this Plan shall not be continued past the occurrence of any one of the following events:

(1) The termination of the Plan.
(2) Failure of a Plan member to pay monthly in advance any required premiums.
(3) A person becomes a covered employee or a dependent of a covered employee under any group health plan and that group health plan has no restrictions or limitations on benefits.
(4) A person becomes eligible for Medicare benefits on or after the effective date of the continuation coverage.
(5) The person was determined to be no longer disabled, provided the 18-month coverage was extended to 29 months due to having been determined to be disabled under the Social Security Act, Title II, OASDI or Title XVI, SSI.
(6) The person reaches the maximum applicable continuation period of 18, 29, or 36 months.

(i) Notice requirements concerning continuation coverage shall be developed by the Executive Administrator and Board of Trustees.

(j) The spouse and any eligible dependent children of a covered employee may continue coverage under the Plan on a fully contributory basis for a period not to exceed 36 months from the date the employee becomes eligible for Medicare benefits which results in a loss of coverage under the Plan, provided that the spouse and eligible dependent children were covered under the Plan at the time the employee became eligible for Medicare benefits which results in a loss of coverage under the Plan. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 17, 19-21; 1985, c. 732, ss. 13, 34; 1985 (Reg. Sess., 1986), c. 1020, ss. 19, 29(m)-(x); 1987, c. 738, s. 29(o); 1989, c. 752, s. 22(p); 1991, c. 427, s. 42; 1995, c. 278, s. 2; 1997-512, ss. 32-35; 2000-184, s. 4.)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Part 3 of Article 3 of Chapter 135 is set out twice.

CASE NOTES

Cited in Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

§ 135-40.12. (Effective July 1, 2008) Conversion.

(a) Upon a cessation of group coverage under the Plan and/or eligibility for group coverage under the Plan, an employee or dependent shall be entitled to a conversion to nongroup coverage without the necessity of a physical examination. Such conversion coverage shall include hospitalization, surgical, and medical benefits as contained in the major medical and alternative plan conversion provisions of Article 53 of Chapter 58 of the General Statutes. The Executive Administrator and Board of Trustees in their sole discretion shall approve the conversion coverage, which shall be administered by the Claims Processor through an insurance contract arranged by the Claims Processor, or administered as otherwise directed by the Executive Administrator and Board of Trustees. An eligible employee or dependent must apply for conversion coverage within 30 days after termination of group eligibility.

(b) The Executive Administrator and Board of Trustees shall provide for the continuation of conversion privilege exercised under the predecessor plan, on a fully contributory basis. The Executive Administrator and Board of Trustees shall consult with the Committee on Employee Hospital and Medical Benefits before taking action under this subsection. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 21.6; 1985, c. 732, ss. 30, 56; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.13. (Effective July 1, 2008) Coordination of benefits.

(a) Benefits Subject to This Provision. — All of the benefits provided under this Comprehensive Major Medical Plan.

(b) Definitions. —

(1) "Plan" means any Plan providing benefits or services for or by reason of medical or dental care or treatment, which benefits or services are provided by (i) group, blanket or franchise insured or uninsured coverage, (ii) hospital services prepayment Plan on a group basis, medical service prepayment Plan on a group basis, group practice, or other prepayment coverage on a group basis, (iii) any coverage under labor-management trusteed plans, union welfare plans, employer organization plans, or employee benefit organization plans, and (iv) any coverage under governmental programs except Medicare, or any coverage required or provided by any statute, which coverage is not otherwise excluded from the calculation of benefits under this Plan, but the term "Plan" shall not include any individual policies.

The term "Plan" shall be construed separately with respect to each policy, contract, or other arrangement for benefits or services and separately with respect to that portion of any such policy, contract, or other arrangement which reserves the right to take the benefits or services of other plans into consideration in determining its benefits and that portion which does not.

Part 3 of Article 3 of Chapter 135 is set out twice.

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(2) "Covered services" means any necessary, reasonable and customary item of expense at least a portion of which is covered under at least one of the plans covering the person for whom claim is made. To the extent legally possible, it shall be synonymous with allowable expenses. When a Plan provides benefits in the form of services rather than cash payments, the reasonable cash value of each service rendered shall be deemed to be both an allowable expense and a benefit paid.

(3) "Claim determination period" means any period of time during which a person covered by this Plan is eligible to receive benefits.

(c) Effect on Benefits. —

(1) This provision shall apply in determining the benefits as to a person covered under this Plan for any claim determination period if, for the covered services incurred as to such a person during such claim determination period, the sum of:

a. The benefits that would be payable under this Plan in the absence of this provision, and

b. The benefits that would be payable under all other plans in the absence therein of provisions of similar purpose of this provision would exceed the usual and customary charges for such covered services.

(2) As to any claim determination period with respect to which this provision is applicable, the benefits that would be payable under this Plan in the absence of this provision for the covered services incurred as to such person during such claim determination period shall be reduced to the extent necessary so that the sum of such reduced benefit and all the benefits payable for such covered services under all other plans, except as provided in Item (3) immediately below, shall not exceed the total of such covered services. Benefits payable under another Plan include the benefits that would have been payable had claim been duly made therefor. In the case of another Plan which does not contain a provision coordinating its benefits, the benefits of such other Plan shall be determined before the benefits of this Plan. A Plan without a coordination of benefits provision shall be deemed to be the primary carrier within the meaning of this Plan.

(3) If:

a. Another Plan which is involved in Item (2) immediately above and which contains provisions coordinating its benefits with those of this Plan would, according to its rules, determine its benefits after the benefits of this Plan have been determined, and

b. The rules set forth in Item (4) immediately below would require this Plan to determine its benefits before such other Plan, then the benefits of such other plan will be ignored for the purposes of determining the benefits under this Plan.

(4) For the purposes of Item (3) immediately above, the rules establishing the order of benefit determination are:

a. The benefits of a Plan which covers the person on whose covered services claim is based other than as a dependent shall be determined before the benefits of a Plan which covers such person as a dependent;

b. Except as stated in sub-subdivision c of this subdivision when this Plan and another Plan cover the same child as a dependent of different persons called parents:

1. the benefits of the Plan of the parent whose birthday falls earlier in the calendar year are determined before the bene-

fits of the Plan of the parent whose birthday falls later in the calendar year; but

2. if both parents have the same birthday, the benefits of the Plan that has covered a parent for a longer period of time are determined before those of the Plan that has covered the other parent for a shorter period of time; however, if the other Plan has a rule based on the gender of the parent, and if as a result, the Plans do not agree on the order of benefits, the rule in the other Plan will determine the order of benefits.

c. If two or more Plans cover a person as a dependent child of divorced or separated parents, benefits for the child are determined in this order:

1. first, the Plan of the parent with custody of the child;
2. second, the Plan of the spouse of the parent with custody of the child; and
3. third, the Plan of the parent not having custody of the child.

However, if the specific terms of a court decree state that one of the parents is responsible for the health care expenses of the child, and the entity obligated to pay or provide the benefits of the Plan of that parent has actual knowledge of those terms, the benefits of that Plan are determined first. This paragraph does not apply with respect to any claim determination period or Plan year during which any benefits are actually paid or provided before the entity has actual knowledge.

d. The benefits of a Plan that covers the person as an employee who is neither laid off nor retired (or as that employee's dependent) are determined before those of a Plan that covers that person as a laid-off or retired employee (or as that employee's dependent). If the other Plan does not have this rule, and if, as a result, the Plans do not agree on the order of benefits, this rule is ignored.

e. When rules a and b immediately above do not establish an order of benefit determination, the benefits of a Plan which has covered the person on whose covered services claim is based for the longer period of time shall be determined before the benefits of a Plan which had covered such person for the shorter period of time.

(5) When this provision operates to reduce the total amount of benefits otherwise payable as to a person covered under this Plan during any claim determination period, each benefit that would be payable in the absence of this provision shall be reduced proportionately, and such reduced amount shall be charged against any applicable benefit limit of this Plan.

(d) Medicare Participants' Eligibility. — In the case of employees eligible under the Plan who are also eligible for Medicare benefits, benefits under the Plan will be paid in coordination with Medicare benefits in a manner consistent with federal law.

(e) Right to Receive and Release Necessary Information. — For the purpose of determining the applicability of and implementing the terms of this provision of this Plan or any provision of similar purpose of any other Plan, the Claims Processor may, without the consent of or notice to any person, release to or obtain from any insurance company or other organization or person any information, with respect to any person, which the Claims Processor deems to be necessary for such purposes. Any person claiming benefits under this Plan shall furnish to the Claims Processor such information as may be necessary to implement the provision.

Part 3 of Article 3 of Chapter 135 is set out twice.

(f) Facility of Payment. — Whenever payments which should have been made under this Plan, in accordance with this provision, have been made under any other plans, the Claims Processor shall have the right, exercisable alone and in its sole discretion, to pay over to any organizations making such other payments any amounts it shall determine to be warranted in order to satisfy the intent of this provision, and amounts to be paid shall be deemed to be benefits paid under this Plan, and, to the extent of such payments, the Claims Processor shall be fully discharged from liability under the Plan.

(g) Right of Recovery. — Whenever payments have been made by the Claims Processor with respect to covered services in a total amount which is, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Claims Processor shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Claims Processor shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, or any other organizations. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 18; 1985 (Reg. Sess., 1986), c. 1020, ss. 20, 30; 1989, c. 770, s. 35.)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

§ 135-40.13A. (Effective July 1, 2008) Liability of third person; right of subrogation; right of first recovery.

(a) The Plan shall have the right of subrogation upon all of the Plan member's right to recover from a liable third party for payment made under the Plan, for all medical expenses, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise. Notwithstanding any other provision of law to the contrary, the recovery limitation set forth in G.S. 28A-18-2 shall not apply to the Plan's right of subrogation of Plan members.

(b) If the Plan is precluded from exercising its right of subrogation, it may exercise its rights of recovery pursuant to G.S. 135-40.13(g). If the Plan recovers damages from a liable third party in excess of the claims paid, any excess will be paid to the member, less a proportionate share of the costs of collection.

(c) In the event a Plan member recovers any amounts from a liable third party to which the Plan is entitled under this section, the Plan may recover the amounts directly from the Plan member. The Plan has a lien, for not more than the value of claims paid related to the liability of the third party, on any damages subsequently recovered against the liable third party. If the Plan member fails to pursue the remedy against a liable third party, the Plan is subrogated to the rights of the Plan member and is entitled to enforce liability in the Plan's own name or in the name of the Plan member for the amount paid by the Plan.

(d) In no event shall the Plan's lien exceed fifty percent (50%) of the total damages recovered by the Plan member, exclusive of the Plan member's reasonable costs of collection as determined by the Plan in the Plan's sole discretion. The decision by the Plan as to the reasonable cost of collection is conclusive and is not a "final agency decision" for purposes of a contested case under Chapter 150B of the General Statutes. Notice of the Plan's lien or right to recovery shall be presumed when a Plan member is represented by an attorney, and the attorney shall disburse proceeds pursuant to this section. (2004-124, s. 31.25; 2006-264, s. 66(a).)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Effect of Amendments. — Session Laws 2006-264, s. 66(a), effective August 27, 2006, and applicable to payments made by the Plan after July 20, 2004, for which reimbursement is sought on or after August 27, 2006, rewrote the section.

§ 135-40.14. (Effective July 1, 2008) Right to amend.

The General Assembly reserves the right to alter, amend, or repeal Parts 2 and 3 of this Article. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 62.)

Part 3 of Article 3 Set Out Twice. — This Part is effective until July 1, 2008. For the Part as in effect until July 1, 2008, see the preceding Part, also numbered G.S. 135-40 through G.S. 135-40.14.

Part 4. Long-Term Care Benefits.

§ 135-41. Undertaking.

(a) The State of North Carolina undertakes to make available an optional program of long-term care benefits for the benefit of its qualified employees, retired employees and their dependents which will pay benefits in accordance with the terms hereof. Retired employees of the Local Governmental Employees' Retirement System pursuant to Article 3 of Chapter 128 of the General Statutes and their dependents are also eligible to be qualified for the benefits provided by this Part.

(b) **(Effective until July 1, 2008)** The long-term care benefits provided by this Part shall be made available through the Teachers' and State Employees' Comprehensive Major Medical Plan pursuant to Articles 2 and 3 of this Chapter (hereinafter called the "Plan") and administered by the Plan's Executive Administrator and Board of Trustees. In administering the benefits provided by this Part, the Executive Administrator and Board of Trustees shall have the same type of powers and duties that are provided under Part 3 of this Article for hospital and medical benefits. The benefits provided by this Part may be offered by the Plan on a self-insured basis, in which case a third-party claims processor shall be chosen through competitive bids in accordance with State law, or through a contract of insurance, in which case a carrier licensed to do business in North Carolina shall be selected on a competitive bid basis in accordance with State law.

(b) **(Effective July 1, 2008)** The long-term care benefits provided by this Part shall be made available through the State Health Plan for Teachers and State Employees pursuant to Articles 2 and 3 of this Chapter (hereinafter called the "Plan") and administered by the Plan's Executive Administrator and Board of Trustees. In administering the benefits provided by this Part, the

G.S. 135-41(b) is set out twice. See note.

Executive Administrator and Board of Trustees shall have the same type of powers and duties that are provided under Part 3 of this Article for hospital and medical benefits. The benefits provided by this Part may be offered by the Plan on a self-insured basis, in which case a third-party claims processor shall be chosen through competitive bids in accordance with State law, or through a contract of insurance, in which case a carrier licensed to do business in North Carolina shall be selected on a competitive bid basis in accordance with State law.

(c) The benefits authorized by this Part are available only to qualified employees and retired employees who voluntarily elect to provide such benefits for themselves and their qualified dependents. Payroll deductions shall be available from employee salary and disability benefit payments and from retired employee retirement benefit payments for fully contributory premium amounts.

(d) The Executive Administrator and Board of Trustees of the Plan shall insure insofar as possible that the long-term care benefits provided by this Part shall be tax-qualified under federal law. (1997-468, s. 7; 2007-323, s. 28.22A(o); 2007-345, s. 12.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until July 1, 2008. The second version of subsection (b) set out above is effective July 1, 2008.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in the first sentence of subsection (b).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 135-41.1. Long-term care benefits.

Long-term care benefits provided by this Part are subject to elimination periods, coinsurance provisions, and other limitations separate and apart from those provided for in Part 3 of this Article. No limitation on out-of-pocket expenses are provided for the benefits covered by this section. Long-term care benefits are as follows:

(1) Nursing Home Benefits. — The Plan will pay a fixed amount of the reasonable and customary daily charges allowed for nursing facilities providing skilled nursing care and intermediate nursing care up to a maximum amount per day for each day after a fixed number of consecutive days for each nursing home stay. Such daily charges shall be inclusive of semiprivate room and board; skilled and semiskilled nursing services; routine laboratory tests and examinations; physical, occupational, and speech therapy; respiratory and other gas therapy; and drugs, injections, biologicals, fluids, solutions, dietary aids and supplements, and other routine medical supplies and equipment. Readmission to a nursing home within 180 days, exclusive of hospital stays, for the same or related cause or causes shall be considered a single nursing home stay for the purposes of this section. Benefits payable under this subdivision are contingent upon compliance with the following conditions and will, in no instance, be paid under this section without compliance with each of the following conditions:

a. Confinement to a nursing home is medically appropriate due to an illness, disease, or injury upon recommendation of an admitting physician other than a proprietor, employee, or agent of the nursing home;

b. Confinement to a nursing home is for any overnight stay for which a charge for a day's stay is due and payable; and

c. Prior to confinement, the admitting physician secures approval certification from the Plan for confinement.

As used in this section, a nursing home is a facility or a part of a facility which is (i) operated under State law and which is qualified as a skilled nursing or intermediate nursing facility under Medicare; or is (ii) a facility meeting the requirements for licensure under Chapter 131E of the General Statutes.

(2) Custodial Benefits. — The Plan will pay a fixed percentage of the fixed amount of reasonable and customary daily charges allowed by the Plan in subdivision (1) of this section for assisted living facilities, for adult day care facilities, and for home care agencies up to a maximum amount per day for each day after a fixed number of consecutive days that such custodial care is provided. Benefits payable under this subdivision are contingent upon compliance with the following conditions and will, in no instance, be paid under this subdivision without compliance with each of the following conditions:

a. Use of such custodial benefits is medically appropriate in a treatment plan established and certified initially and at least once every six months by an attending physician or other allied health professionals other than a proprietor, employee, or agent of one or more of the aforementioned facilities and agencies;

b. Confinement to a nursing home would be medically appropriate without custodial care proposed to be rendered by one or more of the aforementioned facilities or agencies; and

c. Prior to use of such custodial benefits, an attending physician or other allied health professional secures approval from the Plan for the use of the benefits.

As used in this section, an assisted living facility is a facility which (i) is operated under State law to provide residential care for the aged or disabled whose principal need is a home which provides personal care appropriate to their age or disability; or (ii) meets the requirements for licensure under Chapter 131D of the General Statutes. As used in this section, an adult care facility is a facility which (i) is operated under State law to provide group care for the aged and disabled in a setting away from their residence on a less than 24-hour basis when such aged or disabled would otherwise be in need of full-time personal care away from their residence; or (ii) meets the requirements for certification under Chapter 131D of the General Statutes. As used in this section, a home care agency is a residential care agency which is (i) operated under State law and which is qualified as a home health care agency under Medicare; or (ii) an agency meeting the requirements for licensure as a home care agency under Chapter 131E of the General Statutes.

(3) Other Benefits. — Upon prior approval of the Plan, other care, services, supplies, and equipment may be used as more cost-effective alternatives to the benefits provided by this section when directed by an attending physician.

(4) The Executive Administrator and Board of Trustees of the Plan shall establish the payment percentages, maximum daily payment rates, benefit periods, elimination periods, and maximum lifetime benefits payable for each covered individual for the nursing home and custodial benefits provided by this section. The Executive Administrator and Board of Trustees shall provide for inflationary increases in the maximum daily payment rates and the maximum lifetime benefits payable for each covered individual.

(5) The Executive Administrator and Board of Trustees of the Plan shall provide a bed reservation benefit whenever Plan members are hospitalized during a stay in a nursing home or an assisted living facility.

(6) The Executive Administrator and Board of Trustees of the Plan shall provide for a waiver of premiums involving minimum lengths of stay in a nursing home or an assisted living facility. In addition, the Executive Administrator and Board of Trustees shall allow coverage to be reinstated upon failure to pay premiums, provided certain grace periods are not exceeded and retroactive premium payments are made.

(7) Limitations and Exclusions to Long-Term Care Benefits. — The benefits provided by this section are for the purpose of meeting the requirements for assistance from the loss of functional capacity associated with a chronic illness, disease, or disabling injury for extended periods of time; and are, in no way, intended to duplicate the benefits provided for acute and other medical care provided by Medicare or Part 3 of this Article. A loss of functional capacity can occur from: (i) an illness, disease, or disabling injury resulting in a physical incapacity to perform the activities of daily living; or (ii) an irreversible organic mental impairment resulting in a mental incapacity. Activities of daily living consist of routine functions involving personal care and mobility. (1997-468, s. 7.)

§ 135-41.2. Conversion.

Upon cessation of group coverage under this Part, an employee, retired employee, or dependent shall be entitled to a conversion to a nongroup plan of long-term care benefits. The Executive Administrator and Board of Trustees of the Plan shall determine how the conversion rights authorized by this Part shall be administered. (1997-468, s. 7.)

Editor's Note. — Session Laws 1997-468, s. 7, designated this section as G.S. 135.41.2. The section has been set out above as G.S. 135-41.2 to reflect the apparent intent of the legislature.

§ 135-41.3. Right to alter, amend, or repeal.

The General Assembly reserves the right to alter, amend, or repeal this Part. (1997-468, s. 7.)

Editor's Note. — Session Laws 1997-468, s. 7, designated this section as G.S. 135.41.3. The section has been set out above as G.S. 135-41.3 to reflect the apparent intent of the legislature.

Part 5. Health Insurance Program for Children.

§ 135-42. Undertaking.

(a) **(Effective until July 1, 2008)** The State of North Carolina undertakes to make available a health insurance program for children (hereinafter called the "Program") to provide comprehensive acute medical care to low-income, uninsured children who are residents of this State and who meet the eligibility requirements established for the Program under Part 8 of Article 2 of Chapter 108A of the General Statutes. The Executive Administrator and Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter called the "Plan") shall administer the

G.S. 135-42(a) is set out twice. See note.

Program under this Part and shall carry out their duties and responsibilities in accordance with Parts 2 and 3 of this Article and with applicable provisions of Part 8 of Article 2 of Chapter 108A. The Plan's self-insured indemnity program shall not incur any financial obligations for the Program in excess of the amount of funds that the Plan's self-insured indemnity program receives for the Program.

(a) **(Effective July 1, 2008)** The State of North Carolina undertakes to make available a health insurance program for children (hereinafter called the "Program") to provide comprehensive acute medical care to low-income, uninsured children who are residents of this State and who meet the eligibility requirements established for the Program under Part 8 of Article 2 of Chapter 108A of the General Statutes. The Executive Administrator and Board of Trustees of the State Health Plan for Teachers and State Employees (hereinafter called the "Plan") shall administer the Program under this Part and shall carry out their duties and responsibilities in accordance with Parts 2 and 3 of this Article and with applicable provisions of Part 8 of Article 2 of Chapter 108A. The Plan's self-insured indemnity program shall not incur any financial obligations for the Program in excess of the amount of funds that the Plan's self-insured indemnity program receives for the Program.

(b) The benefits provided under the Program shall be equivalent to and made available through the Plan pursuant to Articles 2 and 3 of this Chapter and as provided under G.S. 108A-70.21(b) and administered by the Plan's Executive Administrator and Board of Trustees. To the extent there is a conflict between the provisions of Part 8 of Article 2 of Chapter 108A and Part 3 of this Article pertaining to eligibility, fees, deductibles, copayments, and other cost-sharing charges, the provisions of Part 8 of Article 2 of Chapter 108A shall control. In administering the benefits provided by this Part, the Executive Administrator and Board of Trustees shall have the same type of powers and duties that are provided under Part 3 of this Article for hospital and medical benefits.

(c) The benefits authorized by this Part are available only to children who are residents of this State and who meet the eligibility requirements established for the Program under Part 8 of Article 2 of Chapter 108A of the General Statutes. (1998-1, s. 4(a); 2007-323, s. 28.22A(i).)

Subdivision (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2008. The second version of subsection (a) set out above is effective July 1, 2008.

Editor's Note. — Session Laws 2007-323, s. 28.22(j), provides: "To ensure a smooth and effective transition of the administration of the NC Health Choice Program, enacted under Part 8 of Article 2 of Chapter 108A of the General Statutes, and administered under Part 5 of Article 3 of Chapter 135 of the General Statutes, the Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan and the Department of Health and Human Services, Division of Medical Assistance, shall meet to discuss the administration of NC Health Choice in view of the implementation of the State Health Plan for Teachers and State Employees effective July 1, 2008. These meetings shall address all issues that may arise regarding the administration of NC Health Choice under the State Health Plan, including provider payment rates and collection of applicable premiums and co-payments. The Executive Administrator and the Department shall report to the Committee on Employee Hospital and Medical Benefits not later than February 1, 2008, with recommendations on statutory or other changes necessary to ensure effective administration of NC Health Choice."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(i), effective July 1, 2008, in subsection (a), substituted "State Health Plan for Teachers and State Employees" for "North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter called the "Plan")" near the beginning of the second sentence, and, in the last sentence, substituted "Plan" for "Plans' self insured indemnity program" near the beginning and substituted "Plan" for "Plan's self insured indemnity program" near the end.

§ 135-42.1. Right to alter, amend, or repeal.

The General Assembly reserves the right to alter, amend, or repeal this Part. (1998-1, s. 4(a).)

§§ 135-43 through 135-49: Reserved for future codification purposes.

ARTICLE 4.

Consolidated Judicial Retirement Act.

§ 135-50. Short title and purpose.

(a) This Article shall be known and may be cited as the "Consolidated Judicial Retirement Act."

(b) The purpose of this Article is to improve the administration of justice by attracting and retaining the most highly qualified talent available within the State to the positions of justice and judge, district attorney and solicitor, public defender, and clerk of superior court, within the General Court of Justice. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 2, 3; 2005-276, s. 29.30A(a); 2005-345, s. 42; 2007-323, s. 28.21B(a).)

Cross References. — As to source of payment of employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for public employees, see G.S. 143-34.1.

Open Enrollment — Contributory Death Benefit. — Session Laws 2007-388, s. 1, provides: "Notwithstanding any section of law or any rules and regulations adopted by the Boards of Trustees to the contrary, the Retirement Systems Division of the Department of State Treasurer shall allow for an open enrollment period in the Contributory Death Benefit for Retired Members of the Teachers' and State Employees' Retirement System, the Local Governmental Employees' Retirement System, the Consolidated Judicial Retirement System, and the Legislative Retirement System. This open enrollment period shall begin February 1, 2008, and end May 31, 2008. The Retirement Systems Division shall send notice by U.S. mail of the open enrollment period to all retirees who elected not to be covered under this benefit or who failed to make any election at the time of their retirement and shall send a second notice by U.S. mail to any such retiree who fails to make an election within 60 days of the notification of the open enrollment period. Notice, at minimum, shall consist of notification of the open enrollment period and the consequences of failure to respond within the specified time frames, informational materials explaining the benefit program and the associated costs, and a preprinted personalized enrollment application to facilitate the enrollment process indicating each individual retiree's contribution rate. The contribution rate for retirees electing coverage during the open enrollment period shall be increased by eleven and one-tenth percent (11.1%) the rate established for retirees who elected coverage when first eligible, at retirement. For retirees electing coverage during this open enrollment period, coverage shall become effective the first of the month following the month in which the election of coverage is received by the Retirement Systems Division but not before February 1, 2008. Contribution rates for coverage shall be based upon the retiree's nearest age as of the effective date of coverage and shall begin by deduction from the retiree's net monthly retirement allowance in the month in which coverage becomes effective. Coverage elected by retirees during this open enrollment period shall be subject to all other laws and rules and regulations adopted by the Board of Trustees governing the Contributory Death Benefit for Retired Members."

Editor's Note. — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

In Session Laws 1999-237, s. 28.22(d), the General Assembly authorized the Board of Trustees of the Consolidated Judicial Retirement System to adopt a fixed amortization period of nine years for purposes of the unfunded accrued liability for the Retirement System beginning with the valuation for December 31, 1998.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(a), which had proposed to amend subsection (b) of this section by adding "and to membership on the Utilities Commission" at the end.

Effect of Amendments. — Session Laws 2007-323, s. 28.21B(a), effective July 1, 2007, inserted "public defender" near the end of subsection (b).

Legal Periodicals. — For note, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

CASE NOTES

Purpose. — The Consolidated Judicial Retirement Act, G.S. 135-50 et seq., was established for the purpose of improving the administration of justice by attracting and retaining the most highly qualified talent available within the State to the positions of justice and judge, district attorney and solicitor, and clerk of superior court by providing, as set forth in G.S. 135-54, retirement allowances and other benefits under the provisions of the Act for justices and judges, district attorneys, and clerks of superior court of the General Court of Justice of North Carolina, and their survivors. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

§ 135-51. Scope.

(a) This Article provides consolidated retirement benefits for all justices and judges, district attorneys, and solicitors who are serving on January 1, 1974, and who become such thereafter; and for all clerks of superior court who are so serving on January 1, 1975, and who become such after that date; and for all public defenders who are serving on July 1, 2007, and who become public defenders after that date.

(b) For justices and judges of the appellate and superior court divisions of the General Court of Justice who so served prior to January 1, 1974, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Articles 6 and 8, as the case may be, of Chapter 7A of the General Statutes.

For district attorneys and judges of the district court of the General Court of Justice who so served prior to January 1, 1974, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Article 1 of this Chapter.

For clerks of superior court of the General Court of Justice who so served prior to January 1, 1975, the provisions of this Article supplement and, under certain circumstances, replace the provisions of Article 1 of this Chapter.

(c) The retirement benefits of any person who becomes a justice or judge, district attorney, or solicitor on and after January 1, 1974, or clerk of superior court on and after January 1, 1975, or public defender on or after July 1, 2007, shall be determined solely in accordance with the provisions of this Article. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 4; 2005-276, s. 29.30A(b); 2005-345, s. 42; 2007-323, s. 28.21B(b).)

Editor's Note. — Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(b), which had proposed to amend subsection (a) of this section by substituting "after that date; and for all members of the Utilities Commission who are serving on September 1, 2005, and who become members of the Utilities Commission after that date" for "thereafter" at the end and by inserting "or a member of the Utilities Commission on or after September 1, 2005" in subsection (c).

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.21B(b), effective July 1, 2007, substituted "after that date; and for all public defenders who are serving on July 1, 2007, and who become public defenders after that date" for "thereafter" at the end of subsection (a); and inserted "or public defender on or after July 1, 2007" near the end of subsection (c).

§ 135-52. Application of Article 1; administration.

(a) References in Article 1 of this Chapter to the provisions of "this Chapter" shall not necessarily apply to this Article. However, except as otherwise provided in this Article, the provisions of Article 1 are applicable and shall apply to and govern the administration of the Retirement System established hereby. Not in limitation of the foregoing, the provisions of G.S. 135-5(h), 135-5(n), 135-9, 135-10, 135-12 and 135-17 are specifically applicable to the Retirement System established hereby.

(b) The provisions of this Article shall be administered by the Board of Trustees of the Teachers' and State Employees' Retirement System. (1973, c. 640, s. 1.)

CASE NOTES

Cited in Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

§ 135-53. Definitions.

The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Accumulated contributions" with respect to any member shall mean the sum of all the amounts deducted from the compensation of the member pursuant to G.S. 135-68 since he last became a member and credited to his account in the annuity savings fund, plus any amount standing to his credit pursuant to G.S. 135-67(c) as a result of a prior period of membership, plus any amounts credited to his account pursuant to G.S. 135-28.1(b) or 135-56(b), together with regular interest on all such amounts computed as provided in G.S. 135-7(b).

(2) "Actuarial equivalent" shall mean a benefit of equal value when computed upon the bases of such mortality tables as shall be adopted by the Board of Trustees, and regular interest.

(2a) "Average final compensation" shall mean the average annual compensation of a member during the 48 consecutive calendar months of membership service producing the highest such average.

(3) "Beneficiary" shall mean any person in receipt of a retirement allowance or other benefit as provided in this Article.

(4) "Board of Trustees" shall mean the Board of Trustees established by G.S. 135-6.

(4a) "Clerk of superior court" shall mean the clerk of superior court provided for in G.S. 7A-100(a).

(5) "Compensation" shall mean all salaries and wages derived from public funds which are earned by a member of the Retirement System for his service as a justice or judge, or district attorney, or clerk of superior court, or public defender.

(6) "Creditable service" shall mean for any member the total of his prior service plus his membership service.

(6a) "District attorney" shall mean the district attorney or solicitor provided for in G.S. 7A-60.

(7) "Filing" when used in reference to an application for retirement shall mean the receipt of an acceptable application on a form provided by the Retirement System.

(8) "Final compensation" shall mean for any member the annual equivalent of the rate of compensation most recently applicable to him.

(9) "Judge" shall mean any justice or judge of the General Court of Justice and the administrative officer of the courts.

(10) "Medical board" shall mean the board of physicians provided for in G.S. 135-6.

(11) "Member" shall mean any person included in the membership of the Retirement System as provided in this Article.

(12) "Membership service" shall mean service as a judge, district attorney, clerk of superior court, or public defender rendered while a member of the Retirement System.

(13) "Previous system" shall mean, with respect to any member, the retirement benefit provisions of Article 6 and Article 8 of Chapter 7A of the General Statutes, to the extent that such Article or Articles were formerly applicable to the member, and in the case of judges of the district court division, district attorney, public defender, and and clerk of superior court of the General Court of Justice, the Teachers' and State Employees' Retirement System.

(14) "Prior service" shall mean service rendered by a member, prior to his membership in the Retirement System, for which credit is allowable under G.S. 135-56.

(14a) "Public defender" means a public defender provided for in G.S. 7A-498.7, the appellate defender provided for in G.S. 7A-498.8, the capital defender, and the juvenile defender.

(15) "Regular interest" shall mean interest compounded annually at such a rate as shall be determined by the Board of Trustees in accordance with G.S. 135-7(b).

(16) "Retirement" shall mean the withdrawal from active service with a retirement allowance granted under the provisions of this Chapter. In order for a member's retirement to become effective in any month, the member must render no service at any time during that month.

(17) "Retirement allowance" shall mean the periodic payments to which a beneficiary becomes entitled under the provisions of this Article.

(18) "Retirement System" shall mean the "Consolidated Judicial Retirement System" of North Carolina, as established in this Article.

(19) "Year" as used in this Article shall mean the regular fiscal year beginning July 1 and ending June 30 in the following calendar year, unless otherwise defined by regulation of the Board of Trustees. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 5-10; 1999-237, s. 28.24(f); 2005-276, s. 29.30A(c); 2005-345, s. 42; 2007-323, s. 28.21B(c).)

Editor's Note. — In 135-53: Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(c), which had proposed to amend this section by inserting references to Utilities Commissioners in subdivisions (5), (12) and (13) of this section and by adding subsection (14a), a definition of "Utilities Commissioner."

This section was amended by Session Laws 2007-323, s. 28.21B(c), in the coded bill drafting format provided by G.S. 120-20.1. In subdivision (13), the word "and" before "clerk of superior court" was omitted, not stricken through, and an additional word "and" was inserted, underlined, resulting in the word "and" appearing twice. Subdivision (13) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.21B(c), effective July 1, 2007, inserted "or public defender" in subdivisions (5) and (12); deleted "or" preceding "clerk" in subdivision (12); substituted "district attorney, public defender, and" for "and district attorney" in subdivision (13); and added subdivision (14a).

§ 135-54. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Article for justices and judges, district attorneys, public defenders, and clerks of superior court of the General Court of Justice of North Carolina, and their survivors. The Retirement System so created shall be established as of January 1, 1974.

The Retirement System shall have the power and privileges of a corporation and shall be known as the "Consolidated Judicial Retirement System of North Carolina," and by such name all of its business shall be transacted. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 11; 2005-276, s. 29.30A(d); 2005-345, s. 42; 2007-323, s. 28.21B(d).)

Editor's Note. — Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(d), which had proposed to amend this section by inserting "and Utilities Commissioners" in the first paragraph.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.21B.(d), effective July 1, 2007, inserted "public defenders," near the end of the first sentence of the first paragraph.

CASE NOTES

Purpose. — Consolidated Judicial Retirement Act, G.S. 135-50 et seq., was established for the purpose of improving the administration of justice by attracting and retaining the most highly qualified talent available within the State to the positions of justice and judge, district attorney and solicitor, and clerk of superior court, within the General Court of Justice, G.S. 135-50(b), by providing, as set forth in G.S. 135-54, retirement allowances and other benefits under the provisions of the Act for justices and judges, district attorneys, and clerks of superior court of the General Court of Justice of North Carolina, and their survivors. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

§ 135-55. Membership.

(a) The membership of the Retirement System shall consist of:

(1) All judges and district attorneys in office on January 1, 1974;

(2) All persons who become judges and district attorneys or reenter service as judges and district attorneys after January 1, 1974;
(3) All clerks of superior court in office on January 1, 1975;
(4) All persons who become clerks of superior court or reenter service as clerks of superior court after January 1, 1975;
(5) All public defenders in office on July 1, 2007; and
(6) All persons who become public defenders or reenter service as public defenders after July 1, 2007.

(b) The membership of any person in the Retirement System shall cease upon:
(1) The withdrawal of his accumulated contributions after he is no longer a judge, district attorney, public defender, or clerk of superior court, or
(2) His retirement under the provisions of the Retirement System, or
(3) His death. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, ss. 12, 13; 2005-276, s. 29.30A(e); 2005-345, s. 42; 2007-323, s. 28.21B(e).)

Editor's Note. — Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(e), which had proposed to amend this section by inserting subdivisions (a)(5) and (6), adding Utilities Commissioners in office on and after September 1, 2005, to the Retirement System and inserting "Utilities Commissioner" in subdivision (b)(1).

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.21B.(e), effective July 1, 2007, in subsection (a), deleted "and" at the end of subdivision (a)(3), substituted a semicolon for a period at the end of subdivision (a)(4), and added subdivisions (a)(5) and (a)(6); and, inserted "public defender" near the middle of subsection (b)(1).

CASE NOTES

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 122, 349 S.E.2d 621 (1986).

§ 135-56. Creditable service.

(a) Subject to such rules and regulations as the Board of Trustees shall adopt with regard to the verification of a judge's prior service, the prior service of a judge shall consist of his service rendered prior to January 1, 1974, as a justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, judge of the district court division of the General Court of Justice, as administrative officer of the courts, or as a solicitor or district attorney.

(b) When membership ceases as a result of a member's withdrawal of his accumulated contributions, the prior service and previous membership service of the member shall no longer be considered to be creditable service; provided, however, that if a member whose creditable service has been cancelled in accordance with this subsection subsequently returns to membership for a period of five years, he may thereafter repay in a lump sum the amount withdrawn plus regular interest thereon from the date of withdrawal through the date of repayment and thereby increase his creditable service by the amount of creditable service lost when he withdrew his accumulated contributions.

(c) On and after January 1, 1984, the creditable service of a member who was a member of the former Uniform Solicitorial or Uniform Clerks of Superior Court Retirement Systems at the time of merger of those Systems into this Consolidated Judicial Retirement System and whose accumulated contributions are transferred from those Systems to this System, includes service that was creditable in the Uniform Solicitorial and Uniform Clerks of Superior Court Retirement Systems; and membership service with those Retirement Systems is membership service with this Retirement System.

(d) Any member may purchase creditable service for service as a judge, district attorney, or clerk of superior court, when not otherwise provided for in this section, and as a judge of any lawfully constituted court of this State inferior to the superior court, not to include service as a magistrate, justice of the peace or mayor's court judge. The member, after the transfer of any accumulated contributions from the Teachers' and State Employees' Retirement System or Local Governmental Employees' Retirement System, shall pay an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire with an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(e) Any member may purchase creditable service for service as a member of the General Assembly not otherwise creditable under this section, provided the service is not credited in the Legislative Retirement Fund nor the Legislative Retirement System, and further provided the member pays a lump sum amount equal to the full cost of the additional service credits calculated on the basis of the assumptions used for the purposes of the actuarial valuation of the System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which a member could retire on an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the Board of Trustees. Notwithstanding the foregoing provisions of this subsection that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance.

(f) The creditable service of a member who was a member of the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System and whose accumulated contributions and reserves are transferred from that System to this System, includes service that was creditable in the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System, and membership service with those Retirement Systems is membership service with this Retirement System.

(g) If a member who has not vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 135-75.1 for acts committed after July 1, 2007, then that member shall forfeit all benefits under this System. If a member who has vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 135-75.1 for acts committed after July 1, 2007, then that member is not entitled to any creditable service that accrued after July 1, 2007. No member shall forfeit any benefit or creditable service earned from a position not as a justice, judge, district attorney, or clerk of superior court.

(h) On and after July 1, 2007, the creditable service of a member who was a public defender and a member of the Teachers' and State Employees'

Retirement System at the time of transfer of membership from the previous system to this System shall include service as a public defender that was creditable in the previous system immediately prior to July 1, 2007. The accumulated contributions, creditable service, and reserves, if any, of a member as a public defender shall be transferred from the previous system to this System in the same manner as prescribed under G.S. 135-28.1 as it pertained to judges of the district court division of the General Court of Justice. (1973, c. 640, s. 1; 1977, c. 936; 1983 (Reg. Sess., 1984), c. 1031, ss. 14, 15; 1985, c. 649, s. 1; 1989, c. 255, s. 21(a); 1999-237, s. 28.24(c); 2003-284, s. 30.18(f); 2007-179, s. 4(b); 2007-323, s. 28.21B(h).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-179, s. 4(b), effective July 1, 2007, and applicable to offenses committed on or after that date, added subsection (g).

Session Laws 2007-323, s. 28.21B(h), effective July 1, 2007, added subsection (h).

§ 135-56.01. Reciprocity of creditable service with other State-administered retirement systems.

(a) Only for the purpose of determining eligibility for benefits accruing under this Article, creditable service standing to the credit of a member of the Legislative Retirement System, Teachers' and State Employees' Retirement System, or the Local Governmental Employees' Retirement System shall be added to the creditable service standing to the credit of a member of this System; provided, that in the event a person is a retired member of any of the foregoing retirement systems, such creditable service standing to the credit of the retired member prior to retirement shall be likewise counted. In no instance shall service credits maintained in the aforementioned retirement systems be added to the creditable service in this System for application of this System's benefit accrual rate in computing a service retirement benefit unless specifically authorized by this Article.

(b) A person who was a former member of this System and who has forfeited his creditable service in this System by receiving a return of contributions and who has creditable service in the Legislative Retirement System, Teachers' and State Employees' Retirement System, or the Local Government Employees' Retirement System may count such creditable service for the purpose of restoring the creditable service forfeited in this System under the terms and conditions as set forth in this Article and reestablish membership in this System.

(c) Creditable service under this section shall not be counted twice for the same period of time whether earned as a member, purchased, or granted as prior service credits. (1989 (Reg. Sess., 1990), c. 1066, s. 35(d); 1997-456, s. 27.)

Editor's Note. — Former G.S. 135-56A was recodified as this section pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 135-56.1: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1031, s. 16.

§ 135-56.2. Creditable service for other employment.

Any member may purchase creditable service for service as a State teacher or employee, as defined under G.S. 135-1(10) and (25), and for service as an employee of local government, as defined under G.S. 128-21(10). A member, upon the completion of 10 years of membership service, may also purchase creditable service for periods of federal employment, provided that the member is not receiving any retirement benefits resulting from this federal employment, and provided that the member is not vested in the particular federal retirement system to which the member may have belonged while a federal employee. The member, after the transfer of any accumulated contributions from the Teachers' and State Employees' Retirement System or Local Governmental Employees' Retirement System, shall pay an amount equal to the full cost of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the Retirement System's liabilities, taking into account the additional retirement allowance arising on account of the additional service credits commencing at the earliest age at which the member could retire with an unreduced retirement allowance as determined by the Board of Trustees upon the advice of the consulting actuary, plus an administrative fee as set by the Board of Trustees. As an alternative to transferring any accumulated contributions from the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System to the Consolidated Judicial Retirement System, a member may irrevocably elect to transfer these contributions to the Supplemental Retirement Income Plan of North Carolina as determined by the Plan's Board of Trustees and the Department of State Treasurer in accordance with the provisions of G.S. 135-94(a)(4). Notwithstanding the foregoing provisions of this section that provide for the purchase of service credits, the terms "full cost", "full liability", and "full actuarial cost" include assumed annual post-retirement allowance increases, as determined by the Board of Trustees, from the earliest age at which a member could retire on an unreduced service allowance. (1983 (Reg. Sess., 1984), c. 1041; 1985, c. 348, s. 1; c. 749, s. 2; 1989, c. 255, s. 21(b).)

§ 135-56.3. Repayments and Purchases.

(a) Purchase of Service Credits Through Rollover Contributions From Certain Other Plans. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of this Article, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through rollover contributions to the Annuity Savings Fund from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code, (ii) an eligible plan under Section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state, (iii) an individual retirement account or annuity described in Section 408(a) or 408(b) of the Internal Revenue Code that is eligible to be rolled over and would otherwise be includible in gross income, or (iv) a qualified plan described in Section 401(a) or 403(a) of the Internal Revenue Code. Notwithstanding the foregoing, the Retirement System shall not accept any amount as a rollover contribution unless such amount is eligible to be rolled over to a qualified trust in accordance with applicable law and the member provides evidence satisfactory to the Retirement System that such amount qualifies for rollover treatment. Unless received by the Retirement System in the form of a direct rollover, the rollover contribution must be paid to the Retirement System on or before the 60th day after the date it was received by the member.

Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of this Article, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) an annuity contract described in Section 403(b) of the Internal Revenue Code or (ii) an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state.

(b) Purchase of Service Credits Through Plan-to-Plan Transfers. — Notwithstanding any other provision of this Article, and without regard to any limitations on contributions otherwise set forth in this Article, a member, who is eligible to restore or purchase membership or creditable service pursuant to the provisions of this Article, may, subject to such rules and regulations established by the Board of Trustees, purchase such service credits through a direct transfer to the Annuity Savings Fund of funds from (i) the Supplemental Retirement Income Plans A, B, or C of North Carolina or (ii) any other defined contribution plan qualified under Section 401(a) of the Internal Revenue Code which is maintained by the State of North Carolina, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state. (2002-71, s. 7.)

Editor's Note. — Session Laws 2002-71, s. 9, provides, in part, that s. 7 of the act becomes effective January 1, 2003, except that G.S. 135-56.3(b), as enacted by s. 7, becomes effective the later of January 1, 2003, or the date upon which the Department of State Treasurer receives a ruling from the Internal Revenue Service approving the direct transfers provided for in that subsection. The Revisor of Statutes is informed that a favorable letter of determination has been received.

§ 135-57. Service retirement.

(a) Any member on or after January 1, 1974, who has attained his fiftieth birthday and five years of membership service may retire upon written application to the board of trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 120 days subsequent to the execution and filing thereof, he desires to be retired.

(b) Any member who is a justice or judge of the General Court of Justice shall be automatically retired as of the first day of the calendar month coinciding with or next following the later of January 1, 1974, or his attainment of his seventy-second birthday; provided, however, that no judge who is a member on January 1, 1974, shall be forced to retire under the provisions of this subsection at an earlier date than the last day that he is permitted to remain in office under the provisions of G.S. 7A-4.20.

(c) Any member who terminates service on or after January 1, 1974, having accumulated five or more years of creditable service may retire under the provisions of subsection (a) above, provided that he shall not have withdrawn his accumulated contributions prior to the effective date of his retirement, and the requirement of subsection (a) that the member be in service shall not apply.

(d) Any member who was in service October 8, 1981, who had attained 50 years of age, may retire upon written application to the board of trustees setting forth at what time, as of the first day of a calendar month, not less than one day nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. (1973, c. 640, s. 1; 1981, c. 378, s. 6; 1983, c. 761, s. 230; 1987, c. 513, s. 1; 1991 (Reg. Sess., 1992), c. 873, s. 2; 2007-431, s. 4.)

Effect of Amendments. — Session Laws 2007-431, s. 4, effective July 1, 2007, substituted "120 days" for "90 days" in subsection (a).

CASE NOTES

Cited in Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

§ 135-58. Service retirement benefits.

(a) Any member who retires under the provisions of subsection (a) or subsection (c) of G.S. 135-57 before July 1, 1990, after he either has attained his sixty-fifth birthday or has completed 24 years or more of creditable service shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of his retirement and shall be continued on the first day of each month thereafter during his lifetime, the amount of which shall be computed as the sum of (1), (2) and (3) following, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which he is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System or the North Carolina Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment) would total three fourths of his final compensation:

(1) Four percent (4%) of his final compensation, multiplied by the number of years of his creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and one-half percent (3 ½%) of his final compensation, multiplied by the number of years of his creditable service rendered as a judge of the superior court or as administrative officer of the courts;

(3) Three percent (3%) of his final compensation, multiplied by the number of years of his creditable service rendered as a judge of the district court, district attorney, or clerk of superior court.

(a1) Any member who retires under the provisions of subsection (a) or subsection (c) of G.S. 135-57 on or after July 1, 1990, but before July 1, 1999, after he either has attained his 65th birthday or has completed 24 years or more of creditable service shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of his retirement and shall be continued on the first day of each month thereafter during his lifetime, the amount of which shall be computed as the sum of (1), (2), and (3) following, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which he is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System or the North Carolina Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment) would total three-fourths of his final compensation:

(1) Four and two-hundredths percent (4.02%) of his final compensation, multiplied by the number of years of his creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and fifty-two hundredths percent (3.52%) of his final compensation, multiplied by the number of years of his creditable service rendered as a judge of the superior court or as administrative officer of the courts;

(3) Three and two-hundredths percent (3.02%) of his final compensation, multiplied by the number of years of his creditable service rendered as

a judge of the district court, district attorney, or clerk of superior court.

(a2) Any member who retires under the provisions of G.S. 135-57(a) or G.S. 135-57(c) on or after July 1, 1999, but before July 1, 2001, after the member has either attained the member's 65th birthday or has completed 24 years or more of creditable service, shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of the member's retirement and shall be continued on the first day of each month thereafter during the member's lifetime, the amount of which shall be computed as the sum of the amounts in subdivisions (1), (2), (3), (4), and (5) following, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which the member is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System, or the Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment) would total three-fourths of the member's final compensation:

(1) Four and two-hundredths percent (4.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and fifty-two hundredths percent (3.52%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the superior court or as Administrative Officer of the Courts;

(3) Three and two-hundredths percent (3.02%) of the member's final compensation, multiplied by the number of years of creditable service, rendered as a judge of the district court, district attorney, or clerk of superior court;

(4) A service retirement allowance computed in accordance with the service retirement provisions of Article 3 of Chapter 128 of the General Statutes using an average final compensation as defined in G.S. 135-53(2a) and creditable service equal to the number of years of the member's creditable service that was transferred from the Local Governmental Employees' Retirement System to this System as provided in G.S. 135-56; and

(5) A service retirement allowance computed in accordance with the service retirement provisions of Article 1 of this Chapter using an average final compensation as defined in G.S. 135-53(2a) and creditable service equal to the number of years of the member's creditable service that was transferred from the Teachers' and State Employees' Retirement System to this System as provided in G.S. 135-56.

(a3) Any member who retires under the provisions of G.S. 135-57(a) or G.S. 135-57(c) on or after July 1, 2001, but before January 1, 2004, after the member has either attained the member's 65th birthday or has completed 24 years or more of creditable service, shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of the member's retirement and shall be continued on the first day of each month thereafter during the member's lifetime, the amount of which shall be computed as the sum of the amounts in subdivisions (1), (2), (3), (4), and (5) following, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which the member is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System, or the Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment) would total three-fourths of the member's final compensation:

(1) Four and two-hundredths percent (4.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and fifty-two hundredths percent (3.52%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the superior court or as Administrative Officer of the Courts;

(3) Three and two-hundredths percent (3.02%) of the member's final compensation, multiplied by the number of years of creditable service, rendered as a judge of the district court, district attorney, or clerk of superior court;

(4) A service retirement allowance computed in accordance with the service retirement provisions of Article 3 of Chapter 128 of the General Statutes using an average final compensation as defined in G.S. 135-53(2a) and creditable service equal to the number of years of the member's creditable service that was transferred from the Local Governmental Employees' Retirement System to this System as provided in G.S. 135-56; and

(5) A service retirement allowance computed in accordance with the service retirement provisions of Article 1 of this Chapter using an average final compensation as defined in G.S. 135-53(2a) and creditable service, including any sick leave standing to the credit of the member, equal to the number of years of the member's creditable service that was transferred from the Teachers' and State Employees' Retirement System to this System as provided in G.S. 135-56.

(a4) Any member who retires under the provisions of G.S. 135-57(a) or G.S. 135-57(c) on or after January 1, 2004, but before July 1, 2007, after the member has either attained the member's 65th birthday or has completed 24 years or more of creditable service, shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of the member's retirement and shall be continued on the first day of each month thereafter during the member's lifetime, the amount of which shall be computed as the sum of the amounts in subdivisions (1), (2), (3), (4), and (5) of this subsection, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which the member is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System, or the Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment), would total three-fourths of the member's final compensation:

(1) Four and two hundredths percent (4.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and fifty-two hundredths percent (3.52%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the superior court or as Administrative Officer of the Courts;

(3) Three and two hundredths percent (3.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the district court, district attorney, or clerk of superior court;

(4) A service retirement allowance computed in accordance with the service retirement provisions of Article 3 of Chapter 128 of the General Statutes using an average final compensation as defined in

G.S. 135-53(2a) and creditable service equal to the number of years of the member's creditable service that was transferred from the Local Governmental Employees' Retirement System to this System as provided in G.S. 135-56; and

(5) A service retirement allowance computed in accordance with the service retirement provisions of Article 1 of this Chapter of the General Statutes using an average final compensation as defined in G.S. 135-53(2a) and creditable service, including any sick leave standing to the credit of the member, equal to the number of years of the member's creditable service that was transferred from the Teachers' and State Employees' Retirement System or the Legislative Retirement System to this System as provided in G.S. 135-56.

(a5) Any member who retires under the provisions of G.S. 135-57(a) or G.S. 135-57(c) on or after July 1, 2007, after the member has either attained the member's 65th birthday or has completed 24 years or more of creditable service, shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of the member's retirement and shall be continued on the first day of each month thereafter during the member's lifetime, the amount of which shall be computed as the sum of the amounts in subdivisions (1), (2), (3), (4), and (5) of this subsection, provided that in no event shall the annual allowance payable to any member be greater than an amount which, when added to the allowance, if any, to which the member is entitled under the Teachers' and State Employees' Retirement System, the Legislative Retirement System, or the Local Governmental Employees' Retirement System (prior in any case to any reduction for early retirement or for an optional mode of payment), would total three-fourths of the member's final compensation:

(1) Four and two hundredths percent (4.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a justice of the Supreme Court or judge of the Court of Appeals;

(2) Three and fifty-two hundredths percent (3.52%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the superior court or as Administrative Officer of the Courts;

(3) Three and two hundredths percent (3.02%) of the member's final compensation, multiplied by the number of years of creditable service rendered as a judge of the district court, district attorney, clerk of superior court, or public defender;

(4) A service retirement allowance computed in accordance with the service retirement provisions of Article 3 of Chapter 128 of the General Statutes using an average final compensation as defined in G.S. 135-53(2a) and creditable service equal to the number of years of the member's creditable service that was transferred from the Local Governmental Employees' Retirement System to this System as provided in G.S. 135-56; and

(5) A service retirement allowance computed in accordance with the service retirement provisions of Article 1 of this Chapter using an average final compensation as defined in G.S. 135-53(2a) and creditable service, including any sick leave standing to the credit of the member, equal to the number of years of the member's creditable service that was transferred from the Teachers' and State Employees' Retirement System or the Legislative Retirement System to this System as provided in G.S. 135-56.

(b) Any member who retires under the provisions of subsection (a) or subsection (c) of G.S. 135-57 before he either has attained his sixty-fifth birthday or has completed 24 years of creditable service shall receive an annual retirement allowance, payable monthly, which shall commence on the effective date of his retirement and shall be continued on the first day of each month thereafter during his lifetime, the amount of which shall be determined in the same manner and be subject to the same maximum limitation as provided for in subsection (a) above except that the allowance so computed shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which the member's retirement date precedes the first day of the month coincident with or next following the earlier of

(1) The member's sixty-fifth birthday or

(2) The date the member would have completed 24 years of creditable service if he had been in membership service from his retirement date until such date.

For the sole purpose of determining whether a member has completed the required 24 years of creditable service referred to in this subsection (b) or the date on which he would have completed such period of creditable service if he had remained in membership service, in the case of a member of the Teachers' and State Employees' Retirement System who became a member of this Retirement System under circumstances described in G.S. 135-28.1, and who at the time of his retirement hereunder is in service and has retained his membership in the Teachers' and State Employees' Retirement System as provided for in G.S. 135-28.1, his creditable service shall be taken as the sum of his creditable service hereunder plus the amount of creditable service remaining to his credit in such other system as provided for in G.S. 135-28.1.

(c) The foregoing subsections of this section to the contrary notwithstanding, in no event will the retirement allowance payable at any time to a retired member who was a member of a previous system immediately prior to January 1, 1974, prior to any reduction of such allowance in accordance with G.S. 135-61, be less than the retirement allowance to which he would have been entitled under the terms of such previous system if this Article had not been enacted.

(d) Commencing with the payment for the month of January 1974, the retirement allowance of each retired member of a previous system who was in receipt of a retirement allowance thereunder as of January 1, 1974, shall be paid from the assets of the Retirement System in the same amount as would have been applicable for January 1974, if this Article had not been enacted.

(e) Notwithstanding any other provision to the contrary, in no event will the retirement allowance payable at any time to a retired member who was a member of a previous system immediately prior to January 1, 1974, prior to any reduction of such allowance in accordance with G.S. 135-61, be greater than the retirement allowance to which he would have been entitled under the terms of such previous system if this Article had not been enacted or than the retirement allowance to which he would have been entitled under this Article if he had not been entitled to benefits under the terms of such previous system, whichever is larger. (1973, c. 640, s. 1; 1977, c. 1120, s. 2; 1983 (Reg. Sess., 1984), c. 1031, ss. 17, 18; c. 1109, ss. 13.14, 13.15; 1985, c. 649, s. 7; 1989 (Reg. Sess., 1990), c. 1077, ss. 6, 7; 1999-237, s. 28.24(d), (e); 2001-424, s. 32.29(a), (b); 2003-284, s. 30.18(g), (h); 2005-276, s. 29.30A(f), (g); 2005-345, s. 42; 2007-323, s. 28.21B(f), (g).)

Editor's Note. — Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(f) and (g), which had proposed to amend this section by inserting 'but before September 1, 2005,' after 'January 1, 2004,' in the first paragraph of subsection (a4) and adding subsection (a5).

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 28.21B(f), (g), inserted "but before July 1, 2007," in the first sentence of subsection (a)(4); and added subsection (a5).

CASE NOTES

Differential in percentages used to calculate retirement benefits does not violate the equal protection clause of U.S. Const., Amend. XIV. The objectives sought by the legislature to be obtained from the present retirement system are valid, and the method chosen is reasonably calculated to achieve that end. Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

Applied in Shepherd v. Consolidated Judicial Retirement Sys., 89 N.C. App. 560, 366 S.E.2d 604 (1988).

§ 135-59. Disability retirement.

(a) Upon application by or on behalf of the member, any member in service who has completed five or more years of creditable service and who has not attained his sixty-fifth birthday may be retired by the Board of Trustees, on the first day of any calendar month, not less than one day nor more than 90 days next following the date of filing such application, on a disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired; and, provided further, that if a member is removed by the Supreme Court for mental or physical incapacity under the provisions of G.S. 7A-376, no action is required by the medical board under this section and, provided further, the medical board shall determine if the member is able to engage in gainful employment and, if so, the member shall still be retired and the disability retirement allowance as a result thereof shall be reduced as in G.S. 135-60(d). Provided further, that the medical board shall not certify any member as disabled who:

(1) Applies for disability retirement based upon a mental or physical incapacity which existed when the member first established membership in the system; or

(2) Is in receipt of any payments on account of the same disability which existed when the member first established membership in the system.

The Board of Trustees shall require each employee upon enrolling in the Retirement System to provide information on the membership application concerning any mental or physical incapacities existing at the time the member enrolls.

Notwithstanding the foregoing to the contrary, any beneficiary who commenced retirement with an early or service retirement benefit has the right, within three years of this retirement, to convert to an allowance with disability retirement benefits without modification of any election of optional allowance previously made; provided, the beneficiary presents clear and convincing evidence that the beneficiary would have met all applicable requirements for disability retirement benefits while still in service as a member. The allowance on account of disability retirement benefits to the beneficiary shall be retroactive to the effective date of early or service retirement.

(b) Notwithstanding the foregoing, the surviving spouse of a deceased member who has met all other requirements for disability retirement benefits, except whose death occurred before the first day of the calendar month in which the member's disability retirement allowance was due and payable, and who was the designated beneficiary for a return of accumulated contributions and the final compensation death benefit as provided in G.S. 135-63, shall be paid in lieu of the return of accumulated contributions and the final compensation death benefit a monthly allowance equal to a reduced retirement allowance provided by a fifty percent (50%) joint and survivorship option, plus the allowance payable to a former member's surviving spouse, in the manner prescribed under G.S. 135-64 as though the former member had commenced retirement the first day of the month following his death. (1973, c. 640, s. 1; 1981, c. 689, s. 3; c. 940, s. 2; 1985, c. 479, ss. 192(b), 194; 1987, c. 513, s. 1.)

§ 135-60. Disability retirement benefits.

(a) Upon retirement for disability in accordance with G.S. 135-59, a member shall receive a disability retirement allowance computed and payable as provided for service retirement in G.S. 135-58(a2) except that the member's creditable service shall be taken as the creditable service he would have had had he continued in service to the earliest date he could have retired on an unreduced service retirement allowance as a member in the same division of the General Court of Justice in which he was serving on his disability retirement date.

(b) Once each year during the first five years following retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained his sixtieth birthday to undergo a medical examination, such examination to be made at the place of residence of the beneficiary or other place mutually agreed upon, by a physician or physicians designated by the Board of Trustees. Should any disability beneficiary who has not yet attained his sixtieth birthday refuse to submit to at least one medical examination in any such year by a physician or physicians designated by the Board of Trustees, his allowance may be discontinued until his withdrawal of such refusal, and should his refusal continue for one year, it shall be assumed that he is no longer disabled.

(c) Should the medical board certify to the Board of Trustees that a disability beneficiary prior to his sixty-fifth birthday has recovered to the extent that he would not satisfy the requirements for disability retirement if he were an active member of the Retirement System, or if his disability shall be assumed to have terminated in accordance with subsection (b) above, his disability retirement allowance shall thereupon cease, he shall be restored as a member of the Retirement System, and the period during which he was in receipt of a disability retirement allowance shall not be included in his creditable service.

(d) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. This difference shall be increased on January 1 of each year by the ratio of the Consumer Price Index to the Index one year earlier, calculated to the nearest tenth of one percent (1/10th of 1%).

Should the earning capacity of the disability beneficiary later change, the portion of his disability retirement allowance not provided by his contributions may be further modified. In lieu of the reductions on account of a disability beneficiary earning more than the aforesaid difference, he may elect to convert his disability retirement allowance to a service retirement allowance calculated on the basis of his final compensation and creditable service at the time of disability retirement and his age at the time of conversion to service retirement. This election is irrevocable. (1973, c. 640, s. 1; 1981, c. 975, s. 4; c. 980, s. 5; 1983 (Reg. Sess., 1984), c. 1031, s. 19; 1999-237, s. 28.24(g).)

§ 135-61. Election of optional allowance.

Any member who retires under the provisions of this Article shall have the right to elect to have his allowance payable under any one of the optional forms provided for in G.S. 135-5(g), subject to the conditions therein contained, in lieu of the allowance that would otherwise be payable. (1973, c. 640, s. 1.)

§ 135-62. Return of accumulated contributions.

(a) Should a member cease membership service otherwise than by death or retirement under the provisions of this Article, he shall, upon submission of an application, be paid, not earlier than 60 days from the date of termination of service, his contributions and, if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service as a judge. Upon payment of such accumulated contributions his membership in the Retirement System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered, except as otherwise provided in G.S. 135-56(b). Any such payment of a member's accumulated contributions shall be in full and complete discharge of any rights in or to any benefits otherwise payable under this Article.

(b) Repealed by Session Laws 1993, c. 531, s. 7. (1973, c. 640, s. 1; 1981, c. 672, s. 4; 1983, c. 467; 1983 (Reg. Sess., 1984), c. 1031, s. 20; 1993, c. 531, s. 7.)

CASE NOTES

Recovery of Contributions Following Removal for Cause. — Loss of retirement benefits as the result of the removal of a judge from office for cause other than mental or physical incapacity does not mean that the judge forfeits his right to recover the contributions which he paid into the fund. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

§ 135-63. Benefits on death before retirement.

(a) Upon receipt of proof, satisfactory to the Board of Trustees, of the death of a member in service, there shall be paid in a lump sum to such person as the member shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit equal to the sum of (i) the member's accumulated contributions, plus (ii) the member's final compensation; provided, however, that if the member has attained his fiftieth birthday with at least five years of membership service at his date of death, and if the designated recipient of the death benefits is the member's spouse who survives him, and if the spouse so elects, then the lump-sum death benefit provided for herein shall consist only of a payment equal to the member's final compensation and there shall be paid to the surviving spouse an annual retirement allowance, payable monthly, which shall commence on the first day of the calendar month coinciding with or next following the death of the member and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such retirement allowance shall be equal to one half of the amount of the retirement allowance to which the member would have been entitled had he retired under the provisions of G.S. 135-57(a) on the first day of the calendar month coinciding with or next following his date of death, reduced by two percent (2%) thereof for each full year, if any, by which the age of the member at his date of death exceeds that of his spouse. If the retirement allowance to the spouse shall terminate on the remarriage or death of the spouse before the total of the retirement allowance payments made equals the amount of the member's accumulated contributions at date of death, the excess of such accumulated contributions over the total of the retirement allowances paid to the spouse shall be paid in a lump sum to such person as the member shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time such payment falls due, otherwise to the former member's legal representatives.

(b) There shall be paid to the surviving unremarried spouse of any former judge who died in service prior to January 1, 1974, and after his forty-ninth birthday an annual retirement allowance which shall commence on January 1, 1974, and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such retirement allowance shall be computed in accordance with the provisions of subsection (a) above as if the provisions of this Article had been in effect on the date of death of the former judge, and the final compensation of such former judge had been equal to the rate of annual compensation in effect on December 31, 1973, for the office held by the former judge at the time of his death.

(c) Upon receipt of proof, satisfactory to the Board of Trustees, of the death of a member not in service, there shall be paid in a lump sum to such person as the member shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit equal to the member's accumulated contributions.

(d) Notwithstanding the provisions of G.S. 7A-376, there shall be paid to the surviving spouse of any former judge whose death occurred prior to July 1, 1983, who had not withdrawn his contributions pursuant to G.S. 135-62, an annual retirement allowance which shall commence on July 1, 1983, and shall be continued on the first day of each month thereafter until the death or remarriage of the spouse. If the spouse dies or remarries before the total of the retirement allowance paid equals the amount of the former judge's accumulated contributions, the excess of the accumulated contributions over the total of the retirement allowance paid to the spouse shall be paid in a lump sum to the person the spouse has nominated by written designation duly acknowledged and filed with the Board of Trustees, if the person is living at the time the payment falls due, otherwise to the spouse's legal representative. The amount of any such retirement allowance shall be computed in accordance with the provisions of subsection (a) above. This subsection does not authorize allowances to surviving spouses of former judges convicted of crimes related to the performance of their judicial duties. (1973, c. 640, s. 1; c. 1385; 1983, c. 761, ss. 231, 234.)

§ 135-64. Benefits on death after retirement.

(a) In the event of the death of a former member while in receipt of a retirement allowance pursuant to his retirement under the provisions of G.S.

135-57, or after a former member's sixty-fifth birthday while in receipt of a retirement allowance pursuant to his retirement under the provisions of G.S. 135-59, there shall be paid to the former member's surviving spouse, if any, an annual retirement allowance, payable monthly, which shall commence on the first day of the calendar month next following the date of death of the former member and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such allowance shall be equal to one half of the allowance that was payable to the former member for the month immediately prior to his month of death, or which would have been so payable had an optional mode of payment not been elected under the provisions of G.S. 135-61, reduced by two percent (2%) thereof for each full year, if any, by which the age of the former member at date of death exceeds that of his spouse.

(b) In the event of the death of a former member prior to his sixty-fifth birthday while in receipt of a retirement allowance pursuant to his retirement under the provisions of G.S. 135-59, there shall be paid to the former member's surviving spouse, if any, an annual retirement allowance, payable monthly, which shall commence on the first day of the calendar month next following the date of death of the former member and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such allowance shall be equal to one half of the allowance to which the former member would have been entitled under the provisions of G.S. 135-58 if he had remained in service from his disability retirement date to his date of death with no change in his final compensation or status and had then retired, reduced by two percent (2%) thereof for each full year, if any, by which the age of the former member at date of death exceeds that of his spouse.

(c) In the event of the death of a former member while in receipt of a retirement allowance under the provisions of G.S. 135-58, 135-60, or 135-61, if such former member is not survived by a spouse to whom a retirement allowance is payable under the provisions of subsection (a) or subsection (b) above, nor survived by a beneficiary to whom a monthly survivorship benefit is payable under one of the optional modes of payment under G.S. 135-61, there shall be paid to such person as the member shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit equal to the excess, if any, of the accumulated contributions of the member at his date of retirement over the total of the retirement allowances paid to him prior to his death.

(d) In the event that a retirement allowance becomes payable to the spouse of a former member under the provisions of subsection (a) or subsection (b) above, or to the designated survivor of a former member under one of the optional modes of payment under G.S. 135-61, and such retirement allowance to the spouse shall terminate on the remarriage or death of the spouse, or on the death of the designated survivor, before the total of the retirement allowances paid to the former member and his spouse or designated survivor combined equals the amount of the member's accumulated contributions at his date of retirement, the excess of such accumulated contributions over the total of the retirement allowances paid to the former member and his spouse or designated survivor combined shall be paid in a lump sum to such person as the member shall have nominated by written designation duly acknowledged and filed with the Board of Trustees, if such person is living at the time such payment falls due, otherwise to the former member's legal representatives.

(e) In the event of the death of a retired former judge while in receipt of a retirement allowance under the provisions of G.S. 135-58(d), there shall be paid to the former judge's surviving spouse, if any, an annual retirement allowance payable monthly, which shall commence on the first day of the calendar month next following the date of death of the former judge and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such allowance shall be equal to one half of the allowance that was payable to the former judge for the month immediately prior to his month of death, reduced by two percent (2%) thereof for each full year, if any, by which the age of the former judge at date of death exceeds that of his spouse.

(f) There shall be paid to the surviving unremarried spouse of any former judge who died prior to January 1, 1974, while in receipt of a retirement allowance under the provisions of a previous system, a retirement allowance which shall commence on January 1, 1974, and shall be continued on the first day of each month thereafter until the remarriage or death of the spouse. The amount of any such retirement allowance shall be equal to one half of the allowance that would have been payable to the former judge for the month of December 1973, if the previous system had been in effect at his date of retirement and if he had survived to January 1, 1974, reduced by two percent (2%) thereof for each full year, if any, by which the age of the former judge at date of death exceeded that of his spouse.

(g) Upon the death of a retired member on or after July 1, 1988, but before January 1, 1999, there shall be paid a death benefit to the surviving spouse of a deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of five thousand dollars ($5,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(h) Upon the death of a retired member on or after January 1, 1999, but before July 1, 2004, there shall be paid a death benefit to the surviving spouse of a deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of six thousand dollars ($6,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

(i) Upon the death of a retired member on or after July 1, 2004, but before July 1, 2007, there shall be paid a death benefit to the surviving spouse of a deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of nine thousand dollars ($9,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees.

Upon the death of a retired member on or after July 1, 2007, there shall be paid a death benefit to the surviving spouse of a deceased retired member or to the deceased retired member's legal representative if not survived by a spouse; provided the retired member has elected, when first eligible, to make, and has continuously made, in advance of his death required contributions as determined by the Board of Trustees on a fully contributory basis, through retirement allowance deductions or other methods adopted by the Board of Trustees, to a group death benefit trust fund administered by the Board of Trustees separate and apart from the Retirement System's Annuity Savings Fund and Pension Accumulation Fund. This death benefit shall be a lump-sum payment in the amount of ten thousand dollars ($10,000) upon the completion of 24 months of contributions required under this subsection. Should death occur before the completion of 24 months of contributions required under this subsection, the deceased retired member's surviving spouse or legal representative if not survived by a spouse shall be paid the sum of the retired member's contributions required by this subsection plus interest to be determined by the Board of Trustees. (1973, c. 640, s. 1; 1987, c. 824, s. 4; 1995, c. 509, s. 76; 1998-212, s. 28.27(b), (c); 2004-147, ss. 5, 6; 2005-91, ss. 5, 6; 2007-496, s. 4.)

Effect of Amendments. — Session Laws 2007-496, s. 4, effective July 1, 2007, and applicable to eligible retirees who die on or after that date, in subsection (i), inserted "but before July 1, 2007" in the first sentence, and added the last paragraph.

§ 135-65. Post-retirement increases in allowances.

(a) Commencing with the post-retirement adjustment, effective July 1, 1974, all retirement allowances payable under the provisions of this Article shall be adjusted annually in accordance with the provisions of G.S. 135-5(o).

(b) Increases in Benefits Paid to Members Retired prior to July 1, 1978. — Notwithstanding subsection (a) of this section, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1978, which shall become payable on July 1, 1979, as otherwise provided in subsection (a) of this section, shall be the current maximum four percent (4%) plus an additional one percent (1%) to a total of five percent (5%) for the year 1979 only. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(c) Increases in Benefits Paid to Members Retired prior to July 1, 1979. — Notwithstanding the foregoing provisions, the increase in allowance to each beneficiary on the retirement rolls as of July 1, 1979, which shall become payable on July 1, 1980, shall be the current maximum four percent (4%) plus an additional six percent (6%) to a total of ten percent (10%) for the year 1980-81 only. The provisions of this subsection shall apply also to the allowance of a surviving annuitant of a beneficiary.

(d) Increases in Benefits Paid to Members Retired Prior to July 1, 1982. — From and after July 1, 1983, the retirement allowance to or on account of beneficiaries on the retirement rolls as of July 1, 1982, shall be increased by four percent (4%) of the allowance payable on July 1, 1982, provided the increase in retirement allowances shall be payable in accordance with all requirements, stipulations and conditions set forth in subsection (a) of this section.

(e) Increase in Benefits Paid to Members Retired on or before July 1, 1983. — From and after July 1, 1984, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1983, shall be increased by eight percent (8%) of the allowance payable on July 1, 1983.

(f) From and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1984, shall be increased by four percent (4%) of the allowance payable on July 1, 1984. Furthermore, from and after July 1, 1985, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1984, but before June 30, 1985, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1984, and June 30, 1985.

(g) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985. Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985 and June 30, 1986.

(h) From and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1986, shall be increased by four percent (4.0%) of the allowance payable on July 1, 1986. Furthermore, from and after July 1, 1987, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1986, but before June 30, 1987, shall be increased by a prorated amount of four percent (4.0%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1986, and June 30, 1987.

(i) From and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1987, shall be increased by three and six-tenths percent (3.6%) of the allowance payable on July 1, 1987. Furthermore, from and after July 1, 1988, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1987, but before June 30, 1988, shall be increased by a prorated amount of three and six-tenths percent (3.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1987, and June 30, 1988.

(j) From and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1988, shall be increased by three and one-half percent (3.5%) of the allowance payable on July 1, 1988. Furthermore, from and after July 1, 1989, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1988, but before June 30, 1989, shall be increased by a prorated amount of three and one-half percent (3.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1988, and June 30, 1989.

(k) Increase in Allowance as to Persons on Retirement Rolls as of June 1, 1990. — From and after July 1, 1990, the retirement allowance to or on account of beneficiaries on the retirement rolls as of June 1, 1990, shall be increased by six-tenths percent (0.6%) of the allowance payable on June 1, 1990. This allowance shall be calculated on the basis of the allowance payable and in effect on June 30, 1990, so as not to be compounded on any other increase granted by act of the 1989 Session of the General Assembly (1990 Regular Session).

(*l*) From and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1989, shall be increased by six and one-tenth percent (6.1%) of the allowance payable on July 1, 1989. Furthermore, from and after July 1, 1990, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1989, but before June 30, 1990, shall be increased by a prorated amount of six and one-tenth percent (6.1%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1989, and June 30, 1990.

(m) From and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1991, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1991. Furthermore, from and after July 1, 1992, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1991, but before June 30, 1992, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1991 and June 30, 1992.

(n) From and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1992, shall be increased by one and six-tenths percent (1.6%) of the allowance payable on July 1, 1992. Furthermore, from and after July 1, 1993, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1992, but before June 30, 1993, shall be increased by a prorated amount of one and six-tenths percent (1.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1992, and June 30, 1993.

(o) From and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1993, shall be increased by three and one-half percent (3.5%) of the allowance payable on July 1, 1993. Furthermore, from and after July 1, 1994, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1993, but before June 30, 1994, shall be increased by a prorated amount of three and one-half percent (3.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1993, and June 30, 1994.

(p) From and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1994, shall be increased by two percent (2%) of the allowance payable on July 1, 1994. Furthermore, from and after July 1, 1995, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1994, but before June 30, 1995, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1994, and June 30, 1995.

(q) From and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1995, shall be increased by four and four-tenths percent (4.4%) of the allowance payable on July 1, 1995. Furthermore, from and after September 1, 1996, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1995, but before June 30, 1996, shall be increased by a prorated amount of four and four-tenths percent (4.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1995, and June 30, 1996.

(r) From and after July 1, 1997, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1996, shall be increased by four percent (4%) of the allowance payable on June 1, 1997. Furthermore, from and after July 1, 1997, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1996, but before June 30, 1997, shall be increased by a prorated amount of four percent (4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1996, and June 30, 1997.

(s) From and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1997, shall be increased by two and one-half percent (2.5%) of the allowance payable on June 1, 1998. Furthermore, from and after July 1, 1998, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1997, but before June 30, 1998, shall be increased by a prorated amount of two and one-half percent (2.5%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1997, and June 30, 1998.

(t) From and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1998, shall be increased by two and three-tenths percent (2.3%) of the allowance payable on June 1, 1999. Furthermore, from and after July 1, 1999, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1998, but before June 30, 1999, shall be increased by a prorated amount of two and three-tenths percent (2.3%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1998, and June 30, 1999.

(u) From and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1999, shall be increased by two and six-tenths percent (2.6%) of the allowance payable on June 1, 2000. Furthermore, from and after July 1, 2000, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1999, but before June 30, 2000, shall be increased by a prorated amount of two and six-tenths percent (2.6%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1999, and June 30, 2000.

(v) From and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2000, shall be increased by two percent (2%) of the allowance payable on June 1, 2001. Furthermore, from and after July 1, 2001, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2000, but before June 30, 2001, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2000, and June 30, 2001.

(w) From and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2001, shall be increased by one and four-tenths percent (1.4%) of the allowance payable on June 1, 2002. Furthermore, from and after July 1, 2002, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2001, but before June 30, 2002, shall be increased by a prorated amount of one and four-tenths percent (1.4%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2001, and June 30, 2002.

(x) From and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2002, shall be increased by one and twenty-eight hundredths percent (1.28%) of the allowance payable on June 1, 2003. Furthermore, from and after July 1, 2003, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2002, but before June 30, 2003, shall be increased by a prorated amount of one and twenty-eight hundredths percent (1.28%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2002, and June 30, 2003.

(y) From and after July 1, 2004, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2003, shall be increased by one and seven-tenths percent (1.7%) of the allowance payable on June 1, 2004, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 2004, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2003, but before June 30, 2004, shall be increased by a prorated amount of one and seven-tenths percent (1.7%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2003, and June 30, 2004.

(z) From and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2004, shall be increased by two percent (2%) of the allowance payable on June 1, 2005. Furthermore, from and after July 1, 2005, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2004, but before June 30, 2005, shall be increased by a prorated amount of two percent (2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2004, and June 30, 2005.

(aa) From and after July 1, 2006, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2005, shall be increased by three percent (3%) of the allowance payable on June 1, 2006. Furthermore, from and after July 1, 2006, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2005, but before June 30, 2006, shall be increased by a prorated amount of three percent (3%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2005, and June 30, 2006.

(bb) From and after July 1, 2007, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 2006, shall be increased by two and two-tenths percent (2.2%) of the allowance payable on June 1, 2007. Furthermore, from and after July 1, 2007, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 2006, but before June 30, 2007, shall be increased by a prorated amount of two and two-tenths percent (2.2%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 2006, and June 30, 2007. (1973, c. 640, s. 1; 1979, c. 838, s. 104; 1979, 2nd Sess., c. 1137, s. 69; 1983, c. 761, s. 221; 1983 (Reg. Sess., 1984), c. 1034, s. 224; 1985, c. 479, s. 189(b); 1985 (Reg. Sess., 1986), c. 1014, s. 49(b); 1987, c. 738, s. 27(b); 1987 (Reg. Sess., 1988), c. 1086, s. 22(b); 1989, c. 752, s. 41(b); 1989 (Reg. Sess., 1990), c. 1077, ss. 8, 9; 1991

(Reg. Sess., 1992), c. 900, s. 53(c); 1993, c. 321, s. 74(f); 1993 (Reg. Sess., 1994), c. 769, s. 7.30(n); 1995, c. 507, s. 7.22(b); 1996, 2nd Ex. Sess., c. 18, s. 28.21(b); 1997-443, s. 33.22(e); 1998-153, s. 21(b); 1999-237, s. 28.23(b); 2000-67, s. 26.20(e); 2001-424, s. 32.22(b); 2002-126, s. 28.8(c); 2003-284, s. 30.17(b); 2004-124, s. 31.17(b); 2005-276, s. 29.25(b); 2006-66, s. 22.18(c); 2007-323, s. 28.20(b).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 22.18(c), effective July 1, 2006, added a new subsection (aa).

Session Laws 2007-323, s. 28.20(b), effective July 1, 2007, added subsection (bb).

§ 135-66. Administration; management of funds.

The State Treasurer shall be the custodian of the assets of this Retirement System and shall invest them in accordance with the provisions of G.S. 147-69.2 and 147-69.3. (1973, c. 640, s. 1; 1979, c. 467, s. 18.)

§ 135-67. Assets of Retirement System.

(a) All of the assets of the Retirement System shall be credited according to the purpose for which they are held to one of two funds, namely, the annuity savings fund and the pension accumulation fund.

(b) The annuity savings fund shall be the fund to which all members' contributions, and regular interest allowances thereon as provided for in G.S. 135-7(b), shall be credited. From this fund shall be paid the accumulated contributions of a member in accordance with G.S. 135-62, or 135-63.

(c) Upon the retirement of a member, his accumulated contributions shall be transferred from the annuity savings fund to the pension accumulation fund. In the event that a retired former member should subsequently again become a member of the Retirement System as provided for in G.S. 135-60(c) or 135-71, any excess of his accumulated contributions at his date of retirement over the sum of the retirement allowance payments received by him since his date of retirement shall be transferred from the pension accumulation fund to the annuity savings fund and shall be credited to his individual account in the annuity savings fund.

(d) The pension accumulation fund shall be the fund in which shall be accumulated contributions by the State and amounts transferred from the annuity savings fund in accordance with subsection (c) above, and to which all income from the invested assets of the Retirement System shall be credited. From this fund shall be paid retirement allowances and any other benefits provided for under this Article except payments of accumulated contributions as provided in subsection (b) above.

(e) The regular interest allowance on the members' accumulated contributions provided for in G.S. 135-7(b) shall be transferred each year from the pension accumulation fund to the annuity savings fund. (1973, c. 640, s. 1.)

§ 135-68. Contributions by the members.

(a) Each member shall contribute by payroll deduction for each pay period for which he receives compensation six percent (6%) of his compensation for such period.

(b) Anything within this Article to the contrary notwithstanding, the State, pursuant to the provisions of section 414(h)(2) of the Internal Revenue Code of 1954 as amended, shall pick up and pay the contributions which would be payable by the members under subsection (a) of this section with respect to the services of such members rendered after the effective date of this subsection.

The members' contributions picked up by the State shall be designated for all purposes of the Retirement System as member contributions, except for the determination of tax upon a distribution from the System. These contributions shall be credited to the annuity savings fund and accumulated within the fund in a member's account which shall be separately established for the purpose of accounting for picked-up contributions.

Member contributions picked up by the State shall be payable from the same source of funds used for the payment of compensation to a member. A deduction shall be made from a member's compensation equal to the amount of his contributions picked up by the State. This deduction, however, shall not reduce a member's compensation as defined in subdivision (5) of G.S. 135-53. Picked up contributions shall be transmitted to the Retirement System monthly for the preceding month by means of a warrant drawn by the State payable to the Retirement System and shall be accompanied by a schedule of the picked-up contributions on such forms as may be prescribed. (1973, c. 640, s. 1; 1983, c. 469, s. 1.)

CASE NOTES

Funding. — Teachers' and State Employees' Retirement System of North Carolina, Consolidated Judicial Retirement System of North Carolina, and Legislative Retirement System are funded by both employee and State, or employer, contributions under G.S. 135-8, 135-68, 135-69, 120-4.19, and 120-4.20; these systems provide for a systematic method of funding of the respective retirement system with employee contributions computed as a set percentage of the employees' salaries, and with systematic employer contributions in accordance with formulas mandated by the retirement statutes, which include calculations by an actuary based on the actuarial valuation of liabilities of the retirement systems. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

§ 135-69. Contributions by the State.

(a) The State shall contribute annually an amount equal to the sum of the "normal contribution" and the "accrued liability contribution."

(b) The normal contribution for any period shall be determined as a percentage, equal to the normal contribution rate, of the total compensation of the members for such period. The normal contribution rate shall be determined as the percentage represented by the ratio of (i) the annual normal cost to provide the benefits of the Retirement System, computed in accordance with recognized actuarial principles on the basis of methods and assumptions approved by the Board of Trustees, in excess of the part thereof provided by the members' contributions, to (ii) the total annual compensation of the members of the Retirement System.

(c) The accrued liability contribution for any period shall be determined as a percentage, equal to the accrued liability contribution rate, of the total compensation of the members for such period. The accrued liability contribution rate shall be determined as the percentage represented by the ratio of (i) the level annual contribution necessary to amortize the unfunded accrued liability over a period of 40 years, computed in accordance with recognized actuarial principles on the basis of methods and assumptions approved by the Board of Trustees, to (ii) the total annual compensation of the members of the Retirement System.

(d) The unfunded accrued liability as of any date shall be determined, in accordance with recognized actuarial principles on the basis of methods and assumptions approved by the Board of Trustees, as the excess of (i) the then present value of the benefits to be provided under the Retirement System in the future over (ii) the sum of the assets of the Retirement System then currently on hand in the annuity savings fund and the pension accumulation fund, plus the then present value of the stipulated contributions to be made in the future by the members, plus the then present value of the normal contributions expected to be made in the future by the State.

(e) The normal contribution rate and the accrued liability contribution rate shall be determined after each annual valuation of the Retirement System and shall remain in effect until a new valuation is made.

(f) The annual contributions by the State for any year shall be at least sufficient, when combined with the amount held in the pension accumulation fund at the start of the year, to provide the retirement allowances and other benefits payable out of the fund during the year then current. (1973, c. 640, s. 1.)

CASE NOTES

Funding. — Teachers' and State Employees' Retirement System of North Carolina, Consolidated Judicial Retirement System of North Carolina, and Legislative Retirement System are funded by both employee and State, or employer, contributions under G.S. 135-8, 135-68, 135-69, 120-4.19, and 120-4.20; these systems provide for a systematic method of funding of the respective retirement system with employee contributions computed as a set percentage of the employees' salaries, and with systematic employer contributions in accordance with formulas mandated by the retirement statutes, which include calculations by an actuary based on the actuarial valuation of liabilities of the retirement systems. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

§ 135-70. Transfer of members to another system.

(a) Any member whose membership service is terminated other than by retirement or death and, who, while still a member of this Retirement System becomes a member of either the Teachers' and State Employees' Retirement System or the North Carolina Local Governmental Employees' Retirement System, may elect to retain his membership in this Retirement System by not withdrawing his accumulated contributions hereunder. Any such member shall retain all the rights, credits and benefits obtaining to him under this Retirement System at the time of such termination of service while he is a member of such other system and does not withdraw his contributions hereunder.

(a1) The accumulated contributions and creditable service of any member whose service as a member of this Retirement System has been or is terminated other than by retirement or death and who, while still a member of this Retirement System, became or becomes a member, as defined in G.S. 135-1(13), of the Teachers' and State Employees' Retirement System for a period of five or more years may, upon application of the member, be transferred from this Retirement System to the Teachers' and State Employees' Retirement System. In order to effect the transfer of a member's creditable service from this Retirement System to the Teachers' and State Employees'

Retirement System, there shall be transferred from this Retirement System to the Teachers' and State Employees' Retirement System the sum of (i) the accumulated contributions of the member credited in the annuity savings fund and (ii) the amount of reserve held in this Retirement System as a result of previous contributions by the employer on behalf of the transferring member.

(b) Any member who becomes eligible for benefits under more than one system may file application therefor with each retirement system to the end that each retirement system shall pay appropriate benefits without transfer of funds between the systems.

(c) The Board of Trustees shall effect such rules as it may deem necessary to administer the provisions of the preceding subsections of this section and to prevent any duplication of service credits or benefits that might otherwise occur. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 21; 2003-284, s. 30.18(d).)

§ 135-70.1. Transfer of members from the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System.

(a) The accumulated contributions, creditable service, and reserves, if any, of a former teacher or employee, as defined in G.S. 135-1(25), 135-1(10), and 128-21(10), respectively, or a former member of the General Assembly who is a member of the Consolidated Judicial Retirement System for a period of five or more years may, upon application of the member, be transferred from the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System to the Consolidated Judicial Retirement System. The accumulated contributions, creditable service, and reserves of any member whose service as a teacher or employee or member of the General Assembly is terminated other than by retirement or death and who becomes a member of the Consolidated Judicial Retirement System may, upon application of the member, be transferred from the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System to the Consolidated Judicial Retirement System. In order to effect the transfer of a member's creditable service from the Local Governmental Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System, to the Consolidated Judicial Retirement System, the accumulated contributions of each member credited in the annuity savings fund in the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Legislative Retirement System shall be transferred and credited to the annuity savings fund in the Consolidated Judicial Retirement System.

(b) The Board of Trustees shall effect such rules as it may deem necessary to administer the preceding subsection and to prevent any duplication of service credits or benefits that might otherwise occur. (1999-237, s. 28.24(h); 2003-284, s. 30.18(e); 2005-276, s. 29.30A(h); 2005-345, s. 42.)

Editor's Note. — As enacted by 1999-237, s. 28.24(h), this section was numbered G.S. 135-70A. This section was renumbered as G.S. 135-70.1 at the direction of the Revisor of Statutes.

Session Laws 2005-345, s. 42, repealed Session Laws 2005-276, s. 29.30A(h), which had proposed to amend this section by adding a subsection (a1) concerning the transfer of accumulated contributions, etc., of Utilities Commissioners.

§ 135-71. Return to membership of retired former member.

(a) In the event that a retired former member should at any time return to membership service, his retirement allowance shall thereupon cease and he shall be restored as a member of the Retirement System.

(b) Upon his subsequent retirement, he shall be paid a retirement allowance determined as follows:

(1) For a member who earns at least three years' membership service after restoration to service, the retirement allowance shall be computed on the basis of his compensation and service before and after the period of prior retirement without restrictions; provided, that if the prior allowance was based on a social security leveling payment option, the allowance shall be adjusted actuarially for the difference between the amount received under the optional payment and what would have been paid if the retirement allowance had been paid without optional modification.

(2) For a member who does not earn three years' membership service after restoration to service, the retirement allowance shall be equal to the sum of the retirement allowance to which he would have been entitled had he not been restored to service, without modification of the election of an optional allowance previously made, and the retirement allowance that results from service earned since being restored to service; provided, that if the prior retirement allowance was based on a social security leveling payment option, the prior allowance shall be adjusted actuarially for the difference between the amount that would have been paid for each month had the payment not been suspended and what would have been paid if the retirement allowance had been paid without optional modification.

(3) Subdivision (2) of this section shall apply only to restored members whose initial retirement lasted for more than four calendar months. For restored members whose initial retirement lasted for four or fewer calendar months, subdivision (1) shall apply.

(c) Notwithstanding any other provision in this Chapter, the retirement allowance of a justice or judge shall not be affected by the compensation received as an emergency justice or judge.

(d) Notwithstanding the provisions of G.S. 135-70.1 to the contrary, a retired former member and/or beneficiary of the Teachers' and State Employees' Retirement System as defined in G.S. 135-1(6), whose retirement allowance from this System and/or from the Teachers' and State Employees' Retirement System ceases upon a return to membership service under this System, shall be permitted to transfer the accumulated contributions, creditable service, and reserves, if any, from the Teachers' and State Employees' Retirement System to this System on the same basis as provided for members of other retirement systems under G.S. 135-70.1, if the member attains five or more years of total membership service in this System, and completes at least three years of membership service subsequent to the member's return to membership service. (1973, c. 640, s. 1; 1983 (Reg. Sess., 1984), c. 1031, s. 22; c. 1106, s. 3; 1987, c. 738, s. 39(b); 2005-276, s. 29.30A(i).)

§ 135-72: Repealed by Session Laws 1999-237, s. 28.25, effective July 1, 1999.

§ 135-73. Termination or partial termination; discontinuance of contributions.

In the event of the termination or partial termination of the Retirement

System or in the event of complete discontinuance of contributions under the Retirement System, the rights of all affected members to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the members' accounts, shall be nonforfeitable and fully vested. (1987, c. 177, s. 1(a), (b).)

Editor's Note. — Session Laws 1987, c. 177, s. 1(c), made this section effective upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling from the Internal Revenue Service, United States Department of Treasury, that the Retirement Systems were qualified trusts under Section 401(a) of the Internal Revenue Code of 1954 as amended. A favorable letter was received prior to the enactment of c. 177.

§ 135-74. Internal Revenue Code compliance.

(a) Notwithstanding any other provisions of law to the contrary, compensation for any calendar year after 1988 in which employee or employer contributions are made and for which annual compensation is used for computing any benefit under this Article shall not exceed the higher of two hundred thousand dollars ($200,000) or the amount determined by the Commissioner of Internal Revenue as the limitation for calendar years after 1989; provided the imposition of the limitation shall not reduce a member's benefit below the amount determined as of December 31, 1988.

Effective January 1, 1996, the annual compensation of a member taken into account for determining all benefits provided under this Article shall not exceed one hundred fifty thousand dollars ($150,000), as adjusted pursuant to section 401(a)(17)(B) of the Internal Revenue Code and any regulations issued under the Code. However, with respect to a person who became a member of the Retirement System prior to January 1, 1996, the imposition of this limitation on compensation shall not reduce the amount of compensation which may be taken into account for determining the benefits of that member under this Article below the amount of compensation which would have been recognized under the provisions of this Article in effect on July 1, 1993.

Effective January 1, 2002, the annual compensation of a person, who became a member of the Retirement System on or after January 1, 1996, taken into account for determining all benefits accruing under this Article for any plan year after December 31, 2001, shall not exceed two hundred thousand dollars ($200,000) or the amount otherwise set by the Internal Revenue Code or determined by the Commissioner of Internal Revenue as the limitation for calendar years after 2002.

(b) Notwithstanding any other provisions of law to the contrary, the annual benefit payable on behalf of a member shall, if necessary, be reduced to the extent required by Section 415(b) and with respect to calendar years commencing prior to January 1, 2000, Section 415(e) of the Internal Revenue Code, as adjusted by the Secretary of the Treasury or his delegate pursuant to Section 415(d) of the Code. If a member is a participant under any qualified defined contributions plan that is required to be taken into account for the purposes of the limitation contained in Section 415 of the Internal Revenue Code, the annual benefit payable under this Article shall be reduced to the extent required by Section 415(e) prior to making any reduction under the defined contribution plan provided by the employer. However, with respect to a member who has benefits accrued under this Article but whose benefit had not commenced as of December 31, 1999, the combined plan limitation contained in Section 415(e) of the Internal Revenue Code shall not be applied to such member for calendar years commencing on or after January 1, 2000.

(c) On and after January 1, 1989, the retirement allowance of a member who has terminated employment shall begin no later than the later of April 1 of the calendar year following the calendar year that the member attains 70 1/2 years of age or April 1 of the calendar year following the calendar year in which the member terminates employment.

(d) This subsection applies to distributions made on or after January 1, 1993. Notwithstanding any other provision of the Plan to the contrary that would otherwise limit a distributee's election under this Article, a distributee may elect, at the time and in the manner prescribed by the Plan administrator, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover. Provided, an eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more; any distribution to the extent such distribution is required under section 401(a)(9) of the Code; and the portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net realized appreciation with respect to employer securities). Effective as of January 1, 2002, and notwithstanding the preceding sentence, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Section 408(a) or (b) of the Code, or to a qualified defined contribution plan described in Section 401(a) or 403(a) of the Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible. Provided, an eligible retirement plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, an annuity plan described in section 403(a) of the Code, or a qualified trust described in section 401(a) of the Code, that accepts the distributee's eligible rollover distribution. Effective on and after January 1, 2002, an eligible retirement plan shall also mean an annuity contract described in Section 403(b) of the Code and an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. The definition of eligible retirement plan shall also apply in the case of a distribution to surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code, or a court-ordered equitable distribution of marital property, as provided under G.S. 50-30. Provided, a distributee includes an employee or former employee. Provided further, a direct rollover is a payment by the Plan to the eligible retirement plan specified by the distributee. (1989, c. 276, s. 4; 1993, c. 531, s. 8; 1995, c. 361, s. 2; 2002-71, s. 8.)

§ 135-75. Deduction for payments to certain employees' or retirees' associations allowed.

Any beneficiary who is a member of a domiciled employees' or retirees' association that has at least 2,000 members, the majority of whom are active or retired employees of the State or public school employees, may authorize, in writing, the periodic deduction from the beneficiary's retirement benefits a designated lump sum to be paid to the employees' or retirees' association. The authorization shall remain in effect until revoked by the beneficiary. A plan of deductions pursuant to this section shall become void if the employees' or retirees' association engages in collective bargaining with the State, any political subdivision of the State, or any local school administrative unit. (2002-126, s. 6.4(e).)

§ 135-75.1. Forfeiture of retirement benefits for certain felonies.

(a) Except as provided in G.S. 135-56(g), the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony under the federal laws listed in subsection (b) of this section or the laws of this State listed in subsection (c) of this section if all of the following apply:

(1) The federal or State offense is committed while serving as a justice, judge, district attorney, or clerk of superior court.

(2) The conduct on which the federal or State offense is based is directly related to the member's service as a justice, judge, district attorney, or clerk of superior court.

(b) The federal offenses covered by this section are as follows:

(1) A felony violation of 18 U.S.C. § 201 (Bribery of public officials and witnesses), 18 U.S.C. § 286 (Conspiracy to defraud the Government with respect to claims), 18 U.S.C. § 287 (False, fictitious or fraudulent claims), 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States), 18 U.S.C. § 597 (Expenditures to influence voting), 18 U.S.C. § 599 (Promise of appointment by candidate), 18 U.S.C. § 606 (Intimidation to secure political contributions), 18 U.S.C. § 641 (Public money, property, or records), 18 U.S.C. § 666 (Embezzlement and theft), 18 U.S.C. § 1001 (Statements or entries generally), 18 U.S.C. § 1341 (Frauds and swindles), 18 U.S.C. § 1343 (Fraud by wire, radio, or television), 18 U.S.C. § 1503 (Influencing or injuring officer or juror generally), 18 U.S.C. § 1951 (Interference with commerce by threats or violence), 18 U.S.C. § 1952 (Interstate and foreign travel or transportation in aid of racketeering enterprises), 18 U.S.C. § 1956 (Laundering of monetary instruments), 18 U.S.C. § 1962 (Prohibited activities), or section 7201 of the Internal Revenue Code (Attempt to evade or defeat tax).

(2) Reserved for future codification purposes.

(c) The offenses under the laws of this State covered by this section are as follows:

(1) A felony violation of Article 29, 30, or 30A of Chapter 14 of the General Statutes (Relating to bribery, obstructing justice, and secret listening) or G.S. 14-228 (Buying and selling offices), or Part 1 of Article 14 of Chapter 120 of the General Statutes (Code of Legislative Ethics), Article 20 or 22 of Chapter 163 of the General Statutes (Relating to absentee ballots, corrupt practices and other offenses against the elective franchise, and regulating of contributions and expenditures in political campaigns).

(2) Perjury or false information as follows:

a. Perjury committed under G.S. 14-209 in falsely denying the commission of an act that constitutes an offense within the purview of an offense listed in subdivision (1) of subsection (c) of this section.

b. Subornation of perjury committed under G.S. 14-210 in connection with the false denial of another as specified by subdivision (2) of this subsection.

c. Perjury under Article 22A of Chapter 163 of the General Statutes.

(d) All monies forfeited under this section shall be remitted to the Civil Penalty and Forfeiture Fund. (2007-179, s. 4(a).)

Editor's Note. — Session Laws 2007-179, s. 5, made this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2007-179, s. 4(a), enacted this section with a subdivision (b)(1), but no subdivision (b)(2). Subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

§ 135-76: Reserved for future codification purposes.

Article 4A.

Uniform Solicitorial Retirement Act of 1974.

§§ 135-77 through 135-83: Repealed by Session Laws 1983 (Regular Session 1984), c. 1031, s. 24.

Cross References. — For the Consolidated Judicial Retirement Act, see now G.S. 135-50 et seq.

Article 4B.

Uniform Clerks of Superior Court Retirement Act of 1975.

§§ 135-84 through 135-86: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1031, s. 24.

Cross References. — For the Consolidated Judicial Retirement Act, see now G.S. 135-50 et seq.

§§ 135-87 through 135-89: Reserved for future codification purposes.

Article 5.

Supplemental Retirement Income Act of 1984.

§ 135-90. Short title and purpose.

(a) This Article shall be known and may be cited as the "Supplemental Retirement Income Act of 1984".

(b) The purpose of the Article is to attract and hold qualified employees and officials of the State of North Carolina and its political subdivisions by permitting them to participate in a profit sharing or salary reduction form of deferred compensation which will provide supplemental retirement income payments upon retirement, disability, termination, hardship, and death as allowed under Section 401(k), or any other relevant section, of the Internal Revenue Code of 1954 as amended. As used in this Article, the term "profit" means the excess revenue over expenditures prior to the expenditure of the amount which may be optionally made available for employees to be placed in trust by the State and its political subdivisions on behalf of the employees and officials covered by this Article. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-91. Administration.

(a) The provisions of this Article shall be administered by the Department of State Treasurer and a Board of Trustees consisting of the Board of Trustees of the Teachers' and State Employees' Retirement System and the Board of Trustees of the Local Governmental Employees' Retirement System. The Department of State Treasurer and the Board of Trustees shall create a Supplemental Retirement Income Plan as of January 1, 1985, to be administered under the provisions of this Article.

(b) The Supplemental Retirement Income Plan shall have the power and privileges of a corporation and shall be known as the "Supplemental Retirement Income Plan of North Carolina" and by this name all of its business shall be transacted.

(c) The Department of State Treasurer and the Board of Trustees shall have full power and authority to adopt rules and regulations for the administration of the Plan, provided they are not inconsistent with the provisions of this Article. The Department of State Treasurer and Board of Trustees may appoint those agents, contractors, employees and committees as they deem advisable to carry out the terms and conditions of the Plan.

(d) The Department of State Treasurer and the Board of Trustees shall be charged with a fiduciary responsibility for managing all aspects of the Plan, including the receipt, maintenance, investment, and disposition of all Plan assets.

(e) The administrative costs of the Plan may be charged to members or deducted from members' accounts in accordance with nondiscriminatory procedures established by the Department of State Treasurer and Board of Trustees.

(f) Each institution of The University of North Carolina shall report the data and other information to the Supplemental Retirement Income Plan pertaining to participants in the Optional Retirement Program as shall be required by the Department of State Treasurer and the Board of Trustees.

(g) Each political subdivision of the State that sponsors a retirement or pension plan with members who are members of the Supplemental Retirement Income Plan shall report the data and other information to the Plan pertaining to members of the retirement or pension plan as shall be required by the Department of State Treasurer and the Board of Trustees. (1983 (Reg. Sess., 1984), c. 975; 1985, c. 403, s. 1; 1989 (Reg. Sess., 1990), c. 948, s. 2.)

§ 135-92. Membership.

(a) The membership eligibility of the Supplemental Retirement Income Plan shall consist of any of the following who voluntarily elect to enroll:

(1) Members of the Teachers' and State Employees' Retirement System; and
(2) Members of the Consolidated Judicial Retirement System; and
(3) Members of the Legislative Retirement System; and
(4) Members of the Local Governmental Employees' Retirement System; and
(5) Law enforcement officers as defined under G.S. 143-166.30 and G.S. 143-166.50; and
(6) Participants in the Optional Retirement Program provided for under G.S. 135-5.1; and
(7) Members of retirement and pension plans sponsored by political subdivisions of the State so long as such plans are qualified under

Section 401(a) of the Internal Revenue Code of 1986 as amended from time to time.

(b) The membership of any person in the Supplemental Retirement Income Plan shall cease upon:

(1) The withdrawal of a member's accumulated account; or
(2) Retirement under the provisions of the Supplemental Income Retirement Plan; or
(3) Death. (1983 (Reg. Sess., 1984), c. 975; 1985, c. 403, s. 2; 1989 (Reg. Sess., 1990), c. 948, s. 1.)

§ 135-93. Contributions.

(a) Each member may elect to reduce his compensation by the amount of his contribution to the Supplemental Retirement Income Plan and that amount shall be held in the member's account. Members electing such a reduction in compensation may authorize payroll deductions for making contributions to the Plan.

(b) The State and any of its political subdivisions may make contributions to the Supplemental Retirement Income Plan on behalf of any of its members, provided these contributions are nondiscriminatory in accordance with the Internal Revenue Code of 1954 as amended, and are duly appropriated by their governing bodies, and the contributions are held in the member's account. Employer contributions to the Plan are declared expenditures for a public purpose.

(c) The Department of State Treasurer and Board of Trustees shall establish maximum annual additions that may be made to a member's account and provide for multiple plan reductions in accordance with the Internal Revenue Code of 1954 as amended. (1983 (Reg. Sess., 1984), c. 975.)

§ 135-94. Benefits.

(a) The Department of State Treasurer and the Board of Trustees shall establish a schedule of supplemental retirement income benefits for all members of the Supplemental Retirement Income Plan, subject to the following limitations:

(1) The balance in each member's account shall be fully vested at all times and shall not be subject to forfeiture for any reason.
(2) All amounts maintained in a member's account shall be invested according to the member's election, as approved by the Department of State Treasurer and Board of Trustees, including but not limited to, a time deposit account, a fixed investment account, or a variable investment account. Transfers of accumulated funds shall be permitted among the various approved forms of investment.
(3) The Department of State Treasurer and Board of Trustees shall provide members with alternative payment options, including survivors' options, for the distribution of benefits from the Plan upon retirement, disability, termination, hardship, and death.
(4) With the consent of the Department of State Treasurer and the Board of Trustees, amounts may be transferred from other qualified plans to the Supplemental Retirement Income Plan, provided that the trust from which such funds are transferred permits the transfer to be made and, the transfer will not jeopardize the tax status of the Supplemental Retirement Income Plan.
(5) At the discretion of the Department of State Treasurer and Board of Trustees, a loan program may be implemented for members which complies with applicable State and federal laws and regulations.

(b) All provisions of the Plan shall be interpreted and applied by the Department of State Treasurer and Board of Trustees in a uniform and nondiscriminatory manner.

(c) All benefits under the Plan shall become payable on and after January 1, 1985.

(d) Contributions under the Plan may be made on and after January 1, 1985. (1983 (Reg. Sess., 1984), c. 975; 1993, c. 531, s. 9.)

§ 135-95. Exemption from garnishment, attachment.

Except for the applications of the provisions of G.S. 110-136, and G.S. 110-136.3 et seq., and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a member in the Supplemental Retirement Income Plan to the benefits provided under this Article is nonforfeitable and exempt from levy, sale, and garnishment. (1983 (Reg. Sess., 1984), c. 975; 1985, c. 402; 1989, c. 665, s. 2; c. 792, s. 2.6.)

§§ 135-96 through 135-99: Reserved for future codification purposes.

ARTICLE 6.

Disability Income Plan of North Carolina.

§ 135-100. Short title and purpose.

(a) This Article shall be known and may be cited as the "Disability Income Plan of North Carolina".

(b) The purpose of this Article is to provide equitable replacement income for eligible teachers and employees who become temporarily or permanently disabled for the performance of their duty prior to retirement, and to encourage disabled teachers and employees who are able to work to seek gainful employment after a reasonable period of rehabilitation, and to provide for the accrual of retirement and ancillary benefits to the date the eligible teacher or employee meets the requirements for retirement under the provisions of this Chapter. (1987, c. 738, s. 29(q).)

Study Commission on State Disability Income Plan, Death Benefit Plan, and Separate Insurance Benefits Plan for Law Enforcement Officers. — Session Laws 2003-284, ss. 30.20(a) through (i), as amended by Session Laws 2004-78, s. 5, provides: "(a) There is established a Study Commission on the State Disability Income Plan, the State Death Benefit Plan, and the Separate Insurance Benefits Plan for Law Enforcement Officers.

"(b) The Commission shall be comprised of 13 members as follows:

"(1) Four persons appointed by the President Pro Tempore of the Senate, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, and one of whom shall be familiar with workers' compensation issues relating to State employees or school employees.

"(2) Four persons appointed by the Speaker of the House of Representatives, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, and one of whom shall be familiar with workers' compensation issues relating to State employees or school employees.

"(3) The State Treasurer, or the Treasurer's designee.

"(4) The Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan.

"(5) The Chair of the North Carolina Industrial Commission, or the Chair's designee.

"(6) One person appointed by the President of The University of North Carolina who is familiar with disability issues relating to university employees.

"(7) One person appointed by the President of the North Carolina Community Colleges System who is familiar with disability issues relating to community college employees.

"Any vacancy shall be filled by the officer who made the original appointment.

"(c) The Commission shall study the plan design, funding, and administration of the Disability Income Plan of North Carolina established pursuant to Article 6 of Chapter 135 of the General Statutes, the Death Benefit Plan established pursuant to G.S. 135-5(l), and the Separate Insurance Benefits Plan for State and Local Governmental Law Enforcement Officers established pursuant to G.S. 143-166.60 to determine what changes, if any, should be made to those Plans. The Commission shall consider what changes could be made to the Plans that would enhance the efficiency of and reduce the cost of the Plans to the State and its employees.

"(d) The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall designate cochairs of the Commission from among their respective appointees. The Commission shall meet upon the call of the cochairs. Members of the Commission shall receive per diem, subsistence, and travel allowance in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. The Commission, while in the discharge of official duties, may exercise all powers provided for under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission shall terminate the earlier of the delivery of its final report or December 31, 2004.

"(e) The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. Subject to the approval of the Legislative Services Commission, the Commission may meet in the Legislative Building or the Legislative Office Building.

"(f) The Commission shall employ an actuary with expertise in the areas of disability income insurance and group life insurance to assist the Commission in its work pursuant to the procedure set forth in G.S. 120-32.02. This actuary shall not be a State employee or a person currently under contract with the State to provide services. If necessary, the Commission may hire other employees as provided in G.S. 120-32.02.

"(g) The Commission may meet during a regular or extra session of the General Assembly, subject to approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

"(h) The Commission shall submit a report of the results of its study, including any legislative recommendations, to the General Assembly not later than January 1, 2005.

"(i) Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds to implement the provisions of subsections (a) through (i) of this section."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2006-248, s. 17.1, provides: "There is established a Study Commission on the State Disability Income Plan and Other Related Plans."

Session Laws 2006-248, s. 17.2, provides: "The Commission shall be comprised of 13 members as follows:

"(1) Four persons appointed by the President Pro Tempore of the Senate, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, one of whom shall be familiar with workers' compensation issues relating to State employees or school employees, and one at-large.

"(2) Four persons appointed by the Speaker of the House of Representatives, one of whom shall be familiar with disability issues relating to State employees, one of whom shall be familiar with disability issues relating to school employees, one of whom shall be familiar with workers' compensation issues relating to State employees or school employees, and one at-large.

"(3) The State Treasurer or the Treasurer's designee.

"(4) The Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan.

"(5) The Chair of the North Carolina Industrial Commission or the Chair's designee.

"(6) One person appointed by the President of The University of North Carolina who is familiar with disability issues relating to university employees.

"(7) One person appointed by the President of the North Carolina Community Colleges System who is familiar with disability issues relating to community college employees.

"Any vacancy shall be filled by the officer who made the original appointment. The President Pro Tempore of the Senate and the Speaker of the House shall each appoint a co-chair. The

Commission shall meet at the call of the cochairs."

Session Laws 2006-248, s. 17.3, provides: "The Commission shall study the plan design, funding, and administration of the Disability Income Plan of North Carolina established pursuant to Article 6 of Chapter 135 of the General Statutes, the Death Benefit Plan established pursuant to G.S. 135-5(l), and the Separate Insurance Benefits Plan for State and Local Governmental Law Enforcement Officers established pursuant to G.S. 143-166.60 to determine what changes, if any, should be made to those Plans. The Commission shall consider what changes could be made to the Plans that would enhance the efficiency of and reduce the cost of the Plans to the State and its employees."

Session Laws 2006-248, s. 17.4, provides: "The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall designate cochairs of the Commission from among their respective appointees. The Commission shall meet upon the call of the cochairs. Members of the Commission shall receive per diem, subsistence, and travel allowance in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. The Commission, while in the discharge of official duties, may exercise all powers provided for under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4."

Session Laws 2006-248, s. 17.5, provides: "The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. Subject to the approval of the Legislative Services Commission, the Commission may meet in the Legislative Building or the Legislative Office Building."

Session Laws 2006-248, s. 17.6, provides: "The Commission shall employ an actuary with expertise in the areas of disability income insurance and group life insurance to assist the Commission in its work pursuant to the procedure set forth in G.S. 120-32.02. This actuary shall not be a State employee or a person currently under contract with the State to provide services. If necessary, the Commission may hire other employees as provided in G.S. 120-32.02."

Session Laws 2006-248, s. 17.7, provides: "The Commission may meet during a regular or extra session of the General Assembly, subject to approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

Session Laws 2006-248, s. 17.8, provides: "The Commission shall submit a report of the results of its study, including any legislative recommendations, to the General Assembly not later than January 1, 2007."

Session Laws 2006-248, s. 17.9, provides: "Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds to implement the provisions of this Part."

CASE NOTES

Cited in Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996).

§ 135-101. Definitions.

The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Base rate of compensation" shall mean the regular monthly rate of compensation not including pay for shift premiums, overtime, or other types of extraordinary pay; in all cases of doubt, the Board of Trustees shall determine what is "base rate of compensation".

(2) "Beneficiary" shall mean any person in receipt of a disability allowance or other benefit as provided in this Article.

(3) "Benefits" shall mean the monthly disability income payments made pursuant to the provisions of this Article. In the event of death on or after the first day of a month, or in the event the short-term disability benefit ends on or after the first day of a month where the beneficiary is eligible and applies for an early service or a service retirement allowance the first of the following month, the monthly benefit shall not be prorated and shall equal the benefits paid in the previous month.

(4) "Board of Trustees" shall mean the Board of Trustees of the Teachers' and State Employees' Retirement System as provided in G.S. 135-6.

(5) "Compensation" shall mean any compensation as the term is defined in G.S. 135-1(7a).

(6) "Disability" or "Disabled" shall mean the mental or physical incapacity for the further performance of duty of a participant or beneficiary; provided that such incapacity was not the result of terrorist activity, active participation in a riot, committing or attempting to commit a felony, or intentionally self-inflicted injury.

(7) "Earnings" shall mean all income for personal services rendered or otherwise receivable, including, but not limited to, salaries and wages, fees, commissions, royalties, awards and other similar items and self-employment; in all cases of doubt, the Board of Trustees shall determine what are "earnings".

(8) "Employee" shall mean any employee as the term is defined in G.S. 135-1(10).

(9) "Employer" shall mean any employer as the term is defined in G.S. 135-1(11).

(10) "Medical Board" shall mean the board of physicians as provided in G.S. 135-102(d).

(11) "Member" shall mean any member as the term is defined in G.S. 135-1(13).

(12) "Membership service" shall mean any service as defined in G.S. 135-1(14).

(13) "Participant" shall mean any teacher or employee eligible to participate in the Plan as provided in G.S. 135-103.

(14) "Plan" shall mean the Disability Income Plan of North Carolina as provided in this Article.

(15) "Retirement" shall mean the withdrawal from active service with a retirement allowance granted under the provisions of Article 1 of this Chapter.

(16) "Retirement System" shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2.

(17) "Service" shall mean service as a teacher or employee as defined in G.S. 135-1(10) or G.S. 135-1(25).

(18) "State" shall mean the State of North Carolina.

(19) "Teacher" shall mean any teacher as the term is defined in G.S. 135-1(25).

(20) "Trial Rehabilitation" shall mean a return to service in any capacity, if the return occurs within the waiting period as provided in G.S. 135-104; shall mean a return to service in the same capacity that existed prior to the disability if the return occurs within the short-term disability period as provided in G.S. 135-105; and shall mean a return to service in any capacity and in any position provided the salary earned is equal to or greater than the salary upon which the long-term disability benefit is based immediately preceding the return to service, if the return occurs within the long-term disability period as provided in G.S. 135-106.

(21) "Workers' Compensation" shall mean any disability income benefits provided under the North Carolina Workers' Compensation Act, excluding any payments for a permanent partial disability rating. (1987, c. 738, s. 29(q); 1989, c. 717, ss. 7, 8; 1991 (Reg. Sess., 1992), c. 779, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 7.30(s); 2003-284, s. 30.20(j); 2004-78, s. 1; 2006-74, ss. 1, 2.)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.20(j), effective July 1, 2003, and applicable only to persons who are not vested in the disability plan in question on July 1, 2003, substituted "physical or cognitive limitations that prevent working as determined by the Department of State Treasurer and the Board of Trustees"; for "mental or physical incapacity for the further performance of duty of a participant or beneficiary" in subdivision (6).

Session Laws 2003-284, s. 49.5, is a severability clause.

Subdivision (6), as amended by Session Laws 2004-78, s. 1, is effective retroactively from and after July 1, 2003.

Effect of Amendments. — Session Laws 2006-74, s. 2, effective August 1, 2007, in subdivision (20), substituted language beginning "G.S. 135-105; and shall mean …" and ending "as provided in G.S. 135-106" for "G.S. 135-105 or within the long term disability period as provided in G.S. 135-106," and made a minor stylistic change.

§ 135-102. Administration.

(a) The provisions of this Article shall be administered by the Department of State Treasurer and the Board of Trustees of the Teachers' and State Employees' Retirement System and all expenses in connection with the administration of the Plan, except for expenses incurred by and properly charged to the employer, shall be charged against and paid from the trust fund as created and provided in this Article.

(b) The Plan shall have the power and privileges of a corporation and under the name of Disability Income Plan of North Carolina shall all of its business be transacted, all of its funds invested and all of its cash, securities and other property be held.

(c) The Department of State Treasurer and the Board of Trustees shall have the full power and authority to adopt rules for the administration of the Plan not inconsistent with the provisions of this Article. The Department of State Treasurer and the Board of Trustees may appoint those agents, contractors, and employees as they deem advisable to carry out the terms and conditions of the Plan.

(d) The Department of State Treasurer and the Board of Trustees shall designate a Medical Board to be composed of not fewer than three nor more than five physicians not eligible for benefits under the Plan. Other physicians, medical clinics, institutions or agencies may be employed to conduct such medical examinations and tests necessary to provide the Medical Board with clinical evidence as may be needed to determine eligibility for benefits under the Plan. The Medical Board shall investigate the results of medical examinations, clinical evidence, all essential statements and certifications by and on behalf of applicants for benefits and shall report in writing to the Board of Trustees the conclusions and recommendations upon all matters referred to it.

(e) The Department of State Treasurer and the Board of Trustees may provide the benefits according to the terms and conditions of the Plan as provided in this Article either by purchasing a contract or contracts with any insurance company licensed to do business in this State or by establishing a separate trust fund qualified under Section 501(c)(9) of the Internal Revenue Code of 1986. (1987, c. 738, s. 29(q).)

§ 135-103. Eligible participants.

(a) The eligible participants of the Disability Income Plan shall consist of:

(1) All teachers and employees in service and members of the Teachers' and State Employees' Retirement System or participants of the Optional Retirement Program on January 1, 1988.

(2) All persons who become teachers and employees or re-enter service as teachers or employees and are in service and members of the Teach-

ers' and State Employees' Retirement System or participants of the Optional Retirement Program after January 1, 1988.

(b) The participation of any person in the Disability Income Plan shall cease upon:

(1) The termination of the participant's employment as a teacher or State employee, or
(2) The participant's retirement under the provisions of the Teachers' and Employees' Retirement System or the Optional Retirement Program, or
(3) The participant's becoming a beneficiary under the Plan, or
(4) The participant's death. (1987, c. 738, s. 29(q).)

CASE NOTES

Applied in Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

§ 135-104. Salary continuation.

(a) A participant shall receive no benefits from the Plan for a period of 60 continuous calendar days from the onset of disability determined as the last actual day of service, the day of the disabling event if the disabling event occurred on a day other than a normal workday, or the day succeeding at least 365 calendar days after service as a teacher or employee, whichever is later. These 60 continuous calendar days may be considered the waiting period before benefits are payable from the Plan. During this waiting period, a participant may be paid such continuation of salary as provided by an employer through the use of sick leave, vacation leave or any other salary continuation. Any such continuation of salary as provided by an employer shall not include any period a participant or beneficiary is in receipt of Workers' Compensation benefits.

(b) During the waiting period a participant may return to service for trial rehabilitation for periods of not greater than five continuous days of service. Such return to service will not cause a new waiting period to begin but shall extend the waiting period by the number of days of service. (1987, c. 738, s. 29(q); 1989, c. 717, s. 9; 1991 (Reg. Sess., 1992), c. 779, s. 2.)

CASE NOTES

Salary Continuation. — Because claimant had submitted an application for long-term disability and requested that he remain on the payroll until his accrued leave was exhausted, his request was sufficient exercise of his right to take salary continuation as a form of long-term disability payments, and because claimant was disabled prior to his termination, the trial court correctly ordered that claimant be compensated for the additional annual leave he would have accrued had he stayed on salary continuation through the end of his accrued annual leave. Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

§ 135-105. Short-term disability benefits.

(a) Any participant who becomes disabled and is no longer able to perform his usual occupation may, after at least 365 calendar days succeeding his date of initial employment as a teacher or employee and at least one year of contributing membership service, receive a benefit commencing on the first day succeeding the waiting period; provided that the participant's employer and attending physician shall certify that such participant is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter; provided further that the requirement for one year of contributing membership service must have been earned within 36 calendar months immediately preceding the date of disability and further, salary continuation used during the period as provided in G.S. 135-104 shall count toward the aforementioned one year requirement. As to the requirement that a participant applying for short term disability benefits have at least one year of contributing membership service within the 36 calendar months immediately preceding the date of disability, a participant who would have qualified for a benefit under this section but for service in the uniformed services shall not be denied a benefit under this section because of that interruption for military service provided all other requirements of this section are met.

Notwithstanding the requirement that the incapacity was incurred at the time of active employment, any participant who becomes disabled while on an employer approved leave of absence and who is eligible for and in receipt of temporary total benefits under The North Carolina Workers' Compensation Act, Article 1 of Chapter 97 of the General Statutes, will be eligible for all benefits provided under this Article.

(b) The benefits as provided for in subsection (a) of this section shall commence on the first day following the waiting period and shall be payable for a period of 365 days as long as the participant continues to meet the definition of disability. However, a disabled participant may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of short-term disability benefits; provided further, such election shall not extend the 365 days duration of short-term payments. An election to receive any salary continuation for any part of a given day shall be in lieu of any short-term benefit otherwise payable for that day, provided further, any lump-sum payout for vacation leave shall be treated as if the beneficiary or participant had exhausted the leave and shall be in lieu of any short-term benefit otherwise payable.

(c) The monthly benefit as provided in subsection (a) of this section shall be equal to fifty percent (50%) of 1/12th of the annual base rate of compensation last payable to the participant prior to the beginning of the short-term benefit period as may be adjusted for percentage increases as provided under G.S. 135-108 plus fifty percent (50%) of 1⁄12th of the annual longevity payment to which the participant would be eligible, to a maximum of three thousand dollars ($3,000) per month reduced by monthly payments for Workers' Compensation to which the participant may be entitled. The monthly benefit shall be further reduced by the amount of any payments from the federal Veterans Administration, any other federal agency, or any payments made under the provisions of G.S. 127A-108, to which the participant or beneficiary may be entitled on account of the same disability. Provided, that should a participant have earnings in an amount greater than the short-term benefit, the amount of the short-term benefit shall be reduced on a dollar-for-dollar basis by the amount that exceeds the short-term benefit.

(d) The provisions of this section shall be administered by the employer and further, the benefits during the first six months of the short-term disability period shall be the full responsibility of and paid by the employer; Provided, further, that upon the completion of the initial six months of the short-term disability period, the employer will continue to be responsible for the short-term benefits to the participant, however, such employer shall notify the Plan, at the conclusion of the short-term disability period or upon termination of short-term disability benefits, if earlier, of the amount of short-term benefits paid and the Plan shall reimburse the employer the amounts so paid.

(e) During the short-term disability period, a beneficiary may return to service for trial rehabilitation for periods of not greater than 40 continuous days of service. Such return will not cause the beneficiary to become a participant and will not require a new waiting period or short-term disability period to commence unless a different incapacity occurs. The period of rehabilitative employment shall not extend the period of the short-term disability benefits.

(f) A participant or beneficiary of short-term disability benefits or his legal representative or any person deemed by the Board of Trustees to represent the participant or beneficiary, or the employer of the participant or beneficiary, may request the Board of Trustees to have the Medical Board make a determination of eligibility for the short-term disability benefits as provided in this section or to make a preliminary determination of eligibility for the long-term disability benefits as provided in G.S. 135-106. A preliminary determination of eligibility for long-term disability benefits shall not preclude the requirement that the Medical Board make a determination of eligibility for long-term disability benefits.

(g) The Board of Trustees may extend the short-term disability benefits of a beneficiary beyond the benefit period of 365 days for an additional period of not more than 365 days; provided the Medical Board determines that the beneficiary's disability is temporary and likely to end within the extended period of short-term disability benefits. During the extended period of short-term disability benefits, payment of benefits shall be made by the Plan directly to the beneficiary. (1987, c. 738, s. 29(q); 1989, c. 717, s. 10; 1989 (Reg. Sess., 1990), c. 1032, s. 1; 1991 (Reg. Sess., 1992), c. 779, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 7.30(t); 2003-284, s. 30.20(k); 2004-78, s. 2; 2007-325, s. 1.)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.20(k), effective July 1, 2003, and applicable only to persons who are not vested in the disability plan in question on July 1, 2003, in subsection (a), substituted "unable to perform the duties of the participants's job or any other available jobs with the State" for "no longer able to perform his usual occupation," and substituted "cannot perform the duties of the participant's job or any other jobs available with the State" for "is mentally or physically incapacitated for the further performance of duty."

Session Laws 2003-284, s. 49.5, is a severability clause.

Subsection (a), as amended by Session Laws 2004-78, s. 2, is effective retroactively from and after July 1, 2003.

Effect of Amendments. — Session Laws 2007-325, s. 1, effective July 1, 2007, added the last sentence in the first paragraph of subsection (a).

CASE NOTES

Cited in Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

§ 135-106. Long-term disability benefits.

(a) Upon the application of a beneficiary or participant or of his legal representative or any person deemed by the Board of Trustees to represent the participant or beneficiary, any beneficiary or participant who has had five or more years of membership service may receive long-term disability benefits from the Plan upon approval by the Board of Trustees, commencing on the first day succeeding the conclusion of the short-term disability period provided for in G.S. 135-105, provided the beneficiary or participant makes application for such benefit within 180 days after the short-term disability period ceases, after salary continuation payments cease, or after monthly payments for Workers' Compensation cease, whichever is later; Provided, that the beneficiary or participant withdraws from active service by terminating employment as a teacher or State employee; Provided, that the Medical Board shall certify that such beneficiary or participant is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, and that such incapacity is likely to be permanent; Provided further that the Medical Board shall not certify any beneficiary or participant as disabled who is in receipt of any payments on account of the same incapacity which existed when the beneficiary first established membership in the Retirement System. The Board of Trustees may extend this 180-day filing requirement upon receipt of clear and convincing evidence that application was delayed through no fault of the disabled beneficiary or participant and was delayed due to the employers' miscalculation of the end of the 180-day filing period. However, in no instance shall the filing period be extended beyond an additional 180 days.

The Board of Trustees may require each beneficiary who becomes eligible to receive a long-term disability benefit to have an annual medical review or examination for the first five years and thereafter once every three years after the commencement of benefits under this section. However, the Board of Trustees may require more frequent examinations and upon the advice of the Medical Board shall determine which cases require such examination. Should any beneficiary refuse to submit to any examination required by this subsection or by the Medical Board, his long-term disability benefit shall be suspended until he submits to an examination, and should his refusal last for one year, his benefit may be terminated by the Board of Trustees. If the Medical Board finds that a beneficiary is no longer mentally or physically incapacitated for the further performance of duty, the Medical Board shall so certify this finding to the Board of Trustees, and the Board of Trustees may terminate the beneficiary's long-term disability benefits effective on the last day of the month in which the Medical Board certifies that the beneficiary is no longer disabled.

As to the requirement of five years of membership service, any participant or beneficiary who does not have five years of membership service within the 96 calendar months prior to conclusion of the short-term disability period or cessation of salary continuation payments, whichever is later, shall not be eligible for long-term disability benefits.

Notwithstanding the requirement that the incapacity was incurred at the time of active employment, any participant who becomes disabled while on an employer approved leave of absence and who is eligible for and in receipt of temporary total benefits under The North Carolina Workers' Compensation Act, Article 1 of Chapter 97 of the General Statutes, will be eligible for all benefits provided under this Article.

(b) After the commencement of benefits under this section, the benefits payable under the terms of this section during the first 36 months of the long-term disability period shall be equal to sixty-five percent (65%) of 1/12th of the annual base rate of compensation last payable to the participant or beneficiary prior to the beginning of the short-term disability period as may be adjusted for percentage increases as provided under G.S. 135-108, plus sixty-five percent (65%) of 1/12th of the annual longevity payment to which the participant or beneficiary would be eligible, to a maximum of three thousand nine hundred dollars ($3,900) per month reduced by any primary Social Security disability benefits and by monthly payments for Workers' Compensation to which the participant or beneficiary may be entitled. The monthly benefit shall be further reduced by the amount of any monthly payments from the federal Department of Veterans Affairs, any other federal agency or any payments made under the provisions of G.S. 127A-108, to which the participant or beneficiary may be entitled on account of the same disability. Provided, in any event, the benefit payable shall be no less than ten dollars ($10.00) a month. However, a disabled participant may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of long-term disability benefits; provided such election shall not extend the first 36 consecutive calendar months of the long-term disability period. An election to receive any salary continuation for any part of any given day shall be in lieu of any long-term benefit payable for that day, provided further, any lump-sum payout for vacation leave shall be treated as if the beneficiary or participant had exhausted the leave and shall be in lieu of any long-term benefit otherwise payable. Provided that, in any event, a beneficiary's benefit shall be reduced during the first 36 months of the long-term disability period by an amount, as determined by the Board of Trustees, equal to a primary Social Security retirement benefit to which the beneficiary might be entitled.

After 36 months of long-term disability, no further benefits are payable under the terms of this section unless the member has been approved and is in receipt of primary Social Security disability benefits. In that case the benefits payable shall be equal to sixty-five percent (65%) of 1/12th of the annual base rate of compensation last payable to the participant or beneficiary prior to the beginning of the short-term disability period as may be adjusted for percentage increases as provided under G.S. 135-108, plus sixty-five percent (65%) of 1/12th of the annual longevity payment to which the participant or beneficiary would be eligible, to a maximum of three thousand nine hundred dollars ($3,900) per month reduced by the primary Social Security disability benefits and by monthly payments for Workers' Compensation to which the participant or beneficiary may be entitled. The monthly benefit shall be further reduced by the amount of any monthly payments from the federal Department of Veterans Affairs, for payments from any other federal agency, or for any payments made under the provisions of G.S. 127A-108, to which the participant or beneficiary may be entitled on account of the same disability. Provided, in any event, the benefit payable shall be no less than ten dollars ($10.00) a month.

Notwithstanding the foregoing, the long-term disability benefit is payable so long as the beneficiary is disabled and is in receipt of a primary Social Security disability benefit until the earliest date at which the beneficiary is eligible for an unreduced service retirement allowance from the Retirement System, at which time the beneficiary would receive a retirement allowance calculated on the basis of the beneficiary's average final compensation at the time of disability as adjusted to reflect compensation increases subsequent to the time of disability and the creditable service accumulated by the beneficiary, including creditable service while in receipt of benefits under the Plan. In the event the beneficiary has not been approved and is not in receipt of a primary Social Security disability benefit, the long-term disability benefit shall cease after the first 36 months of the long-term disability period. However, a beneficiary shall be entitled to a restoration of the long-term disability benefit in the event the Social Security Administration grants a retroactive approval for primary Social Security disability benefits with a benefit effective date within the first 36 months of the long-term disability period. In such event, the long-term disability benefit shall be restored retroactively to the date of cessation.

(c) Notwithstanding the foregoing, a beneficiary in receipt of long-term disability benefits who has earnings during the long-term disability period shall have his long-term disability benefit reduced when the sum of the net long-term disability benefit and the earnings equals one hundred percent (100%) of monthly compensation adjusted as provided under G.S. 135-108. The net long-term benefit shall mean the long-term benefit amount payable as calculated under (b) above, after the reduction for Social Security benefits and Workers' Compensation benefits to which the beneficiary might be entitled, and after the reduction for any monthly payments from the federal Department of Veterans Affairs, for payments from any other federal agency, or for any payments made under the provisions of G.S. 127A-108, to which the participant or beneficiary may be entitled on account of the same disability. The net long-term disability benefit shall be reduced dollar-for-dollar for the amount of earnings in excess of the one hundred percent (100%) monthly limit. Any beneficiary exceeding the earnings limitations shall notify the Plan by the fifth of the month succeeding the month in which the earnings were received of the amount of earnings in excess of the limitations herein provided. Failure to report excess earnings may result in a suspension or termination of benefits as determined by the Board of Trustees.

(c1) During the long-term disability period, a beneficiary may return to service for trial rehabilitation for periods of not greater than 36 months of continuous service. Such return will not cause the beneficiary to become a participant and will not require a new waiting period or short-term disability period to commence regardless of whether the beneficiary is unable to continue in service due to the same incapacity or a different incapacity.

A beneficiary who, during a period of trial rehabilitation, is unable to continue in service may be entitled to a restoration of the long-term disability benefit provided that the Medical Board certifies that the beneficiary is disabled in accordance with the laws in effect at the time of the Board's original approval for long-term disability benefits, either due to the same or a different incapacity, notwithstanding the requirement the incapacity has been continuous. In the event that the Medical Board determines that the long-term disability benefit should be restored, the restored benefit should be calculated in accordance with G.S. 135-106(b); should include any post-disability benefit adjustments as provided by G.S. 135-108; and shall continue as long as the beneficiary remains disabled until the beneficiary has received a total of 36 long-term disability payments. Continuation of long-term disability benefit payments beyond 36 total payments shall be dependent upon approval for primary Social Security disability benefits as required by G.S. 135-106(b).

A beneficiary who returns to service for a period of trial rehabilitation and who has continued in service for greater than 36 continuous months shall again become a participant, and any subsequent incapacity shall be treated as a new incapacity causing a new waiting period to begin. Such a beneficiary may be entitled to additional long-term disability benefits on account of the new incapacity provided the beneficiary meets all other requirements notwithstanding the requirement of five years of membership service within the 96 calendar months prior to becoming disabled or the cessation of continuous salary continuation payments.

(d) Notwithstanding the foregoing, a participant or beneficiary who has applied for and been approved by the Medical Board for long-term disability benefits may make an irrevocable election, within 90 days from the date of notification of such approval, and prior to receipt of any long-term disability benefit payments, to forfeit all pending and accrued rights to the long-term disability benefit including any ancillary benefits and retire on an early service retirement allowance or receive a return of accumulated contributions from the Retirement System. (1987, c. 738, s. 29(q); 1989, c. 717, s. 11; 1989 (Reg. Sess., 1990), c. 1032, s. 2; 1991 (Reg. Sess., 1992), c. 779, s. 4; 1993 (Reg. Sess., 1994), c. 769, s. 7.30(u); 2003-284, s. 30.20(l); 2004-78, ss. 3, 4; 2005-91, s. 6.1; 2005-276, s. 29.30B(a), (b); 2006-74, ss. 3, 4(a), (b); 2007-325, s. 2.)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.20(*l*), effective July 1, 2003, and applicable only to persons who are not vested in the disability plan in question on July 1, 2003, in subsection (a), substituted "unable to perform any occupation for which the beneficiary or participant is reasonably qualified for by training or experience" for "mentally or physically incapacitated for the further performance of duty"; and in the second paragraph, substituted "unable to perform any occupation for which the beneficiary or participant is reasonably qualified for by training or experience, the Department of State Treasurer" for "mentally or physically incapacitated for the further performance of duty, the Medical Board shall so certify this finding to the Board of Trustees."

Session Laws 2003-284, s. 49.5, is a severability clause.

Subsection (a), as amended by Session Laws 2004-78, s. 3, is effective retroactively from and after July 1, 2003.

Session Laws 2004-78, s. 4, as amended by Session Laws 2005-276, s. 29.30B, and as amended by Session Laws 2006-74, s. 4, effective August 1, 2007, and applicable only to persons not vested in the disability plan in question on that date, substituted "unable to perform any occupation or employment commensurate to the beneficiary's or participant's education, training, or experience, which is available in the same commuting area for State employees or within the same local school administrative unit for school personnel, without an adverse impact on the beneficiary's or participant's career status, and in which the beneficiary or participant can be expected to earn not less than sixty-five percent (65%) of that beneficiary's or participant's predisability earnings" for "mentally or physically incapacitated for the further performance of duty" in the first paragraph in subsection (a).

Effect of Amendments. — Session Laws 2006-74, s. 3, effective July 1, 2002, added subsection (c1).

Session Laws 2007-325, s. 2, effective August 1, 2007, and applicable only to those persons who have less than five years of membership service as of July 31, 2007, rewrote the section.

CASE NOTES

"Primary". — "Primary" as used in subsection (b) refers to benefits directly received by the disabled person as opposed to "secondary" benefits, which are derivative benefits that may be paid to a disabled worker's spouse, children, or family under certain circumstances. Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996).

"Entitle". — "Entitle" has acquired no technical meaning, and therefore "entitle" must be given its ordinary meaning. Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996).

Offset for Insurance Benefits Under Social Security. — Under G.S. 135-106(b), the amount of the offset should be the net insurance benefits under the Social Security Administration (SSA) after deduction of attorney's fees and costs associated with obtaining the disability insurance benefits from the SSA. Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996).

Entitlement to Attorney Fees. — Since former employee's attorney has a right superior as against employee to the attorney's fee and since attorney must claim her fee directly from the Social Security Administration (SSA), employee was not entitled within the meaning of G.S. 135-106(b) to the amount statutorily reserved for the attorney's fee. Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996).

Salary Continuation as a Form of Long-Term Disability. — Because claimant had submitted an application for long-term disability and requested that he remain on the payroll until his accrued leave was exhausted, his request was sufficient exercise of his right to take salary continuation as a form of long-term disability payments, and because claimant was disabled prior to his termination, the trial court correctly ordered that claimant be compensated for the additional annual leave he would have accrued had he stayed on salary continuation through the end of his accrued annual leave. Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

§ 135-107. Optional Retirement Program.

Any participant of the Optional Retirement Program who becomes a beneficiary under the Plan shall be eligible to receive long-term disability benefits so long as the beneficiary is disabled and is in receipt of a primary Social Security disability benefit until the time the beneficiary would first qualify for an unreduced service retirement benefit had the beneficiary elected to be a member of the Teachers' and State Employees' Retirement System, and shall receive no service accruals as otherwise provided members of the Retirement System under the provisions of G.S. 135-4(y). In the event a beneficiary who was a participant in the Optional Retirement Program has not been approved and is not in receipt of a primary Social Security disability benefit, the long-term disability benefit shall cease after the first 36 months of the long-term disability period. However, a beneficiary shall be entitled to a restoration of the long-term disability benefit in the event the Social Security Administration grants a retroactive approval for primary Social Security disability benefits with a benefit effective date within the first 36 months of the long-term disability period. In such event, the long-term disability benefit shall be restored retroactively to the date of cessation. (1987, c. 738, s. 29(q); 2007-325, s. 3.)

Effect of Amendments. — Session Laws 2007-325, s. 3, effective August 1, 2007, and applicable only to those persons who have less than five years of membership service as of July 31, 2007, inserted "so long as the beneficiary is disabled and is in receipt of a primary Social Security disability benefit" near the beginning, and added the last three sentences.

§ 135-108. Post disability benefit adjustments.

The compensation upon which the short-term or long-term disability benefit is calculated under the provisions of G.S. 135-105(c) or G.S. 135-106(b) may be increased by any permanent across-the-board salary increase granted to employees of the State by the General Assembly and the benefits payable to beneficiaries shall be recalculated based upon the increased compensation, reduced by any percentage increase in Social Security benefits granted by the Social Security Administration times the amount used in the reduction of benefits for primary Social Security disability or retirement benefit as provided in G.S. 135-106(b). The provisions of this section shall be subject to future acts of the General Assembly. (1987, c. 738, s. 29(q); 2001-424, s. 32.32A.)

§ 135-109. Reports of earnings.

The Department of State Treasurer and Board of Trustees shall require each beneficiary to annually provide a statement of the beneficiary's income received as compensation for services, including fees, commissions, or similar items, income received from business, and benefits received from the Social Security Administration, the federal Veterans Administration, any other federal agency, under the North Carolina Workers' Compensation Act, or under the provisions of G.S. 127A-108. The benefit payable to a beneficiary who does not or refuses to provide the information requested within 60 days after such request shall not be paid a benefit until the information so requested is provided, and should such refusal or failure to provide such information continue for 240 days after such request the right of a beneficiary to a benefit under the Article may be terminated. (1987, c. 738, s. 29(q); 2003-359, s. 23.)

§ 135-110. Funding and management of funds.

(a) A trust fund is hereby created to which all receipts, transfers, appropriations, contributions, investment earnings and other income belonging to the Plan shall be deposited, and from which all benefits, expenses, and other charges against the Plan shall be disbursed. The Board of Trustees shall be the trustee of the funds created by this Article.

(b) The Board of Trustees shall on the basis of such economic and demographic assumptions duly adopted, determine and adopt a uniform percentage of compensation as is defined in Article 1 of this Chapter which would be sufficient to fund the benefits payable under this Article on a term cost method basis as recommended by an actuary engaged by the Board of Trustees. Such uniform percentage of compensation shall not be inconsistent with acts of the General Assembly as may be thereafter adopted.

(c) Each employer shall contribute monthly to the Plan an amount determined by applying the uniform percentage of compensation adopted by the

Board of Trustees multiplied by the compensation of teachers and employees reportable to the Retirement System or the Optional Retirement Program. Such monthly contribution shall be paid by the employer from the same source of funds from which the compensation of teachers and employees are paid.

(d) The State Treasurer shall be the custodian of the funds and shall invest the assets of the fund in accordance with the provisions of G.S. 147-69.2 and G.S. 147-69.3. (1987, c. 738, s. 29(q).)

§ 135-111. Applicability of other pension laws.

Subject to the provisions of this Article, the provisions of G.S. 135-9, entitled "Exemption from taxes, garnishment, attachment, etc."; G.S. 135-10, entitled "Protection against fraud"; G.S. 135-10.1, entitled "Failure to Respond"; and G.S. 135-17, entitled "Facility of payment" shall be applicable to this Article and to benefits paid pursuant to the provisions of this Article. (1987, c. 738, s. 29(q); 2005-91, s. 7.)

§ 135-112. Transition provisions.

(a) Any participant in service as of the date of ratification of this Article and who becomes disabled after one year of membership service will be eligible for all benefits provided under this Article notwithstanding the requirement of five years' membership service to receive the long-term benefit; provided, however, any beneficiary who receives benefits as a result of this transition provision before completing five years of membership service shall receive lifetime benefits in lieu of service accruals under the Retirement System as otherwise provided in G.S. 135-4(y).

(b) All benefit recipients under the former Disability Salary Continuation Plan provided for in G.S. 135-34 and the rules adopted thereto shall become beneficiaries under this Plan under the same provisions and conditions including the benefit amounts payable as were provided under the former Disability Salary Continuation Plan. Any benefit recipient under the former Disability Salary Continuation Plan who returns to service on or after January 1, 1988, who subsequently becomes disabled due to the same disabling condition within 90 days after restoration to service shall not become a participant of the Disability Income Plan but shall be entitled to a restoration of the disability benefit under the same provisions and conditions, including the benefit amounts payable, as were provided under the former Disability Salary Continuation Plan, and shall be entitled to make application for disability retirement benefits under the Retirement System under the same provisions and conditions as were provided members whose service terminated prior to January 1, 1988.

(c) Any person who retired on a disability retirement allowance from the Teachers' and State Employees' Retirement System prior to the effective date of this Article shall be entitled to apply for and receive any benefits that would have otherwise been provided under the Disability Salary Continuation Plan provided for in G.S. 135-34 and shall become beneficiaries under this Plan, under the same provisions and conditions, including the benefit amounts payable, as were provided under the former Disability Salary Continuation Plan. (1987, c. 738, s. 29(q); 1989, c. 717, s. 12.)

Editor's Note. — G.S. 135-34, referred to in this section, was repealed by Session Laws 1987, c. 738, s. 29(*l*). See now G.S. 135-100 et seq.

§ 135-113. Reservation of power to change.

The benefits provided in this Article as applicable to a participant who is not a beneficiary under the provisions of this Article shall not be considered as a part of an employment contract, either written or implied, and the General Assembly reserves the right at any time and from time to time to modify, amend in whole or in part or repeal the provisions of this Article. (1987, c. 738, s. 29(q).)

§ 135-114. Reciprocity of membership service with the Legislative Retirement System and the Consolidated Judicial Retirement System.

Only for the purpose of determining eligibility for benefits accruing under this Article, membership service standing to the credit of a member of the Legislative Retirement System or the Consolidated Judicial Retirement System shall be added to the membership service standing to the credit of a member of the Teachers' and State Employees' Retirement System. However, in the event that a participant or beneficiary is a retired member of the Legislative Retirement System or the Consolidated Judicial Retirement System whose retirement benefit was suspended upon entrance into membership in the Teachers' and State Employees' Retirement System, such membership service standing to the credit of the retired member prior to retirement shall be likewise counted. Membership service under this section shall not be counted twice for the same period of time. (1993 (Reg. Sess., 1994), c. 769, s. 7.30(q).)

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